THE RIGHTS OF WAR AND PEACE.

HUGO GROTIIUS, ON WAR and PEACE.
THE
RIGHTS
OF
WAR
AND
PEACE,
IN THREE BOOKS.
Wherein are explained,
The LAW of NATURE and NATIONS,
AND
The Principal Points relating to GOVERNMENT.
Written in LATIN by the Learned
HUGO GROTIIUS,
And Translated into ENGLISH.
To which are added,
All the large Notes of Mr. J. BARBEYRAC,
Professor of Law at Groningen,
And Member of the Royal Academy of Sciences at Berlin.
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THE LIFE OF HUGO GROTIIUS.

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

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

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

HUGO GROTIIUS, in Dutch, de Groot, one of the greatest Men in Europe, was born at Delft the 10th of April, 1583; where his Family had been Illustrious between Four and Five Hundred Years. He made so early a Progress in his Studies, that he writ some Verses before he was nine Years of Age; and at Fifteen he had a great Understanding in Philosophy, Divinity and the Civil Law; but he was still better skill'd in Philology, as he made it appear by the Commentary he writ at that Age upon Martianus Capella, a very difficult Author. So prodigious was his Memory, that being present at the Musfet of some Regiments, he remembered the Names of every Soldier there. In the Year 1598 he accompanied the Dutch Embassador, the famous Barnevelt, into France, where Henry IV gave him several Marks of his Esteem; he took there his Degree of Doctor of Law, and being returned into his Country, he applied himself to the Bar, and pleaded before he was Seventeen Years of Age; he was not Twenty four Years old when he was made Advocate-General; he settled at Rotterdam in 1613, and was Penfionary of that Town; he would not accept of that Employment, but upon Condition that he should not be deprived of it; for he foresaw that the Quarrels of Divines about the Doctrine of Grace, which formed already a thousand Raftions in the State, would occasion many Revolutions in the chief Towns; he was sent into England in the same Year, by reason of the Mifunderstanding between the Merchants of both Nations; he wrote a Treatif upon that Subject, and called it Mare Liberum, or a Treatif fhewing the Right the Dutch have to the Indian Trade. He found himself so far engaged in the Affairs which undid Barnevelt, that he was arrested in August 1618, and condemned to perpetual Imprisonment the 18th Day of May 1619, and to forfeit his Estate; he was confined to the Castle of Louv. the 6th of June in the same Year, where he was severely used for above 18 Months; from whence, by the Contrivance of Mary de Regelsberg his Wife, he made his Escape, who having observed that the Guards, being weary of searching a large Trunk full of Books and Linnen to be washed at Gorcum, a neighboring Town, let it go without opening it as they used to do, advised her Husband to put himself into it, having made some Holes with a Wimble in the Place where the fore-part of his Head was, that he might not be fill'd. He followed her Advice, and was in that manner carried to a Friend of his at Gorcum; from whence he went to Antwerp in the usual Waggon, after he had crofled the publick Place in the Disguife of a Joyner, with a Ruler in his Hand. That good Woman pretended all the while that her Husband was very
very sick, to give him time to make his escape into a foreign country: But when she thought he was safe, she told the guards, laughing at them, that the birds were fled. At first there was a design to prosecute her, and some judges were of opinion she should be kept in prison instead of her husband; but by a majority of votes she was released, and praised by every body, for having by her wit procured her husband's liberty. Such a wife deferred not only to have a statue erected to her in the commonwealth of learning, but also to be canonized; for we are indebted to her for so many excellent works published by her husband, which had never come out of the darkness of Louvestein, if he had remained there all his life-time, as some judges appointed by his enemies designed it.

He retir'd into France, where he met with a kind reception at court, and had a pension alligned him; the Dutch Embassadors endeavoured to possess the king against him, but that prince did not regard their artifices, and gave a glorious testimony to the virtue of that illustrious refugee, and admired the virtue of the man, who being so ill used in his country, never omitted an opportunity to advance its interest, and increase its grandeur. He applied himself very closely to study, and to compose books. The first he published after he settled in France, was an apology for the magistrates of Holland, who had been turned out of their places. The contrary party was very much displeased with this treatise, they thought Grotius made it appear that they had acted against the laws, and therefore they endeavoured again to ruin and defame him, but the protection of the French court secured him against their attempts.

He left France after he had been there eleven years, and returned into Holland full of hopes, by reason of a kind letter he received from prince frederick henry, who succeded his brother in that republic; but his enemies prevented the good effects of that letter, and therefore he was forced once more to leave his country; he resolved to go to Hamburg, where he stayed till he accepted the offers he received from the crown of Sweden, in the year 1634. Queen christina made him one of her counsellors, and sent him Embassador to Lewis XIII. Having discharged the duties of that employment about eleven years, he set out from France to give an account of his Embassy to the queen of Sweden; he went through Holland, and received many honours at Amsterdam; he saw Queen Christina at Stockholm, and after he had discoursed with her about the affairs he had been entrusted with, he most humbly begged of her, that she would grant him his dismission. The queen gave him no positive answer when he asked leave to retire, which displeased some great men, who were afraid that she would keep him in her council: He perceived their discontent, and was so pressing to obtain his dismission, that it was
The Life of Hugo Grotius.

was granted him at last. The Queen, upon his Departure, gave him several Marks of her great Esteem for him. The Ship on Board which he embarked was violently toft by a Storm on the Coasts of Pomerania; Grotius being sick, and uneafy in Mind, continued to travel by Land, but his Illnefs forced him to ftop at Rofock, where he died in a few Days, on the 28th of August 1645. His Body was carried to Delft to be buried among his Anceftors: he left behind him three Sons, and one Daughter. The Daughter was married to a French Gentleman called Mombas, who was very much talk'd of, on Occafion of a Trouble he was brought intofoon after the French had pafted the Rhine in the Year 1672. The elder Son and the youngest pitched upon a Military Life, and died without being married. The second, whose Name was Peter de Groot, made himfelf illustrious by his Embaffies. The Eleétor Pa- lantine being refored to his Dominions by the Treaty of Munfter, appointed him his Refident in Holland: He was made Penfionary of the City of Amsterdam in 1660, and difcharged the Duties of that Place with great Ability for the Space of Seven Years. He was feft Embaffador to the Northern Crowns in the Year 1668. At a Year's End he went into France with the fame Character, and acquitted himfelf in that Employment with great Dexterity and Wildom. When the War was kindled 1672, he returned into his Country, and was deprived of his Office of Penfionary at Rotterdam, which he had enjoyed ever fince his Return from his Embaffy into Sweden: He was deprived of it during the Popular Timults, which occasioned so many Alterations in the Towns of Holland. He re- tired to Antwerp, and then to Cologne, whilst the Peace was treating there, and acted for the Good of his Country as much as ever he could; and yet when he returned into Holland he was accused of a State Crime; the Caufe was tried and he was acquitted: He retired into a Country-Houfe, where he died at 70 Years of Age.

The Calumnies, maliciously difpersed by the Enemies of GRO- TIIUS, about his Death, are irrefragably confuted by the Relation of the Minifter who attended upon him when he was dying. The Minifter, called John Quifforpiaus, was Profeflor of Divinity at Rof- tock. His Relation imports, " That he went to Grotius who " had fend for him, and found him almost dying; that he exhorted " him to prepare for Death, in order to enjoy a more happy Life, " to acknowledge his Sins, and to repent of them; that having men- tioned to him the Publican, who confefTed himself a Sinner, and " begged God's Mercy, the fick Man anfwered, I am that Pub- lican; that he went on and told him he fhould have Recourse " to Jesus Christ, without whom there is no Salvation, and that " Grotius replied, I place all my Hopes in Jesus Christ a- lone; that he repeated in a loud Voice a Prayer in High-Dutch, " and that the fick Man faid it softly after him with his Hands " joined; that having ended, he asked him whether he underflood
him, and his Answer was, I understand you very well; that he continued to repeat to him some Passages of the Word of God, which dying People are usually put in Mind of, and to ask him, Do you understand me? and that GROTIUS answered, I hear your Voice, but I do not understand every thing that you say; that with this Answer the sick Man loft his Speech, and expired soon after.

It were an absurd thing to call in Question the Sincerity of Quisforpius, nothing could move him to be false in his Account, and it is certain that the Lutheran Ministers were no less displeased than the Calvinists with the particular Opinions of GROTIUS, and therefore the Testimony of the Professor of Rosdock is an authentick Proof; and if such Evidence is not sufficient in Matters of Fact, we make way for Scepticism, and it will be difficult to prove any thing. It is therefore an undeniable Case that GROTIUS being a dying, was affected like the Publician mentioned in the Gospel, he confessed his Faults, he was sorry for them, and implored the Mercy of his heavenly Father; that he placed all his Hopes in Jesus Christ alone; that his last Thoughts were those that are contained in the Prayer of dying People, according to the Liturgy of the Lutheran Churches. The Result of which is, that those who say he died a Socinian, would be too gently used if they were only told, that they are guilty of a rash Judgment; they are Persons prejudiced against the Character of this Great Man, and therefore very unworthy of our Belief. Several People have wondered that his Grand-Children did not ask Satisfaction for this Injury done to his Memory, and that they appeared less sensible in this Point, than Jansenius's Relations upon lighter Calumnies; but some Persons highly approve their waving all Judicial Proceedings. There is a solid Answer to that Reflection upon our Author made by a Book entitled l'Esprit de Mr. Arnauld; and since the Accuser made no Reply to it, it is a plain Sign he has been convinced of Calumny. The Apologyst for the Character of GROTIUS begins thus, "But, Sir, what that Author and Father Smon say of GROTIUS, is nothing, if compared to what the nameless Author of the scandalous Libel intitled l'Esprit de Mr. Arnauld says of him; it is true, he flanders every Body in that Book, and the manifest Lies that are in it, ought to make one difbelieve every thing else; but because some are so weak, as to be imposed upon by his bold way of speaking, because some of those to whom you shew my Letters, entertain an ill Opinion of GROTIUS upon that Account, you will give me leave to undeceive them. Perhaps they will not be displeased to find an Author, for whom they have so great an Esteem, guilty of the most horrid Calumny that ever was; this will teach them, that one ought to suspect those who appear so zealous for Truth, and that sometimes a prodigious Malice and Detraction are concealed under the zealous Pretence of defending the Church of God. Afterwards the Apologyst examines the four Accusations one after another; I shall not dwell on what b " he
"he says upon the first Head, viz. That GROTIUS was a violent "Arminian. GROTIUS, says our Author, in the second Place, "was a Socinian, as appears from his enumerating the Proofs of "Christ's Divinity. Sir, desire your Friends to read GROTIUS's "Annotations upon the Passages of St. Mark and St. John which I "have mentioned to you, and if they do not say that it is an abomi-
nable Calumny, I am willing to be accounted a most wicked Ca-
Jumniator. See also the D.XL VIIIth Letter among the Literæ Ec-
clesiafieæ & Theologiae. I should be too long should I mention "what he says upon the third Head, I shall only set down this Passage "out of it, "When Mr. Arnauld lays something that is injurious to "the Reformed, the Author of the Libel exclaims violently against "him, and Mr. Arnauld is then an unsincere Man, an unsair Au-
cuer, an Infamous Calumniator; but when he says something that "may serve this Satyrical Writer to inveigh against those whom he "hates, every thing is then right, it serves him to fill up his Page, "and to prevent his being placed among the little Authors."
I must not forget that Mr. Arnauld blames the Lutheran Minister for not asking GROTIUS in what Communion he would die, this is a material Thing, says Mr. Arnauld, "with respect to a Man "who was known to have had no Communion a long time with any "Protestant Church, and to have confused in his last Books most of "the Doctrines that are common to them. Whereupon the Apo-
logist lays, that Mr. Arnauld and the Author of the Libel do "wrongly fancy, that a Man has no Religion when he joins with "none of the Factions that condemn Mankind, and each of which "pretends to be the only Church of Christ. GROTIUS abtain-
ed from communicating with the Protestants, as well as with the "Papists, because the Communion, which was appointed by Christ "as a Symbol of Peace and Concord among his Disciples, is ac-
counted in those Societies a Sign of Discord and Division."——
Quixtorpia acted the Part of a wife Man in not asking him what Communion he would die in, since he saw him dying in the Commu-
nion of Jesus Christ, by Virtue of which we are faved, and not by Virtue of that of the Bishop of Rome, or of the several Protestant Societies.
Without enquiring whether Quixtorpia was in the Right or the Wrong for not asking such a Question, we observe, that a Man who believes the Fundamental Doctrines of Christianity, but forbears re-
ceiving the Communion, because he looks upon that Action as a Sign that one dams the other Christian Sects, cannot be accounted an Atheist, but by one who has forgot the Notions of Things or Defini-
tions of Words; nay, we go farther, and maintain it cannot be de-
nied that such a Man is a Christian; we allow you to say, that his believing all the Sects that receive the Gospel to be in the way to Sal-
vation is an Heresy; we allow you to assert, that it is a pernicious and dangerous Doctrine; notwithstanding which, can it be said that thos
those who believe that Jesus Christ is the Eternal Son of God, co-eoffsential and consubstantial with the Father, that he died for us, that he sits at the right Hand of God his Father; that Men are saved by Faith in his Death and Intercession; that one ought to obey his Precepts, and repent of one's Sins, &c. we say, can it be affirmed that such People are not Christians? No Man of Sense can affirm it; but none would be more unreasonable in asserting such a thing than the Author of l'Esprit de Mr. Arnauld, since he published another Book, wherein he shews that all those who believe the Fundamental Points, belong to the true Church, whatever Se&c. they may be of. We omit several other Maxims advanced by him, whereby it appears, that one may be saved in all Religions; we only mention such Doctrines as he cannot deny, and according to which he ought to acknowledge, that GROTIUS, who believed the Fundamental Doctrines, without approving Calvinism or Popery, &c. in every thing, was a Member of the true Church.

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

During his Stay at Paris, before he was Embassador of Sweden, "he translated into Latin Prose his Book concerning the Truth of the Christian Religion, which he had writ in Dutch Verse, for the Use of the Seamen who travelled into the Indies, that they might have some Diversion in reading such a pious Poem." Thus du Maurier speaks of it; but he is very much to blame for giving such a mean Notion of the Author's Design, for GROTIUS aimed at a nobler End; he had a Mind to enable the Dutch, who travel to the Indies, to promote the Conversion of the Infidels; this is the Character he gives of it himself; My Resolution was to do something of Advantage to all my Countrymen, but especially for Seamen, that in all their Leisure they have Aboard, they may use their Time with Profit to themselves, and not loiter away their Hours as some do. And therefore beginning with a Panegyrick upon my own Nation, which infinitely excels all others in this Art; I encouraged them, that they would improve their Art, not only for their Benefit and Gain, but that they would regard it as the Mercy of Heaven, and use it for the propagating of the Christian Religion. It is an Excellent Work, and the Notes upon it are very learned. It was translated into English, French, Dutch, German, Greek, Perisian, and Arabick; but we do not know whether all those Translations have been publish'd; the Greek was not printed in the Year 1637. In the Year following GROTIUS mentions the Persia Translation only, as a Book which the Pope's Missionaries had a Mind to publish. My Book, says he, concerning the Truth of the Christian Religion, that is accounted Socirian by some, is so far from having that Character here, that it is to be turn'd by the Pope's Missionaries into the Persian Tongue.
Tongue, to convert, by the Favour of God, the Mahometans who are in that Kingdom. In the Year 1641, an Englishman, who had translated that Book into Arabick, was desirous his Translation should be printed in England. There came a very learned Englishman to me within these few Days, says he, who lived a long time in the Turkish Dominions, and translated my Book of the Truth of the Christian Religion into Arabick, and will endeavour, if he can, to have it published in England: He thinks no Book more profitable, either to instruct the Christians of those Parts, or to convert the Mahometans that are in the Turkish, Persian, Tartarian, Punic, or Indian Empire. That Translation made by the famous Dr. Edward Pocock, was printed at London in the Year 1660. There are three German Translations of that Work, two in Prose, and one in Verse, and two French Translations in Prose.

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

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

But his Book Of the Rights of War and Peace was the Master-piece of his Works, and therefore deserves a more particular Account; it was printed at Paris in 1625, and dedicated to Lewis XIII. "King Gustavus of Sweden having read and admired it, resolved to make use of the Author, whom he took to be a great Politician by reason of that Work; but that Prince having been killed at the Battle of Lutzen in the Year 1632, Chancellor Oxenstern, according to his own Inclination, and the Design of the late King Gustavus, nominated him to be sent Embassador into France," Colonies says, "It is believed that Grotius exhausted his Parts upon that Book, and that he might have said of it what Casaubon said of his Commentary upon Perthes, in a Letter to Mr. Perllan his Kinman, which is not printed, in Perseon omnem ingenii conatus effudimus; and indeed that Work of Grotius is an excellent Piece, and I do not wonder that it has been explained in some German Universitites." —Here follows the Judgment which M. Bignon, that unblamable Magistrate, makes of that Book in a Letter to Grotius, dated the 5th of March, 1633. "I had almost forgot, says he, to thank you for your Treatise De Jure Belli, which is as well printed as the Subject deserves it; I have been told that a great King had it always in his Hands, and I believe it is true, because a very great Advantage must accrue from it, since that Book shews, that there is Reason and Jusitice in a Subject, which is thought to consist only in Confusion and Injustice; those who read it will learn the true Maxims of the Christian Policy, which are the solid Foundations of all Governments; I have read it again with a wonderful Pleasure." They did not make the
fame Judgment of it at Rome, where it was placed among prohibited Books the 4th of February 1672. M. Chauvin's Memorial concerning the Fate and Importance of that Work is so curious, that we cannot forbear transcribing some things out of it. It informs us that GROTIUS undertook to write that Book at the Solicitation of the famous Peirescius. He himself says so, in a Letter he wrote to him, when he presented him with the Copy of that Work. "The Subject of it was thought to be so important and useful, that it gave Occasion to make a particular Science of it; for the Explanations of which, some Professors have been appointed on purpose in the Universities. Charles Lewis, Elector Palatine, did so highly value that Book, that he thought it should serve as a Text to the Doctrine concerning the Right of Nature, and the Law of Nations, and in order to teach it he appointed M. de Puffendorf in the University of Heidelberg; and in Imitation of that Prince, the like Settlements have been made in other Universities. It does not appear that any Body criticized upon this Work of GROTIUS during his Life-time;" but when he was dead it occasioned many Disputes, and was published over all the World of Letters, and commented upon by the most learned of all Nations. It came out at last, cum Notis Variorum, by which means our Author, within 50 Years after his Death, obtained an Honour, which was not bestowed upon the Ancients till after many Ages.

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

H. GROTIUS
H. Grotius

To

His Most Christian Majesty

LeWis XIII.

King of France and Navarre.

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

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

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

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

I.

The Civil Laws, whether that of the Romans, or of any other People, many have unreservedly undertaken, either to explain by Commentaries, or to draw up into short Abridgments: as Nations, which is common to many Nations or Rulers of Nations, whether derived from Nature, or instituted by Divine Commands; or introduced by Custom and tacit Consent, few have touched upon, and none hitherto treated of universally and methodically: though it is the Interest of Mankind that it should be done.

II. Cicero 

rightly commended the Excellence of this Science, in the Business of Alliances, Treaties, Conventions between States, Princes, and foreign Nations, and in short, in all Affairs that regard the Rights of War and Peace. And Euphrates prefers this Science before the Of War and Peace.

III.

To you, who know th' Affairs present and future

Of Men and Gods, not to know what Justice is.

I. (1) The Author here means what he calls the Laws of Nations, which he distinguishes from the Laws of Nature as making a separate Class. But in this he is mistaken; as is acknowledged by all, who have pursued this Study. See Note 3, to B. I. Chap. I. 6, 14.

II. (1) This is not Cicero's Sence. The Words here quoted only signify that Pompey, of whom he is speaking, was very well versed in Alliances, Treaties, and Conventions made, concluded, and formed, between States, Princes, and foreign Nations, &c. Equidem contra civitatem, Judicis, quum in omnem genus ac omnem decretum Animam, etiam ilium, quem sine juro uno non facili differtur, Cn. Pompeius existat, vincularem quantum dam laudem ejus et praestabile messe scientiam in fieri hunc perponit, conditionibus Pugnae, region, interiorem Nationum: in utrum duum Belli Jure ut Public. Quius se E. Corn. Balbo, Cap. VI.

2. 'Angis, 'Angis non est, 'Angis est. Helen.'

Haec, uti etiam, ut in disputatione mathematica, quae est in disputatione Beli Jure ut Public. Quius se E. Corn. Balbo, Cap. VI.

Helen, Vet. 528, 529.

This Thence was an Egyptian Priestess, who dealt in Divination. Helen does not here design to prefer the Knowledge of what is just and unjust, to that of all things human and divine, as our Author pretends. The Poet only intimates, that we ought to join the Study of Morality with the Study of Religion. In this Sence the Verbes here quoted may very justly be understood as addrest to all employed in the publick Ministry of Religion, either to remind them of their Duty, or reprove them for the Faults committed in the Discharge of it, which has been but too often the Case at all Times. See what I have said in this Subject in my Preface to the Pseudofre, § 7, &c.

III. (1) Thrice Words occur in the first Book of that Hillorian. (Chap. LXXXV. Ed. Om.) We find the same Maxim in the fifth, where the Athenians, whose Power was then very considerable, speak thus to the Molians. For you cannot but know that, according to the common Nature of Mankind, I am regulated by the equal Necessities of the Parties; and that those who are invested with a superior Power, do all they can possibly, while the Weak are obliged to submit. (Chap. LXXXIX.) Grotius.

The former of these Passages is not properly applied. It may be observed that the Word here used is 'Angis, which signifies unanswerably, not unjust. Besides, it appears from the Sequel of the Discourse that the Question does not here turn on what is just, or unjust. Hermocrates, the Syracusean Embassador, had remonstrated to the Athenians, that there was not the least Probability, that the Athenians would, after the Defection of Chalcis, grant the Leontins their Liberty, who were Inhabitants of the same Country. Chap. LXXXIX. To which Euphrates replies, that the Athenians had an Interest in making that Deflection, and knew how they would find their Account in it. So that 'Angis in this Place signifies, what is not conformable to the Rules of good Policy, and is the same as in 'Angis in Chap. LXXVI.
The Preliminary Discourse.

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

They have recourse to Force of Arms, not Law.

And Horace 5 thus describes the Fierceness of Achilles:

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

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

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

Antigonus, 7 though old, laughed at the Man, who presented him with a Treatise concerning Justice, at the very Time he was bejuggling his Enemies Cities. And Marcus said 8 he could not hear the Voice of the Laws for the 9 clashing of Arms. Even the modelliest falsest Pompey 10 could borne the Face to say, Can I think of Laws, who am in Arms?

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

You that attempt to fix by certain Rules Things so uncertain, may with like Success

Strive to run mad, and yet preferve your Reaon.

The Existence of Right affered against the Objecrons of Car-nedeas.

1. You that attempt to fix by certain Rules Things so uncertain, may with like Success

Strive to run mad, and yet preserve your Reason.

V. But since it would be a vain Undertaking to treat of Right, if there is really no such thing, it will be necessary, in order to know the Foundation of our Work, and to establish it on solid Foundations, to confute here in a few Words so dangerous an Error. And that we may not engage with a Multiplicity of voices, let us affront them as an Advocate. And who are proper for this Purpose than Carndedas, who arrived to such a Degree of Perfection, (the utmost I set aimed at,) that he could argue for or against Truth, with the same Force of Eloquence? This Man having undertaken to dispute against Justice, that kind of it, especialy, which is the Subject of this Treatise, found no Argument stranger than this. 1 Lewis (say's he) were intimated by Men

2. The Words here used by the Author, are taken fromTacitus. Litt in fammâ forum autem, quod addi- dunt. Annal. Lib. XIV. Cap. I. 3. The Author alludes to a Fragment of the second Book of Cicero's Treatize De Republicâ, preferred by St. Augustin; where Sopha, on the contrary, main- tains, that it is impossible to govern a State well, without observing the Rules of Justice with the utmost Ex- actness. De Civit. Dit. Lib. II. Cap. XIX. 4. This Fragment, which may be seen in Cicero's Oration forMarcus, Cap. XIV. is more entire in Au- lius Gellius, Lib. XX. Cap. X. Non es jure manu conformat, sed membra serva Rom republica, regnaque fereus, quoddam dabit 6. But the Poet speaks only of Civil Laws; and sets vio- lent Measures, the distinguishing Characteristics of War, in Opposition to the legal Proceedings, used for composing Differences in Times of Peace. The same is to be observed of some of the following Passages.


9. The Inhabitants of Argos being engaged in a Dis- pute with the Lacedæmonians about some Lands, and the former having imparted their Claims with the best Reafons, Lysander drew his Sword, saying: He, who is Maker of this, reafons left about the Boundaries of Lands. Plutarch's Apology, p. 190. The same Author, in the Life of Caesar, p. 725. Tom. I. relates that Mem- lis, Tribune of the People, opposing that General for taking Money out of the publick Treafury, and alleging some Laws against that Pradesh, Caesar replied, that the Laws ought your Place to the Edification of Wars.

10. Seneca in his fourth Book De Beneficis, Cap. XXXVII. observes, that Princes make many Grants, without according into the Reasonableness of the Demand, especially during a War, when a just and equitable Man is not able to satisfy so many People supported by Force. He adds, that it is not possible to be at the same Time an honest Man, and a good General. Grotius.

11. He was very apt to blufh, especially when he was obliged to appear in the Assembly of the People. See Seneca's eleventh Epistle, and Grönovius's Note on it.

12. Plutarch, in the Life of Pompey, relates the Mat- ter thus, The Muneraeum pretended to be independent on Pompey, by Virtue of old Romans Law, that Gen- eral broke out into the following Expression: Will you still continue to alledge the Laws against me, while you have our Swords by our Side? Quintus Curtius observes that War towards even the Laws of Nature. Lib. IX. (Cap. IV. Num. 7.) Grotius.

13. (1.) This Passage is taken from the ninth Book of his Treatise against the Jews.

The Preliminary Discourse.

for the sake of Interests, and hence it is that they are different, not only in different Countries, according to the Divinity of their Manners, but often in the same Country, according to the Times. 

As to which is called Natural Right, it is a mere Chimera. Nature prompts all Men, and in general all Animals, to seek their own particular Advantage: So that either there is no Justice at all, or if there is any, it is extreme Folly, because it engages us to procure the Good of others, to our own Prejudice.

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

1. Natural.

Creech.

must by no Means he admitted. For Man is indeed an Animal, but one of a very high Order, and that excels all the other Species of Animals much more than they differ from one another; as the many Animals proper only to Mankind sufficiently demonstrate. Now amongst the Things peculiar to Man, is his Desire of Society, that is, a certain Inclination to live with those of his own Kind, not in any Manner whatever, but peaceably, and in a Community regulated according to the laws of his Understanding; viz a viz Digestion the Stoicks termed "Quinacum." Therefore the
VII. (1) It is an old Proverb that a Dog will not eat Dog's Fish. VAREO DE LING. Lat. Lib. VI. p. 71. Ed. II. EDITION, ADDISON'S JOURNAL.

VII. (2) The Journal remarks that Tigers live peaceably together, and that the wildl Beasts spare those of their own Species.

CAGNAIUS MACULAI. Fam. 4- parcel 5.

Indice Tigris nigri rubrae caten Tigridae genus
Perpetuum: fcrice inter fo cromaret urfii.

SAT. XVI. Ver. 159, & 694.

PHILO, the Jew, has a beautiful Passage to this Purpafe. Addressing himself to men in regard to the Duties of Children to their Parents, he says:

"At least, he may not

take the Behaviour of some brute Beasts, which know how to make an affectionshne Return for Favers re
duced. Dogs keep the Honle, and even expose their Bodies for the Preservation of their Masters, when they are in Danger. It is faid that Shepherds Dogs go be
core the Flocks and fight them till they die, rather than

toler any of their Cattle to be left. Is it not moft

thriftful that Man should be fhuely disposed like a Dog in

the Point of Gratitude, the tameit and molt civilized

Creatures, by the moll brutal of Beasts? But if the

Conduft of terrestrial Animals is not fufficient for our

Inforation, let us make a paff to the Consideration of the

Birds of the Air, and learn our Duty from them.

The Storks, when rendered incapable of flying by

Age, stay in their Nests, whilft their Young traverce

Sea and Land in quest of Food for them. The old

ones, enjoying a Repofe fuitable to their Age, live in

Pleuty and Pleasure, whilft the young ones fupporting

the Fatigue of their Conife cheerfully, with the Sa
tisfation they find in acquiring themfelves of their

Duty, and the comfortable Expofition of the fame

Affiance in their old Age, perform this neceffary

Office at a proper Time, in return for Trafh about

they have received. Thus the fame Birds feed their

Young whilft unflated, and their Parents when in

the Decline of Life. Then they are taught by Na

tural Reafon with Peace for the Solemnice of

thofe, from whom they received it, not wanting to

take Care of themfelves. It is not this sufficient to con

found fafh to thaw fom Convemion for their Parents, and

neglect thofe who alone, or at leaft prefentially to all

others, have a Right to their Affiance? especially

when they consider that in this Cafe they onl y

return what they have received. For all that Children

call their own is received from their Parents, who ei

ther gave the Things themfelves, or put their Chil
dren in a Condition of acquiring them. See con

cering the particular Care of Pigeons about their Young, PORPHYRY De non a. A. Animallm. Lib. III. And as to certain Filles, called Scari and Sarvi, which flew a Concern for thofe of their own Species, CASSIODORUS Pan. Lib. XI. Cap. XL. GROTIUS.

In regard to the Filles our Author mentions, they seem to express a Concern for their Species in the following Influence. When one Sarvar fees another taken by a Flock, he graces the Line, in order to fet him at

Liberty, and sometimes fuccedes in the Attempt. And it is no uncommon Thing to obfervc ferveral of them unite in a Body to deliver a Captive; fo that if it excen
tuus from the Body, the Tail of the Filly, as he unfortunatly does, they affift him to the extran of their Power. If he puts out

his Head, one of them pretends his Tail, that he may

flipt on it, and thus affhage himfelf, while the other

remains ferfous and deferely forward to aid him along, in which, as ELIAN observes, they all like Men, and

practife the Laws of Friendship, which they learn only


PONT. BUT. De vi erit. Natura Animallm. Tom. II. p. 977. C.

2 GRONOV. In this Place brings the Example of Hens which feed their Chickens, and Cocks which feed the Hens out of their own Month. Every one has observed this Praflece, as well as the Aardou, with which the wildl Beasts expufe their own Lives in Defence of their Young; and the Atbitude of Hounds, which bring the Game to the Mailers. Nor is there an Inforation acquainted with the Fervor, with which Bees and Pif

mires unite their Labours for the Good of their repre

fpective Communities, as remarked by the fame ARO

DO המומז. De Hift. and C. GROTIUS. The former in the 15th Chapter of his 3d Book. De Fove

bus Eororum & Melorum, are: Even Bees, Pinfures

and Storks, do fame Things for the Sake of others. They lay in much Mr. Men that they are "therefore formed by Nature for Society, mutual Affi

mance, and living in Community." The latter in his


3 See the Paffeage of PUDIOSE who have undertakcn to criticise, or comment on our Author, have given his Thoughts a wrong Turn in this, and many other Places. The Weaknefs of their Critifim sufficiently appears from this fingle Cofideration, that our Author only affirms that the Principle of Sociabilily has no real

Foundation in the Nature of Man, that we find some

fain Tafks of it even among Irrational Animals, in

gard to thofe of their own Species. He does by no

mean pretend either that there is any Right common

to Men and Beas, or that any certain Confequences can be drawn from the Actions of Brutes, for proving the Many of the PARTICULAR Things in the Law of Nation. See what he says Brot I. Cap. I. §§ 2, 9, and my Remark in the Notes on PUFFENDORP's Law of Nature and Nation, Book II. Chap. III. § 2.

4 I know of no other Place in PLUTARCH, where that Philofopher fppeaks of this natural Preffeny or Incufion of Children, but in his Account of his little Daughter, who, he tells us, was fo overfawly fedly

tempered and benevolent, that she expressed herself more clearly; but till he does not give us a more jufi and philophical Idea of the Thing. Lib. I. § 7. Consults Mr. Le CLAER'S Note on that

Piece, p. 15. of the half Edition of Apologia. 1717.

5 I know of no other Place in PLUTARCH, where that Philofopher fppeaks of this natural Preffeny or Incufion of Children, but in his Account of his little Daughter, who, he tells us, was so overfawly fedly

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Piece, p. 15. of the half Edition of Apologia. 1717.
Nature

Years

apart, I Mankind. defend on themselves. &ther... and as better what those... to the first Elephant, a and to the first

Necessity, not is Whereas we the... defenceless or from... Society...

Sociability, Ibid. "Country, too..." "Ibid... so...to the first... natural... to the first... to the first... as better what... to the first Elephant, a and to the first

Necessity, not is Whereas we the... defenceless or from... Society...
The PRELIMINARY DISCOURSE.

The Refutation of a certain group of authors' view that the People are bound by the Orders of a Dictator, even when these are contrary to the Law of Nature.

I. The Author's View of the Nature of Authority.

The Author believes that authority is derived from the consent of the governed, and that it is not valid if it is not based on this consent. He therefore argues that the People have the right to refuse to obey orders that are contrary to the Law of Nature.

II. The Validity of Authority.

The Author further argues that authority is only valid if it is exercised in accordance with the Law of Nature. He cites examples of situations where authority has been abused, and shows that in such cases the People have a right to resist.

III. The Right of Resistance.

The Author concludes that the People have the right to resist authority that is contrary to the Law of Nature. He cites examples of historical figures who have done so, and argues that this is a duty of the People.

IV. The Author's Proposals for Reform.

The Author proposes several reforms to ensure that authority is always exercised in accordance with the Law of Nature. He calls for a system of checks and balances, and for greater participation by the People in the decision-making process.

By these means, the Author believes that we can ensure that authority is always used for the benefit of the People, and that they have the right to resist when necessary.
The Preliminary Discourse.

XIX.

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

XII. And this now is another Original of Right, besides that of Nature, being that which 2. Voluntary, proceeds from the free Will of God, to which our Understanding insensibly affixes us, we ought 1. Divine, to be subjedt: And even the Laws of Nature itself, whether it be that which confits in the Maintenance of Society, or that which in a looser Sense is called, though it flows from the internal Principles of Man, may notwithstanding be justly ascribed 1. to God, because it was his Pleasure that these Principles should be in us. And in this Sense Chryspippus 1 and the Stoics said, that the Original of Right is to be derived from no other than Jupiter himself's, from which Word Jupiter it is probable 1. the Latin gave it the Name jus.

XIII. There is yet another Reason for ascribing it to God, that God by the Laws which he has given has made those very Principles more clear and evident, even to those who are least capable of Reasoning, and has forbid us to give way to those ingenious Subtleties, which, contrary to be faid of thofe, who refuse Relief or Affiance to the poor and miserable, not in extreme Necessity; for in that Cafe they have a Right to demand what they want, as we shall see in the proper Place. The learned Gronovius, preposlefted with Aristotle's Ideas, and not giving due Attention to the Matter, and the Sequel of our Author's Discourse, widely mistakes his Meaning, and perplexes the Question both here and elsewhere, in which he has been faithfuly followed by Mr. De Courtin.

1. This is to be admitted only in the following Sense: That the Maxims of the Law of Nature are not merely arbitrary Rules, but are founded on the Nature of Things; on the very Confinution of Man, from certain Relations refulted, between such and such Actions, and the State of a reasonable and sociable Creature. But to speak exactly, the Duty and Obligation, or the indispensableness of conformity to their Ideas, and Maxims, necessarily imposes a superior Power, a supreme Master of Man-kind, who can be no other than the Creator, or the supreme Divinity. We shall treat of this Subject more largely in the following Treatise I. Cap. 1. Sec. 10. 2. The Reader may see on that Subject the excellent Treatise of our Author, Concerning the Truth of the Christian Religion.

XIV. For this Reason, according to the Sentiment of Marcus Antonius, every Man, who commits an Act of Injustice, renders himself guilty of Impiety, 'in absentitatem.' Lib. IX. § 4. Jovius.

This Paffage is beautiful, but ill applied. The Author ought to have placed it among those quoted in the fucceeding Note. In Reality, he is here talking of Voluntary Divine Laws, as he himself calls it, Book I. Chap. I. § 96; or, of that, which, being in its own Nature indifferent, becomes just or unjust, because God hath commanded or forbidden it. This is evident from the following Terms by our Author, and the sequel of the Discourse; for he calls the Will, which is the Source of this Right, a free or arbitrary Will; and afterwards observes, as it were occasionally, that the Law of Nature, of which he has been laying the Foundation, may be also considered as flowing from the Divine Will, because it was his Pleasure to establish such internal Principles in Men so that his Nature should be framed in the Notebook of our Author's Meaning. Therefore in this Place it is, that even though there were no Natural Right, or though the Frame of our Nature did not of itself engage us to act in such or such a manner, yet upon the Acknowledgment of a Deity, of whose Existence we cannot reasonably be ignorant or doubtful, we must likewise own ourselves obliged to obey him, whatever commands, even though his Laws had no other Foundation but his absolute and arbitrary Will. This we should always find a Source of Right there; for that God, who has doe clearly revealed himself to Men in the Books, which we call the Holy Scriptures, has there prescribed them a Set of Laws entirely like those, which we say were impiously imposed on them by the Frame of their own Nature. But it may be further said, that the Law of Nature, though sufficientely founded in itself, does likewise derive its Origin from God, independently of Revolution, as it was his Pleasure, &c. This I take to be the Meaning of our Author, and the Conclusion of his Discourse, which does not appear at first Sight. The Improperity of this Quotation will appear still more from the Words immediately following, which it is not amiss to produce. The Emperor gives a Reason for what he had advanced, vis that every Iniquity is a real Impiety. For, says he, universal Nature having made reasonable Creatures for one another, that they may assist one another, according to the Merits of each individual, and shew to others, who does obey his Will, is manifestly guilty of Impiety against the most ancient Divinity. Many Pagan Authors have also acknowledged that the Law of Nature is a Divine Law. See some of the Laws above quoted in my Remark on Pufendorf, Book II. Chap. IV. § 3. Num. 4.

2 When I speak of Nature, says S. Chrysippus, "I mean God's Will is the Original of Right; it is the Naiur of Nature." And Chryspippus expresses himself thus, "For it is not possible to find by any other Principle or Origin of Justice, than Jupiter and univerfical Nature; for there we must always begin, whenever we design to treat of Good and Evil." Book III. Of the Gods. Grotius.

This last Paffage cited from a Stoick, whose Works are not excepted of, he published a great Number is preferved by Plutarch, in his Treatife De Stoicorum refurgentia, p. 1035.; Tom. II. Edid. Hebzel.

4 Perhaps, it might be rather laid that as Office has been converted into Os, to Tawlaw has been changed into Tas, Gen. Jufi, which was afterwards made Tawir, see Tawir as Poole wou'd have it, according to the preceding Note. Cicero also maintaies, that the witch, and most learned Men have been of Opinion that the Source of all Law and Justice is to be sought for in the Divinity. See his Treatife De Legibus, Lib. II. Cap. IV. and Lib. I. Cap. V. VII. X.

Perih. See above in the preceding Note. Cicero also maintains, that the witch and most learned Men have been of Opinion that the Source of all Law and Justice is to be sought for in the Divinity. See his Treatife De Legibus, Lib. II. Cap. IV. and Lib. I. Cap. V. VII. X.

XIII. (1) Disorderly Puffians are condemned through the whole Scripture, especially in the New Testament, which forbids us, under very severe Penalties, to allow ourselves to be hurried away by those blind Motions. The Apostle St. John includes them all under these Heads, the Lof of the Fifth, the Lof of the Eyes, and the Pride of Life, 1 Ep. Chap. II. Ver. 16. that is,
The Preliminary Discourse.

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

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

XV. Amongst Men, Parents are as it were Gods in regard to their Children: Therefore the latter owe them an Obedience, not indeed unlimited, but as extensive * as that Relation requires, and as great as the Dependence of both upon a common Superior permits.

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

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

' Interret, that Spring of Truth and Right.

CREECH.

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

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

Of Nations of all or most States.
in the Language of the Philosophers, social Pleasure, Coexistence, and Ambition.

2 In the Original it is quite the reverse: Qui nobis ipsa, sude adhuc confidunt. But though all the Editions I have seen, agree that of 1632 read it, to, it is evidently fault. It should be read mal confidunt, as I havecorrected it in my Edition of the Original, where the Reader may fee the Reason why the Word supplied is here absolutely necessary.

XIV. (1) Digest. Lib. I. Tit. I. De Jutijid & Jure. Leg. III. The Idea of the Stoicks, and fuch was this Lawyer, concerning the Origin of Mankind, were very confused; and though they introduced the Divinity, it was in a very different Manner from what Moses ufed in his History of the Creation. See Justus Lipsius's Phylog. Soc. Lib. III. Di ret. IV. The Kindred, which they conceived as confabbling among Men, did not confit in their confidering all Mankind as descended from the fame Father and the fame Mother; but only in the Conformity of their Nature, and the Principles or Materials of which they thought them compos'd. See Marcus Antonius, Book II. § 1. and Cato's learned Notes on that Place.

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


3 See below Bod I. Chap. IV. § 6. Num. 2. XVI. (1) So that the Civil Law, though no kind of Law is in itself more arbitrary, is at the Bottom no more than an Extension of Natural Law, a Consequence of that inviolable Law of Nature, that every one is obliged to a religious Performance of his Promife.

XVII. (1) Arque ipsa Utilitas Jutif propo mater, & Relig. Horat. Lib. I. Sat. III. Ver. 92. Upon which Place, an ancient Commentator on Horace, whether Aenon or any other Grammarian, makes the following Remark; * The Poet here opposes the Te- nets of the Stoicks; for his Definition is to prove that "Justice is not Natural, but derived from Interest." See what St. Augustine says against this Opinion, De Diritia Clarificans, Lib. III. Cap. XIV. Grotius. 2 Ibid. § 8. Note z. 3 See Pufendorf, Book VII. Chap. IX. § 5. XVIII. (1) See Bod I. Chap. I. § 14. 2 For these two Names are sometines confounded. See what I have said in Pufendorf, Book II. Chap. III. § 23. Note 3.

Part 2
The Preliminary Discourse.

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

XIX. But it is absurd in him to traduce juftice with the Name of Polly. For, as, according to his own Confession, that Citizen is no fool, who obeys the Laws of his Country, though out of Reversion to that Law to be必須 and ought to pass by some Things that might be advantageous to himself in particular: So neither is that People or Nation foolish, who for the Sake of their own particular Advantage, will not break in upon the Laws: common to all Nations; for the same Reason holds good in both. For as he that violates the Laws of bis Country for the Sake of some present Advantage to himself, thereby spits the Foundation of his own perpetual Interests, and at the same Time that of his Poverty: So that People which violate the Laws of Nature and Nations, break down the Bulwarks of their future Happines and Tranquility. But besides, though there were no Profit to be expected from the Observation of Right, yet it would be a Point of Wisdom, not of Polly, to oblige the Injuftice and Direction of our own Nature.

XX. Therefore neither is this Saying universally true, Which one in Plato expresses thus, The Fear of receiving Injury occasioned the Invention of Law, and it was Force that obliged Men to prate in Justice. For this Saying is applicable only to those Constitutions and Laws which were made for the better Execution of Justice: Thus many, finding themselves weak when taken singly and apart, did, for fear of being oppressed by those that were stronger, unite together to build, and with their joint Forces to defend Courts of Justice, to the End they might be an Insurmountable wall to those whom finely they were unable to deal with. And now in this Sense only may be fitly taken what is said, That Law is that which the stronger pleases to impose, by which we are to understand, that Right has not its Effet external, unless it is supported by Force. Thus Solon did great Things, as he himself boasted.

XXI. Ye neither does Right lose all its Effect, by being deftroyed of the Affiliation of Force. Injuftice brings Peace to the Confecne; Injuftice, Racks and Torments, such as Plato describes in the Breaches of Tyrants. Injuftice is approved of, Injuftice condemned by the Conform of all good Men. But that which is greatest of all, this God is an Enemy, to be other a Patron, who does not so wholly refuse his Judgments for a future Life, but that he often makes the Rigour of them to be perceived in this, as Histories teach us by many Examples.

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

The Emperor Marcus Antoninus makes a judicious Use of this Conversation. Every Alltion of years, which has not a war or remote Relation to the Publick Good, as its End, destroys the Harmony and Uniformity of Life: It is unjust, says he, to abuse the Rights of the Citizen, when by forming Cohab, breaks the Union of the State. Book IX. § 23. And in another Place he says, He who divides himself from another, casts himself off from all human Society. Book XI. § 8. In Reality, as the same Emperor elsewhere observes, what is useful to the whole Swarm, is useful to each particular Bee. Grotius.

The Author, who probably trusted his Memory on this Occasion, has misquoted the second of these Passages; for instead of the words extempore, he writes of eiinnoa μιαν απο των φιλων επεκκαιοηκα, i.e. must necessarily be cut off from the whole Body of Mankind. The Mistake was occasioned by the last Words immediately preceding the former Sentence, and making part of a Compendium; which the Author forgetting, and confounding with what follows, has changed φιλων to φιλω, the Word in the Original, into φιλων. The whole Passage runs thus: A Branch broken off from the Branch, to which it grew, must necessarily be broken off from the whole Tree; as formerly a Man, &c. The last Passage is in Bod VI. § 54, and stands thus: What is not good for the Swarm, is not good for the Bee.

XX. (1) Jura inventa metis injurjus, factiure necis est.

Horat. Sat. III. Ver. 111.


f

XXII. But

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

3 'Quod quod tui licet componatur. Plut. in Sol. Tom. I. p. 86. Edit. Wechel. To the same Purpose

Ovid:

In canque volat, casamque tunetis armis.

That is, He but a good Right, and his Right is supported by Arms. Metam. Lib. VIII. Ver. 59. Grotius.

See Pufendorf, Bod I. Chap. VI. § 12. In the Passage from Ovid, where Sylla, the Daughter of Ni.

The next Words of it are to be joined to the Beginning of the next Verse, and read thus:

In canque volat, casamque tunetis armis.

Ut patriae, vincitur.

That is, And it is in My Opinion we shall be overcome by the Superiority of his Arms, which overrule the Justice of his Cause." See Mr. Berman's Edition, published in 1743.


urus produces that Philosopher's Thought on Occasion of the Remorse of Confidence, with which Socrates was tortured. The weight of Men had good Reason for affirming that if the Soul of Tyrants could be expelled in Viro, we should not, under similar Racks and Torments; for as the Body is torn with Wigs, so is the Mind with Cruelty, Lati, and Made-Administration. Neither the Splendor of the Imperial Dignity, nor Retirement, could secure Tiberius, or blind him from suspecting the Treachery of his Subjects; and interior Punishment of his Crimes. Annals, Book VI. Chap. VI.
Equally concern private Persons, Nations, and Rulers of Nations.

XXII. But whereas many that require Justice in private Citizens, make no Account of it in a whole Nation or its Ruler; the Canons of this Error is, first, that they regard nothing in Rights but the Profit arising from the Practice of its Rules, which is visible with Respect to Citizens, who, taken freely, do not find themselves in need of such things for their Defence and Well-being, do not come to them in need of that Virtue which respects the Benefit of the others, and is called Justice.

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

XXIV. If there is no Community which can be preferred without some Sort of Right, as Aristotlė proved by that remarkable Influence of Robbers, certainly the Society of Mankind, or of several Nations, cannot be without it; which was observed by him who said, That a Thing ought not to be done, even for the Sake of one Country. Aristotlė insitively argues against

XXII. (1) Vice juris est justitia. Gronovius observes, that our Author here makes Use of an Expression of APELLEUS, Book II. Of Moral Philosophy, (p. 13. Ed. Paris.) "Il ne plait pas de parler du bien et de l'interét des Vices, according to the Notions of his School, says, that "When Justice is advantageous to the Possessor of that Virtue, it is termed Benevolence; but when it extends to the Interest of others, it is properly called Social Justice. The Commentator, who produces this Paffage, might have gone higher, and discovered the Source from which both APELLEUS and Grotius derived this Distinction. Ciceron, in Book II of his Republic, says, Justice regards what is necessary so as it is difficult and expensive. And in this he only follows Aristotlė, whose Words are these: The Just Men acts for the Benefit of others; and the Good Man for the Benefits of God belonging to others. Ethic. Nicom. Lib. V. Cap. X. p. 67. Ed. Paris.

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

XXIV. (1) I am very much mistaken, if the Author had taken the Name of the Father for that of the Mother. I am induced to think so, not only because he has not specified the Place of Aristotlė either in the Margin, or the following Note, where he has thrown together together of his Author to the same Purpose, but also because I never saw that Philosopher quoted for the Observation in Question; nor do I remember to have found this Thought in any of his Moral or Political Works. On the contrary, the Commentators have quoted Plato, on a well-known Paffage of Cicero, where the same Remark is very finely turned; so that it is surprizing that Grotius takes no Notice of either of those two great Writers. The Grotiian Philosopher speaks thus: "Do you imagine that a City, an Army, a Gang of Thieves or Highwaymen, or any other Body of Men, united in an unjust Design, could ever succeed in their Enterprise, if they dealt unjustly with one another? In certain, the author of this Paffage rejected the other Person in the Dialogue. De Leg. Lib. I. p. 371. Ed. Stegb.

Such is the Force of Justice, says Cicero, that even they that live by their Crimes can only, without prejudice taking some Sort of Justice among themselves: For if any one of these, who rob in a City, defender, robs his Companion, he is no longer able to act in such infamous Society. A Thief, if he be a Pilot, who does not make an equal Dividend of the Spoils, is either killed or abandoned by his Men. It is even said that Highwaysmen have a Sort of Laws, to which they submit, and which they observe. De Offic. Lib. II. p. 641.

2. St. Chrysostom has the same Observation. But you will easily agree that Highwaysmen have no justly together, and taken it to the Cape. Certainly, when they do not act like Pirates, they in the Distribution of their Booty, they do not observe the Laws of Justice, and give every one his Share. you will find them querulous and fight with one another. In Ep. IV. Flutgarc having left behind Pyrrhus, his Expedition, that he might return to his Kingdom, to that of his augment them should be expressly commanded in a Verte, in the Political Writings of Grotius. (Ver. 68.) They divide his Estate with a Prize, by which he says, to which he adds this Exposition of the Word, (which is unmeaning and baseless,) the Land the People's Country! In the Life of Pyrrhus, Tom. I. p. 388. Ed. Wach. Cicero says, We have but certain Dependence on any Thing, unless Justice is disregarded. Rq. ad Fam. Lib. IV. CXLIX. Paffage observes, that the Distribution of the Property of Titius and Robins, is chiefly owing to unjust Practices among themselves, and their being not true one to another. Chap. XIX. Grotius.

XXIV. (1) The Author probably had in mind a Paffage of Cicero, where that great Orator and Philosopher proposes this Question: Whether the Interest of a Community most conformable to the Laws of Nature is always to be preferred to Mitigation and Mediation; or can account for the Negatives. For, says he, there are some Things, as humane and criminal, that a wise Man will not even do them even for the Preservation of his Country. De Offic. Lib. I. Cap. XLIV. The Author afterwards affirms, that by good Luck it can never happen that the Interest of the State should require such Things to be done, which ought to be well observed.

Grotius.

"A Physician or a Pilot to use Persuasion or Force indifferent in their respective Profession. But, adds Aristotle, the Goodness of Mankind results from this Blindness, that political and edifying Governments are but two Names for the same Thing: They make no Scruple of doing that to others, which they would do not unjustly, and prejudicial in regard to their own selves. They are willing to submit only to those who command them with Justice; but when it comes to their turn to command, they gives themselves no Care of the Justice of the Action." By considering these Words, one would conclude that Aristotle entertained very just Ideas of the natural Quality of each Man in particular, and Nations in general. But it appears from the Sentence that follows, that done, Men, and even some People, were naturally Sobre, on whom
The Preliminary Discourse.

xxiii

I oppose in the Laws of the Spartan King had said, 'That is the most happy Commonwealth, whose Bounds are determined by Spear and Sword; the same Pompey, whom we lately mentioned on the contrary Side, correcting what Maxim said, 'This is happy indeed, which has Justice for its Boundary. For it is probable that the Authority of any Spartan King, who preferred Justice before military Fortitude, for this Reason, that Fortitude ought to be restrained by some sort of Justice.' And that if all Men were just, they would have no Occasion for that Fortitude. The Sticks defined 4 Fortitude itself to be the Virtue that contends for Justice. Themistius, in his Oration to Valens, says very elegantly, that Kings, who consult themselves by the Rules of Wisdom, take Care, not only of the Nation whose Government they are entrusted with, but of all Mankind; and are, as he expresses himself, not φιλαδελφοι to the Macedonians only, or φιλαδελφοι to all Men without Exception. Nothing else made the Name of Minos allude to Ptolemy, but his confining Equity within the Limits of his own Empire.

XXVI. But so far must we be from admitting the Conceit of some, that the Obligation of and War: all Right claims to War; that on the contrary, no War ought to be so much as undertaken but for the obtaining of an equal Advantage, ought to be restricted, ought to be carried on beyond the Bounds of Justice and Fidelity. Demosthenes 1 said well, that War is made against those who cannot be restrained in a judicial Way. For judicial Proceedings are of Force against those who are capable of their Inability to oppose them; but against those who are or think themselves of equal Strength, Wars are undertaken; but yet certainly, to render Wars just, they are to be waged with no less Care and Integrity, than judicial Proceedings are usually carried on.

XXVII. Let it be granted then, that 1 Laws must be silent in the midst of Arms, provided they are only those Laws that are Civil and Judicial, and proper for Times of Peace; but not whom he thought War might be made without any other Reason: and he makes use of the Comparison of a Hunter, who is not allowed to take a till Man for Foot or Sacrifice, but may lawfully pursue such Animals as are wild and proper for the Purpofe designed. See what I have said on this Philosopher's Notions in my Preface to the Second Edition, of the Laws of Nature and Nations.

5 Plutarch, in his Life of Apollonius, blames the Lacedemonians for making Virtue sought principally in the Honour of their Country, and being incapacitated without any other Virtue, but what they thought might contribute to the augmenting of Sparta. Tucydides gives us the Sentiments of the Athenians concerning the Honour of that People, which they generally allowed the Rules of Virtue among themselves, and in what relates to the Laws of their own Country; but several Examples might be given of their different Conduct in regard to others; in short, they often acted in such a Manner, as is contrary to their Laws, and only that by just, which promotes their Interest.

6 Apollonius having observed that it's collections of Afa and a Cylinder of by-passing the King of Persia by the application of Great, asked him if that Prince groaned than I, which is more just and more right? Plutarch, Apoeth. Lacop. p. 213. Grotius.

4 This Definition is produced and commenced by Cicero, De Goff. Lib. I. Cap. XIX.

7 The Emperor Mucos Antoninus declared, that, as Antoninus, he considered Rome was his City and nation Country; but as a Man, the whole World. (Book VI. § 44.) Porphyry says, the blacks are conducted by Rosin, afterwards joining his fellow-Citizens, and observes the same Rule still more rigorously in regard to Strengths and all Mankind; and thus keeping the universal Part in that Subject, because more and more, and continually more his Democracy than thou with whom he deals in this manner. Of Affinity, Book II. (p. 535.) Grotius.

8 We have a veris of an old Poet to this Purpoce.

Kal ιχθυος χρηστής χρόνος οικος χάριτος Minos.

King Minos has laid a horse's Tail on the Nails of the Elephants.


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

Kal ιχθυος εκαζηθής χρόνος χάριτος Minos.


XXVI. (1) The Parallels, which our Author had in View, occurs in the Oration on Celifainum, where De- mogoneus, undertaking to divide the finding of a new General into the Heliacop, in the Room of those Pheioners, who lay under an Accusation of Extortion and Piracy, shows that it would be an extravagant Piece of Malice to proceed to that Extent againc a Subject of the State, whom they might easily punish without so much Noice. This he says, p. 183, is proper, for the Orator, and even necessary to pay Tropic, by supposing, and even publick Funds against an Enemy, who cannot be reduced by the Laws, a Decree, in this manner, and a simple Galley are sufficient against our own Carthaginians, in the Opinion of all confessors. P. 38. Edit. Bafi. 1572.

XXVII. (1) See the Commentaries on this Words of Cicero, in his Oration for Milt. Anti, from Leges into Attos. Cap. IV. 530/6
XXIV. THE PRELIMINARY DISCOURSE.

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

XXVIII. Of how great Force in Wars is the Contumacy of the Judges of the Caufe, Historians every where flower, who often ascribe the Victory chiefly to this Reason. Hence the Proverbial


2 No writen Law is of Force in Regard to Enemies; but there are certain Rules and Coflomns, which are obferv'd by all, even when the Enemy is carried to the greatest Lengts. Orat. ivi. 828. This Paffage is quoted by Pol. Her. Lib. VIII. p. 12. Ed. Grew. The Orator infiiln in the Permiiffion of burying the Dead, the Security of Embaffadors, &c.

3 Upon this Principle it was, that King Althofo- bas, being asked which of the two he would be holli obliged to, Books or Arms; answer'd, that he had learned by Books, both the Art of War, and the Rights of War. Plutarch fays, Thanne good Book there are Laws of War, and that he ought not to put the Deity of conquering or faving, as to make an Advantage of wicked and impious Actions. Grotius.

4 Plutarch has put these Words into the Mouth of Camillus, when he generoufly declared making an Ad- vantage of the Schoolma'ts Treachery, who betrayed the Children of the Fufili to his Hands. Life of Camillus. Tom. I. p. 134.

5 This Fornality is found in Livy, Book I. Chap. XXII.

6 This occurs in a Fragment of that learned Author, preferv'd by Novius, and was taken from his second Book De Fide Papali Romani. See what is said on this Paffage, Bok III. Chap. III. § 41. Note 2.

7 There are Words of that great General, as re- lated by Livy, on the Occafion of the periodical Peace to the Schoolma't; whence Plutarch has taken Occaflon to afcribe to him a Speech very like this, which we have re- lated above, Note 5. There are Laws of War as well as of Peace, and he therefore became the Author of the Laws with as much Justice as Bravery. Book V. Chap. XXVII.

8 Livy makes him fpeak thus, in his Anfwer to the Embaffadors from Carthage, who came to fee for a Peace, that, though he was always facious in Actions, he does not refufe to make a Peace, that the whole World may know the Roman People have a Britt Right to Justice both in engaging in and finishing their Wars. Book XXX. Chap. XVI.

9 The thing itself, however, is far from being indis- putable. On the contrary, if we look into the Con- duct of the Romans, we fhall find Injustice praftiz'd in feparf of their Wars, either in regard to the Subject, the Mariners, or Conflation of them: though Albe- ric Gentili has taken upon him to jully that People in his Treatife De Aris Romanis. See Mr. Bur- den's Letter, in Dr. Johnson's Edition of Hiflorian Specimen, § 82, 83, among his Selectus Juris Naturalis & Gentium; and what Grotius himself fays in his Book De Ferite. Rel. Civil. Lib. II. § 41. I remember a Paffage in Cicero, where that celebrated Orator and Philosopher fays, that Equity and Fidelity are most commonly observed in entering an, pursuing, and ending a War. De Legis. Ed. II. Chap. XIV.

10 Livy, whose Words have been quoted. Note 6.

11 Seneca, Ep. CXX. We admired that great Man, performing in his Refolution of giving a good Example, and commanding all the King's Officers, or the Princes made him on the spot, with the Prefervation of his Behaviour in War, on which is extremely difficult, being perfuaded that some Things were not allowable even in an Enemy, P. 593; Ed. Grew. 1672.

XXVIII. (1) Appian makes Pompey fpeak thus to his Army: "We ought to rely upon the Gods and the
The Preliminary Discourse.

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

XXIX. Now for my Part, being fully assured, by the Reasons I have already given, that there is none Right common to all Nations, which takes Place both in the Preparations and in the Course of War, I had many and weighty Reasons inducing me to write a Treatise upon it. I have observed throughout the Christian World a Licentiousness in regard to War, which even barbarous Nations ought to be ashamed of: A Running to Arms upon very frivolous or rather no Occasions, which being once taken up, there remained no longer any Reverence for Rights, either Divine or Human, just as if from that Time Men were authorized and firmly resolved to commit all manner of Crimes without Restraint.

XXX. The Spectacle of which monstrous Barbarity worked many, and those in no wise bad Men, up into an Opinion, that a Christian, whose Duty consisits principally in being all Men without Exceptions, ought not at all to bear Arms; with whom seems to agree sometimes Johannes Fuscus and our Countryman Eralius, men that were great Lectors of Peace both Ethically and Civily; but, I confess, they had the same View, as those brave zeal in order to make Things that are crooked straight, wholly bind them as much the other Way. But this very Endeavour of inclining too much to the opposite Extreme, is so far from doing Good, that it often does Hurt, because Men readily discovering Things that are urged too far by them, are apt to sight their Authority in other Matters, which perhaps are more reasonable. A Care therefore was to be applied to both those, as well to prevent believing that Nothing, as that all Things are lawful.

XXXI. At the same Time I was likewise willing to promote, by my private Studies, the Profession of Laws, which I formerly practiz'd in public 1 Employments with all possible Integrity; this being the only Thing that was left for me to do, being unresolutely banished my Native Country, which I have honoured with so many of my Labours. Many have before this designed an Endeavour to promote the Knowledge of Law, by giving an Example of a Method for it.

Fault, than that of the Athenians. For, having failed with the Thessalons, when the latter came to attack Pera, during a Truce (Lib. II. § 41. & seq.) and having moreover-refused, contrary to an express Clause of their Treaty, (Lib. V. § 48. p. 504,) to terminate some Difference in a judicial Way, though they had been forbad to it by the Athenians; they were fully persuaded they had been just on their Account, and ingenuously ascribed to their Breach of Faith the Calamities that befell them at Pylos, and upon other Occasions. But after the Athenians, having equipped a Fleet, were gone against the Boeotians, Lacedaemonians, Prono, and other Places, and from Pylos made Incursions into their Country, they returned in fury, in order to a Decision in an amicable Manner, when any Dispute arose in relation to their Treaties: I say, after that Time, the Lacedaemonians believing they had made the Injustice to pass over to the other Side, eagerly fought an Opportunity of declaring War against them.

2. The Author here makes use of the very Terms of Property, and not of Ovid, as Gronovius pretends. His Memory failed him on this Occasion, which was also the Case of the learned Mr. Massar. This Misfort has been corrected by the late Commentators on the Poet laf mentioned.

Frengli & adulteri wives in militis causa,&
Law etis juncta sed, excidit arma puer.
Lib. IV. Eleg. VI. Ver. 51. 52. Edit. Breunkt.

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

On ne epalaris.edu, edu, edu edu, edu.

4. Lucas introduces Pampy employizg this Reven for encouraging his Soldiers before the Battle of Pharsalia.

Causa jubes melior supera favere secundam.

Our latter Cause kits us hope for the Favour of the Gods. Lib. VII. Ver. 349.

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

"Omos ti prartjus ets, aofcndti vtrti,
Bacchus, uio, cas, uere, uter, ueri,
Tribus haud ubi quas: speramus.

When you engage in any good Action, entertain hopes of Success: be prudent, for God forsakes a just Enterprise.


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

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


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

2. He was a Franciscan Preacher at Mentz, who lived in the Reign of Charles V. Ziegler on this Place quotes Stories of Siena, Biblioth. Lib. VI. Annot. 115. 170; where the Author produces and criticises the Passages of those two Writers on this Subject.

3. This great Author has a long Digression on the Proverbs, Doleu Britam Inexpers. An this has very often been the Practice of several Moralists, in all Ages. See a beautiful Passage of Senea on this Subject, which I have given at Length, with a Translation in my Treatise On Gaming, Book I. Chap. III. § 12., XXXI. (1) The Author had been Advocate-General, and Penitentiary of Rotterdam.

2. He wrote this at Paris in 1625.
The Preliminary Discourse.

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

XXXI. But if the Professors of true Justice would undertake to treat of the several Parts of that Law which is perpetual and natural, setting aside every Thing which owes its Rise to Volun- tary Institution, so that for One Instance should treat of Laws, another of Tributes, another of the Office of Judges, another of the Confession of Will, another of the Evidence in Matters of Fact, there might as little from all the Parts collected together be a Body of Laws composed.

XXXIII. What Method we thought fit to use, we have shown in Ded and rather than in Words in this Treatise, which contains that Part of Laws, which is by far the noblest.

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

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

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

V. The Necessity of Writing.

Nothing of the ancient Authors exten- tant on this Subject.

The Defects of the Moderns.

I love merly putative.

XXXVII. (1) The Author is misled here by a cor- rupted Passage of Ammonius the Grammarian, in his Treatise Of like and different Words, upon the Word Νόης, where we read, διώκοντα χαρακτήρα, οἱ Λα버ς τοῦ Νόης, instead of μιορικά, States; as it is quoted by Eusèb. in the Seventh Book of the Hist. See MENAGE on DIOGENES LAERTIUS, Book V. § 26. and SEDLEN, Of the Laws of Nature and Nations, Juxta Diff- erent. Hebr. Lib. 1. Cap. 1. p. 4.

3 2 The Justice of War is taught most Britshly by Brith Law of the Romans. CICERO, De Off. Lib. 1. Cap. XI. See Book II. Chap. XXIII. § 4 and 8 of this Treatise.

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

3 He Dutches, as he was named from the Place of his Birth, and Chancellor of Cologne. He lived about the Middle of the XV Century, and wrote a Treatise De Belgic Jugo.
The Preliminary Discourse.

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

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

3. He was a Native of Armentiers, in Spanish Extraction. His Treatise, De Juris et Officii Bellici, was printed in that City in 1597, in 8vo. The Edition I make use of is that of Lawriei, 1648.

4. This Author has written De Jure Belli: My Edition is printed at Hanou, 1612.

5. This Reproach does not fall on the modern Lawyers alone: Mr. Norton has plainly proved that the ancient Professors of that Science have sometimes been guilty of the same Fault. See his Probable Juris, Lib. II. Cap. II.

XL. (1) "We do not govern our State by the Laws of Barbarians."

"To which Anchises adduces thus:

"The Poet introduces Hermone speaking thus to Andromache.

"Go back to your father, mourn our fate.

"What is dishonourable or dishonest among them, bear


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

2. The same Poet introduces Hermone speaking thus to Andromache.

"We do not govern our State by the Laws of Barbarians."

"To which Anchises replies thus:

"What is dishonourable or dishonest among them, bear

"the same Character also among us."


XL. (1) Why should they not be thus employed? The Emperor Alexander Severus read every Day Cicero's Books De Republic, and his Treatise Of Offices. Grotius.

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

The Philosopher, in Consequence of certain false Principles, with which they were infatuated, frequently advanced veryfalse Maxims, and sometimes contradicted themselves. The Anacharsis were particularly remarkable on this Account, valuing themselves on the Art of maintaining both Sides of all manner of Subjects. See Budeus's Disquisitions Of Moral Sentiments, and the Errors of the Scepticks, among his Anacharsis Historiae Philofophi, and the Morality of the ancient Philosophers, abridged in my Preface to Puffendorf's great Work.

The Historians, as well as the Poets, with a View of keeping up the Character of the Peripatetics introduced, often put Maxims into their Mouths, which are false and contrary to Natural Law. The Writers of both Clauses entertained likewise some Ideas which were far from being just, and sometimes very grofs, on several Subjects; but the Poets exceeded the Historians in this Particular. In regard to the former, see my Preface to Puffendorf, § 10, and as to what concerns the latter, Mr. Le Clerc's Par sopii, Tom. I. p. 200, &c. Our Author, in the Course of this Work, produces a great Number of Passages, which may serve to prove beyond Dispute, what he here advances. We have already seen some of them, at the Entrance of this Preliminary Discourse, § III. Notes 1, 2, which are taken from Tacit. and Tactitius, two of the greatest and most judicious Historians of Antiquity, the one Greek, and the other Latin.

Inference
The Preliminary Discourse

Of Nations.

Inference drawn from the Principles of Nature, or an universal Content. The former shows the Law of Nature, the other the  Law of Nations. The Difference between which is not to be understood from a confusion of the same (for the Law of Nature and of Nations are Words used in every sense by all Writers) but from the Quality of the Subject. For that which cannot be deduced from certain Principles by just Consequences, and yet appears to be everywhere observed, must owe its rise to a free and arbitrary Will.

XLI. Therefore these two I have very carefully endeavoured always to distinguish, and from one another, than from the Civil Law: And even in the Law of Nations, I have made a Distinction between that which is truly and in every Respect lawful, and that which only produces a certain external Effect after the Manner of that primitive Law, 4 so that, for Instance, it may be lawful to ruffle it, or that it even ought to be everywhere defended with the public Force, for the Sake of some Advantage that attends it, or that some great Inconveniencies may be avoided. Which Observation, how necessary it is in many Respectfully, will appear in the following "Treatise": but I have been so careful in distinguishing Things belonging to Right Property and freely to call, whence arises the Obligation of making Reconciliation, from those which are only to be said to belong to it, because that the act otherwise is repugnant to some other Distinct of right Reason, 5 Which Distinction we have already touched upon.

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

XLIV. Among other Things, (that I may mention this by the by, as not being foreign to our Purpose) it is not without Reasoon, that some of the Platonists and ancient 6 Christians seem to differ from Aristotle in this, that he placed the very Nature of Virtue 7 in a Misd常常of Passions and Actions; which being once laid down, drove him to this, that Virtues of a different Kind, as for Instance, 8 Liberality and Frugality, he made but one 9; and assigned

6 See on Puffendorf, Book II. Chap. III. § 23.
7 See, for example, Book III. Chap. VII. § 6.
8 (1) See, for example, Book III. Chap. VII. § 6.
9 (1) This is what Lactantius says, "Who would not believe that Truths are favoured through the Merit of each of them, and diffused through the several Seals, and reduced them into one Body, he would not differ from us." Imit. Divin. Lib. VII. Cap. VII. (Num. 4. Edir. Coler.) Justin Martyr speaks to the Same Purpose in his Apology: "As, e.g. says he, because the Doctrines of Plato are entirely different from those of Christ, but because they are not conformable to them in every Particular. Which is also the Cause in regard to the Tenets of the other Philosophers, as of the Stoicks, and of the Poets and Phylosorops, for each of them, being directed by a Ray of the Light of Divine Reveal'd Doctrines, discover'd something conformable to it, and some good to the World. Ed. Orig. I. "Testimonia" frequently calls Seneca, our Seruus; but then he observes that, none but Christ could give us a complete Body of Spiritual Virtues, (Adv. Inf. Chap. IX.) St. Aug. says it down as a Fact that false Books of Libelality, which are so highly commend'd by Cicero, are sought and learnt in the Christian Churches, diffused through the whole World, Ep. CCH. See what the same Father says in regard to the Platonicus, whom he maintains to be almost Christians, Ep. LVII., in his Treatise De Veris Religionis, Cap. III. and Confess. Book VII. Chap. IX. and Book VIII. Chap. II. Groton. The whole Authorities we may add, that of Clement of Alexandria, who talks in the same manner, Strum. Lib. I. p. 339, 349. Edir. Orig. See the Life of that Father, written by Mr. La Clerc, in his Bibliotheca Univers. Europ. Vol. I. p. 187, Etc. and the Dissertation on the late Mr. Olarum, De Philosoph. Eclect. p. 1216, in the Latin Version of Mr. Stanyly's Philosophical History, printed at Leipsig in 1712.
10 Lactantius treats on this Point at large in his Divina Infinitas, Book VI. Chap. XV. XVI. XVII. Let us add this Passage of Casianus: "Non adhibitatis montes, sed fundamenta e montibus, vel vel continent." Groton. 2 Edic. Infin. Lib. II. Cap. VI. 3 Whatever the learned Gronovius may say on the Subject, these are really two different Virtues. Aristotle might give the Greek Word "Aristoteles" a compound Signification, including both Difficulties and Virtues: because there is a Man is inclined to give freely, and that which directs him to a prudent Regulation of his Expenditures; but they are not two different Difficulties, and two different Virtues. This is true, when we are to consider the Virtues that are distinct from, and separable from all these, and where we have to give away; but it does not therefore follow that Frugality, or a commendable Savingness, is only Part of Liberty. It is a very different Modification of the Soul, which indeed puts us in a Condition of performing more numerous and more considerable Acts of Liberty, on certain Occasions; but which is not therefore a more Part of Liberty itself, than Sobriety and a Love of Work, and the Facility, because they are good Preparatives against Temptations to Impropriety, and because these three Virtues, like most others, mutually assist one another. Whoever takes a Delight in preserving the Indigent with his Substance, and actually does it on proper Occasions in a judicious manner, and as far as his present Circumstances permit, is so far truly liberal, even though for want of that Economy, and Care of his Affairs, which compose the Character of a good Manager, he should be reduced to a Station, in which he is no longer able to give as much as would otherwise have been in his Power. We shall some-
former, or at least confine the Exercife of it to too nar-
row a Compass. The Philosopher himfelf owns that Li-
berality, according to his Definition, confifts more in
giving and fpending judiciously than in getting Delates
in, and keeping them. He does not confift in the per-
formance of fuch Experiments and Gifts; for receivings and keeping it
are rather to be called Paffion of, fo that it is the Befity
or a liberal Man rather to live to give than to be given,
for the Reflexion of both is, to indífquise, and to live
without where it is not due. Ethic. Nicomach. Lib. IV.

IV. Thus our Author rightly obferves that Aris-
totle was oblige to reduce the two Virtues under
Concern in this Particular, is one by Difcret, the other by Excels; fo that Acrimy is in-
deed oppofite to Liberality, according to the common IDea of Man, and from being a perfectly con-
trary to Liberality, that it bears some Refemblance to
that Virtue, and may have fome Tendency toward pro-
moting the Practice of it, which at leaft is not incompa-
faffeable to Legal Virtue. He confiders anーニ
 gan, when the Necessities are to be relieved, there
are others, who give freely, and take a Pleaflure in do-
ing good, though they often do it without much Judg-
mfent, or in a fufpicious Manner.

In the Solutions of this Difficultie. 1. The Phi-
lofopher does not diftinguith the Virtue in queftion by
any particular Name, but only calls the Perfon en-
dowed with it Ambitious and Magnanimous, and under-
stands by it that Difcretion which directs a Man to love
Truth, and commit no Violence on it by his Aktion, in
Things indifferent, i. e. in regard to what we were other-
wife inclined to do, yet do not refufe to do; and this,
not àpriori, but totally dependent on the particular Circum-
stances of the Laws of Fidelity and Justice; for, says he,
"Inferiorities and Engagements, and every thing that regards Fid-
ality, are not to be done under the Name of Virtue." Ethic.

II. From the Justice and Magnanimity, which are
the two Sorts of Virtue, he concludes that, if we ac-
quire the Name of Virtue which the Falsity employes, we
would be under the Influence of the Laws of Fidelity and Justice.
In the new Edition of the Schol. Dialogues, and some other
Pieces of Great Nicomach. One might with more

4. There are feveral Faults in this Difficultie. 1. The
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"Inferiorities and Engagements, and every thing that regards Fid-
ality, are not to be done under the Name of Virtue." Ethic.
and an Infidelity to Injuries, which 7 binders us from being angry against Men.

XLV. But that this Principle of Mediocritie, taken universally, it not rightly laid, appears from the Influence of Justice itfelf, where Oppofites, too much and too little, while he could not be

in the Affeotions and their refepent Aflions, 1 be fought for Both in the Things themselves about

as a Man is ignorant of his own Merit, he is fo far from

being culpable for not at pearing at Honours, that require

Qualifications, of which he believes himfelf not pos-

fessed, that he is to be commendated for not aiming at

them; and Ignorance in this Cafe is the more excusable,
as we are much more inclined to the oppofite, and to

flatter ourselves with the Prefumptions of good Qual-

ities, of which we are entirely unprovided. It is good to

always be attentive a Diffidence of ourfelves in that

Point, in order to avoid the Illuifion of Self-Love; and

there is commonly a Reafon for prefuming, that the

Man who defcribes Honours, does it rather on a

Principle of Modesty, than out of Indolence, or Mean-

nec of Soul. ARIOTLES, however, maintains that

Puffliminiey (by which Term he means an Indulgence to

Honours) appears more frequently in Oppofition to Magna-

nimity, than Ambition, and that it is the more culpable of

the two, Ibid. Experience fhews the Fallacy of the for-

med Opinion; it and every other of that Kind, can does

be allowed that the Philofopher speaks conformably to

the Notices of the Vulgar, and the ambitious Point of

Mankind. Hence it was that among the Ar-

t its; and this is the Principle of our friends, who had a Right to fly to the	
Confufiion, and declined the Charge, were particul-

arly careful to offer the Reafons for their Conformity in the

diftingui fhed Terms, to avoid the Reprufl of Puffliminy.

See in the Notes, p. 28. of W. T. and S. Edts. Grant. But, confiding the Ideas of found

and right Reafon, it will appear that there are more Great-

nes of Soul in refiding Honours than in purfuing and

enracing them.

7 According to our Philofopher, it is no left a Folly

to be not angry on juft Occafions, as to give a bope to

Paffion. They, who commit it, for doing nothing (for de
ciding which, Perfons, Times, and Things require, are chargeable with

Folly. They fourmifiiable, incapable of being affected, or

receiving an Injury. To which he adds that to fuffer

to fuffer painfelv in Such Cases, and mercy the Degree of our Friends, is a	
Mark of a mean and firdle Mind. Ethic. Nicon. Lib. IV. Cap. XI. Hence it appears that

ARITLOLES confiders the Diffidence of all thofe in general, who con

merge their felf in publick Affairs, when they have no Reafon to be	
two angry, as a Vice oppofite to Loyalty by Deft 

and that he does not, as GRONOVUS pretends, confine that

Confufe to the foid and mean Patience of Buftons and

Perfon, which it is not only corrufion, but deferving of the

Invidiag of the Greateft Affiffions and Indiginiies, in Confideration of fome pauly

Advantage. But if we confider the Matter in itself, the

Tontify of a Mind, free from Anger, is not a mo-

ral Deft. For fupposing, what is very feldom to be

found, a Man either naturally or by the Force of long

Challengers, fo hard to be moved, that he is feldom or never

angry, he is this very happy, as being fecured from the

Exceeds of a blind Paffion; nor will such a Man be lef
difpofed, or left able to maintain his juft Right, and

that of his Friends. On the contrary, by being Ma
er of his Paffions, he takes a Reafon of a pecufible Difpofition, he will be able to take more juft Meafures, and manage his In
terel: better than thofe, who are atulfed by a Paffion

to go hard to govern as Anger. Though Anger is not evil in

itfelf, and may be all too much in a certain Point, it is never absolutely necenary. We always

may, and that with more Security, fupport our Dignity

and maintain our Right, without being in a Paffion. But it is eivedent that our Philofopper makes a Virtue of a

middle Degree of Anger, and a Deft of Revenge, the

natural Effect of that Paffion; which being in itfelf

vitiou, never allows Anger to be kept within due

Bounds.

XLV. (1) He fpells in the following Manner of

JUflice, properly to called, which he terms pcrticular or

private, to diftinguifh it from universal or general Juflice, into

two Sorts of Paffions: among all the Virtues of our Neighbour.

This Difpofition being made, it is evident that a juft Action conveys the Rndium between doing an Injury and receiving one. He that does an Injury, has more, and he who is injured, has lefs than his due. Juflice

is in Medicity; not in the fame manner as the Virtues al-

ready given of, but as the Medium to its Objects, and Juf-

like includes the true Extremes. Juflice therefore is a Difpofition to act what is right with Choice and Deliber-

ation, and to render every one his due, both in our Dealing-

with others, and fafe which others have owed one another; to do that which is proper to his Station, and in actuated and advantaged, or left of what is disagreeable and pre-

judicial them is the Due, leaving others to fend a Share of

the former, and too much of the latter, but defend a juft

Proportion here, as well as in the Direction to be made a-
mong others. Juflice, on the contrary, is a Difpofition of

doing Wrong dijjectedly, that is to give each Perfon too

much or too little of what is advantageous or prejudicial,

without any regard to equal Proportion. Thus there is both

Excess and Deficit in Juflice, because it conflions in giv

ing too much and too lit:le, that, is, in appertrating to ones

lefs or too large a Share of what is fecondarly advantageous, and taking too

much or too little, but in Excess and Deficit it is in

equal Diftribution in regard to other Men, deviating from

the Rule of Proportion fimultaneously on one Side, and oftems

as on the other. The Extremes in unjust Actions, by very

every of the former, by as much of the latter, as well as

the excess and deficit in justice, the mean of the two

as is required, i.e. by Meafurement, or geometrically.

GRONOVUS thinks ARISTOLLES sufficiently defended against our

Author's Criticism, by faying, there are no other Virtues,

than one that is called by the Name of Geometric

Proportion, Juflice observes sometimes the Medium of this

Geometrical Proportion, and sometimes that of Architec
tului Proportion in which there is only an Explanation and

Diftribution of Terms, and a Transation from one kind of

Thing to another. But the prefent Queftion does not

turn on the Nature of the Medium, or the Properties to

be required in it. It is obferved here, that the Me

ium, which this Medium is placed, must be specified, as to be

found between two oppofite Extremes of the fame Thing,

whatever Proportion is obferved for determining it. A

According to ARISTOLLES, the Medium, in which the

Effect of Moral Virtue confists, is planted, as one may

fay, in certain Sorts of Paffions and Actions, not vicious in

themselves, but which become fuch, by deviating from

their Due, and which, by being contrary to the Me

ium, which this Medium is placed, is called by the Name of

38. Pea fares, for Example, is a Paffion not evil in its own Nature; too much Fear

is Timidity, or Cowardice; too little is Audacity, or a fmall

Boke of the Prefent, and fome other Deft, which is called

Comune. Speaking, laughing, a regular Compose of the

Face and exterior walking, standing full, in fuch all we do or fay in Conversation are in fubmis

sion to the Mean, as to endeavour at plefting every one, or certain Per

fons on all Occaflions, is Folly: but on the contrary, to

act as if we had no Concern for pleasing any one, is

Cruelty or Incivility; the juft Medium is Cruelty,

or a poofible Voluptuousnefs. See Ethic. Nicon. Book II.

Cap. VI, VII. To return to Jufice, the Virtue under

Consideration, according to our Philofopher, it Medium

in the defined Extremes and Diftribution of Advantages and Difadvantages; for this is what he means by that Equality to which the Actions, whereby we think one to be juft, relates. He hence calls this Equality, is the proper Employment of Juflice, and what confifnes its Nature. A Difregard of this Equa

lity, whether we take or give more of lefs than it re

quires, is a Vice oppofite to Deft, the more or the

lefs is not then in Matter of Jufice, but in the Things

about which it is employed: We do not obferve this

Equity too much or too little, we do not exceed the juft

Degree we have. ANger, which is often half triflid or give too much, this is no more than a different man

ner of Inequality. Where then is the other oppofite

Extreme, which ought to confine in an exceflive Concern for our Neighbour, which in question is not the

the 49 FalsTamum; that rigorous Juflice, which is cal

led the Height of Jufice. (Summ: Jus, famus Inju-

rius, Cricer & Offic. Lib. I. Cap. X. TERENCE

Hecules. Act IV. Scene V. Ver. 48.) For when a

Man
about which Justice is conversant. Which every thing is in the first Place to leap from one kind of Thing to another, which be dereriously blames in others; and in the next Place, to receive
even on's Due may indeed happen to be a Vice, when the Circumstances of himself or his Fa-
ny cannot allow of any Abatement of, but certainly it cannot be repugnant to Justice, since it con-
haps in abstaining from that which is another Man's. Like to which Mistake is that of
his not allowing 4 Adultery proceeding from Lust, and Murder from Anger, to belong properly to
Justice: Whereas the very Nature of Injustice consists in nothing else, but in the Violation of
another's Right; nor does it signify, whether it proceeds from Avarice, or Lust, or Anger, or
imprudent Pity, or Ambition, which are usually the Sources of all great Injuries. For we re-
all Tentation of such Kind, and that for this only Reason, viz. the preserving of
Human Society inviolable, is indeed the proper Business of Justice.

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

Man puts his Demands as far as he may according to the
Rigor of the Law. He also severely in pronouncing Sentence, it is a De-
fect of Equity: He offends against the Spirit of the Law, against that very Equity which the Law deigns to establish. Like to the Law, so Equity contrary to it, as ARISTOTLE himself makes appears, Book V.
Chap. XIV. In a Word, our Philosopher was very fen-
fible of the Lameiffs of his Principle of Mucniscens, when apro-
ingly, and justly, it is plain enough in the
Words already quoted. He owns that Justice is a Mediocrity, not in the same manner as other Virtues are, but as a Medium is its Object, and Injustice only is its opposite, which includes the two Ex-
tremes. This abundantly shows the Udefinableness and Inefficacy of ARISTOTLE's Principle. Besides, it will appear, on a careful Examination of the Matter, that the
subject-matter of all the Virtues may be accurately explain-
ed without having recourse to that Principle. See a
Passage from Mr. Grew, an ingenious Englishman, quoted in my Preceding to Puffendorf, p. xcv., xcv. of the
second Edition.

2 The learned GRONOVUS calls this Chicanery: be-
cause, says he, this left, according to ARISTOTLE, re-
lates to Hardships and Disadvantages, and not Profits and
Advantages. But he is himself guilty of the Fault with which he charges our Author. GROTIUS has his Eye on the Definition of an Unjust Action, which oc-
curs in the Preface of the Puffe, quoted in the foregoing Note; according to which receiving an Injury, or knowing less, than one's due is comprehended in the Idea of
Injustice, as well doing an Injury, on taking more than one's Due. The Philosopher, however, clearly in another Place, where he says, It is evident that both receiving and doing an Injury are evil; for by the former a Man has less, and by the latter more than the Medium requires: But
doing an Injury is the more culpable of this vice, because mul-
ticipically; whereas a Man receives an Injury without
his own, as an Inclusion to Injustice. — So that receiving
an Injury is in itself the least evil, though it may by accident
On reading this last Sentence, we immediately perceive
the tacit Allusion which GROTIUS makes to it, while he
explains it, and refutes the Philosopher’s Opinion.
3 Supposing one Man commits Adultery for Lucie’s Sake, and
receives her Recompense; another is guilty of the same
Crime out of a Motive of Lust, and pays for it. The letter
forms rather frendel than concisely, whereas the former is
unjust, but not frendel, because he acted with a View of
Gains. Besides, every unjust Action has always a Re-

den who receives the Reward who relates to Interest: the
abandoning one’s Comrades in an Engagement, Cowards;
flirting, to Anger. But when a Man gauys by his Crime, it relates only to Injustice. Ethic. Nicom. Lib. V. Cap. 4, Where we find that the Philosopher does not sufficiently
distinguish between the Principle or Motive, which in-
duces a Man to commit an Injustice, and the unjust
Action itself; for he pretends that one and the same
Crime proceeds from another’s Passion, relates either to universal Virtues, or to particular Virtues, which is Justice properly so called, as the Agent is influenced by a Motion of Sensibility, Cowardice, Anger, or by a

formal Design of feizing on what belongs to another, and
taking what belongs not to him. Now besides that
this formal Design is seldom found in Injustice, few
Men doing an Injury merely for the sake of doing it, and
without being actuated by some Passion, without which
they would rather choose to leave their own Right unin-
jured. The Right untouched; besides this Consideration,
I say, the Divinity of Principle may indeed make us of-
fend at the same Time both against Justice, properly so called, and against some Virtue, especially against the
Conscience of others; but, this notwithstanding, every
Action tending to the Prejudice of another’s Right, such
as Adultery and Murder, will always be a real Injustice
against all the Specifications of Mischief, till the Emperor Claudius, his Husband, commanded him to do whatever the should require of him. This Comedy, according to our Commen-
tator, did indeed commit an unjust Action, and an Act
of Intemperance; but if we judge of his Conduct in a
moral Manner, he was neither chargeable with Injustice
nor Intemperance. I own he was not so culpable, as if he
had solicited Mischief; but even granting that a
Husband can yield to another Man his Right to his Wife’s Body, this was by no means the Emperor’s In-
tention, which general Order to oblige the Emperor
SO that the Comic should ought all to have perished in his Refulfil, and by his Com-
plianc he certainly became even more guilty of In-
Justice than Intemperance; because with this lingo
Action did not demonstrate him habitually unjust or intempe-
rate, which is not the present Question. As to Murder
committed by a Motion of Anger, it is sufficiently spe-
cified in the Puffe, here quoted, glaring, relate to
Anger. So that GRONOVUS had no Reason to say he knew not whence this was taken, and that it could
only be from Bib. Nicom. Lib. V. Cap. X. p. 66, in
which he pretends our Author contradicts himself; for
he himself quotes and commends this very Puffe,
Budi. III. Chop. XI. 4. But the Question there turns
up on a different Thing, viz. the Distinction between un-
just Actions that are committed malice-express, and such as are
done without any premeditated Design.

XLVI. (1) AGRIPPA makes a famous General Prophec
this:

The Motion of the Soul, which Nature produces to
what is pure, good, eligible and our Duty, are to be
indulged without Reserve. Those, which have a
considerable Tendency, are not to be followed as all Occasions, but
so far as it is consistent. This Problem is in the
Field of all Mankind a good Cow, without the least Mixture of
Evil, and Anger, so far as animates us to Action, it is
commendable; but an Excess of that Puffe is to be avoided as
a Vile and degenerate. In Becher’s Speech, Budi. (Chop. VII.)

GROTIUS.

2 Here GRONOVUS makes two Replies in Favour of
ARISTOTLE. First, that the Philosopher is to be ex-
cused for thinking Pity, Lust and Anger, to be the
Men among the Moral Virtues, as they are known only by
Revelation delivered to the Greeks; for ARISTOTLE, says he, as all the ancient Pagan Philosopher did in-
cluded.
not in serving God with too much Arduour, but in serving him persurly. Neither can we too much define eternal Happiness, nor too much dread eternal Misery, nor too much hate Sin. It is therefore truly said of Celsus 4, there are some Things whose Extent has no Bound, and which are so much more infamous as they are carried to a higher Pitch. Laoduntius 4, after having discoursed largely on the Passions, says, Wifdom does not confift in moderating them, but in regulating the Impreffions of the Caefta that produce them, for they are excited by external $\text{Objefts.}$ Neither ought a Refrain to be put principally upon them, because it is pohtible for them to be very weak in those who commit the greatest Crime, and to be very violent without leading to any Crime at all. Our Pofite is to fit always a high Pox upon Ariftotle, but as to refervfe to ourselves the fame Liberty which he himself took with his Meflers, for the Sake of finding Truth.

HiJories.

XLVII. HiJories have a double Use with refpect to the Subject we are upon, for they help as much as Exampies and Judgments. Exampies, the better 5 the Times and the rifer the People were, are of so much the greater Authority; for which Reafon we have preferred those of the ancient Grecians and Romans before others. Nor are the Judgments we meet with in HiJories to be defpifed, effenfially when they agree: For the Law of Nature, as we have already laid, is in many Miftres防护 from hence, but of the Law of Nations there is no other Proof but this.

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

XIX. The Author of thefe Books which Men injulfed by God, either with or approifed of, I often fay, but with a Diference of the Old and New Law. Some there are who urge the Old Law for the very Law of Nature, but they are undeniably in the wrong: For many Things 4 it proceed from the first Will of God, which yet is not repugnant to the Law of Nature itself; and fo far an Argument may be rightly drawn from it, provided we carefully diftinguih the Rights of God, which God sometimes exercises by the Miftre of Men, from the Right of Men.

cluded the Worship of the Deity under Magnificence. Editt. Nicon. Lib. IV. Cap. V. This Idea is followed by Salluit. Bell. Carita. Cap. IX. In suppHcs Deorum magnifice, e&c. and by Justin, in bk XXIV. Chap. VI. speaking of the Promfts offered in the Temple of Delphi. Now Excefs in this Care is pohtible, as appears from that ancient Law: Plutatem inuolvit: quae amovens, Cicero de Legib. Lib. II. Cap. VIII. and from the Reafon affifed by Lucretius for a Law he had made for regulating the Exufe of the Sacrifices. Plut. Aphorism. Lucu. p. 225. Ten. IV. Edit. Wech. The other Anfwer is, that solid Piety indeed cannot be carried too far, and the fame is to be found in all other Virtues; which, if we, are fometimes found in the juft Medium, to what Length forever they are carried; but that there may be Excefs in exterior Actions, by which alfo Men may in an Excessive Degree be judged to be Sen- timents. For how do we make it appear that we serve God? Is it not by frequenting Places of Worjhip by praying on our Knees, bear-headed, and with our Hands joined, as Men are exhorted to Heaven: By giving him, by contributing to the necessary Exeiples of the publick Worjhip by obferving Fefivals; by reading and meditating on the Holy Scriptures; by abjuring from every Thing, which we think contains any Impunity, and hindering the Commiffion of it, as much as in us lies, &c.? Now who does not know that in each of these Particles we may do more than God requires, and fometimes Excefs? Thus, confiderably to Ars- totle's Principle, Piety will certainly hold the middle Way between Superflition, which makes its Excefs, and Injuftice or Atheifm, which is its Defect. This is our learned Commentator's Reafoning on which I have two obfervations to make. First, It is no very easy Matter entirely to justify ArifTole's Omifion of so confiderable a Virtue as Piety; and ferval judicious Au- thors have with good Excefs blamed him for allowing Religion no Place in his System of Morality, as I have fhown in my Preface to Pufpofit. p. 24. In Reality, as fo often we acknowledge a Defect, as he did, if we reac- tion with ever to little Excefs, we muft necelfarily difcover certain Duties in which we fland engaged to that Being. Thus we fee feveral of the Pogan Philo- fopers, and particularly that very fane on that Subject, in which do $\text{G}ro\text{S}ovus pretend that according to the Ideas of all the ancient Heathen Writers, the Worship of the Divinity is included in that Virtue, which Ariftotle calls Magnificence. He had forgotten that beautiful Paffage of Cicero. The left, the moft holy and moft pure Worjhip of the God is always to honour them with Piety, Simplicity, and Integrity both of Mind and Words. For the Philofophers are not only the Perfeél: who have diftinguifhod Religion as a Virtue from other Virtues, but the Authors De Nat. Door. Lib. II. Cap. XXVIII. See also his Opinion Pro domo fide, de Pofifures, Lib. XXI. with $\text{G}rovius's Notes, and the Paffages quoted from Sall- ucrn and Eriucreifus in my full Note in Pufpofit. Lib. II. Cap. IV. § 3. It is evident from thofe and feveral other Authorities, which might eafily be produced, that many of the writer Pagans made Piety, and the Worship of the Divinity could not principally in the in- terior Sentiments, and not in the exterior Acts of De- votion. Secondly, we muft then fnd out two vifious Extremes in the interior Sentiments: It must be pohtible for Men to be extremely carful to their heathen God, and to ferve him as much and as well as they can, and efpect and love him too much, be too submittive to his Will, &c. in all which there never can be any Excefs. So that whatever they may do, who are refolved to re- conT:"
Men among themselves. We have therefore avoided, as much as we could, both this Error, and also another contrary to it, viz. 4 that since the Promulgation of the New Testament the Old one is of no Use. We are of a contrary Opinion, both upon Account of what we have said already, and also because the Nature of the New Testament is such, that whatever are the moral Precepts in the Old Testament, the same, or more perfect, 5 are enjoined by the New also: And in this Manner we see the Talmudists of the Old Testament made Use of by the Writers among the Primitive Christians.

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

LI. The New Testament I use for this Purpofe, that I may show, what cannot be elsewhere than in the New Testament, what is lawful for Christians to do; which Thing itself, I hope not without grounding, contrary to what most do, distinguished from the Law of Nature; as being fully ascertained, that no holy Law greater Stability is enjoined us, than the mere Law of Nature in itself requires. Nor have I for all that, emptied my former, what Things in it are rather recommended, than enjoined, to the Intent we may know, that as to transfer all the Commands and Precepts that renders us liable to be punished; so to aim at the highest Perfection, in what is but barely recommended, is the Part of a generous Mind, and that will not fail of a proportionable Reward.

LII. The Canons of Councils 6, when they are just and reasonable, are Consequences drawn from the general Maxims of the Divine Law, fitted to particular Cases that happen: These like-safe either fit what the Divine Law commands, or exHORTs us to what God recommends. And this is the Office of the true Christian Church, to deliver to us those Things that are delivered by God, and in the same Manner as they are delivered. But even the Canons 7 likewise that are not.

Selden’s Treatise De Juris Nat. et Gent. feudorum Diplomat. Bibliorum, is a good Proof of what I advance, how advantageous an Opinion forever that learned Gentleman may have entreated of the Jewish Doctors. See Mr. Le Clerc’s Eccl. History, Sec. I. Anno XVII. 5. The Canons of Councils.


7. The Canon of Conclaves.

8. The Manners and Customs of the first Christians.

an express Order from him to carry off the Egyptian Gold and Silver Vessels, and utterly exterminate the seven Nations of Canaanites, after having feized on their Country, and all their Possessions. We shall not trouble our Readers with what our Author says on this Subject. See Preface Book I. Chap. I. § 40. Num. 6. Book II. Chap. XVI. § 14. and Book III. Chap. I. § 4. Num. 6.

4. This same Anathemas maintain. ZADKIEL refers to Stinus Smaragdi’s Bibliotheca Sacra. Book VIII. Herof. I.

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

13. This is Observation of CAMAN in his Di- vine Inheritance. Grotius. But the most judicious Part of the learned World have at present but little Value for the Rabbies, and are of Opinion that those Doctrines were never introduced under the Old Testament. The most ancient Rabbies, whose Works are extant, are the Authors of the Talmud, who lived some Centuries after JESUS CHRIST. The Hebrews had then long been a dead Language; they had no Book in that Tongue but the Old Testament; they were very bad Criticks, and Men of little Judgment. They had no other ancient Monuments of the History of their own Nation, than the Books of the Old Testament, and were unacquainted with Heathen Authors: Their Traditions must have undergone much Alteration and Corruption by Length of Time. Toupply their Defect of Knowl- edge, and judge their Inclination to Fables and Al- legories, they have invented the most extravagant and chimerical Fables and Customs. So that they are on no Account comparable to Christian Interpreters, who, like Grotius, have studied the Languages methodi- cally, and have recourse to all the Monuments of Anti- quity. See CAsUM, De Repub. Heb. Lib. II. Cap. XXIV. Mr. Le Clerc’s Thoughts on Father Simon’s Critical History, p. 139, 199, and the Defence of that Book, Letter VI; the Bibliotheca Universelle, Vol. IV. p. 315, etc. Vol. VII. p. 247, etc. Vol. X. p. 117, etc. Mr. Le Clerc’s Thoughts on Father Simon’s Critical History, p. 115, etc. Bibliotheca Chrest., Vol. VII. p. 83, 84. DAVID LE CLERC’S Questions Sacra, p. 139, 285, etc. and JOHN LE CLERC’S Que- stions Hieronymianae, Quel. VI. ZADKIEL here quotes a paraphrase of ISRAEL CASANA’S Exercitia Biblical. Book XVI. Num. 15; and another from JOSEPH SCALIGER, De Materia Sacrae, Lib. VII. But the Rabbies are least to be depended on in Matters of Manners and Law.
The Preliminary Discourse.

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


LIII. The Schoolmen that succeeded them, give us many Proofs of their great Capacities; but their Misfortunes were to live in unhappy Times, when good Learning was entirely neglected: The left Wonder then, that among many Things, in their Writings commendable, there are none that need Indulgence. And yet when they agree in Matters of Morality, they seldom err, as being quick in differing those Things that are blamable in the Sayings of others; and even in this their prevailing Humour of contradicting, they set us a laudable Pattern of Modesty, in disputing against another without Arguments, and not, as the Custom of late hath been, in the Dibouwer of Learning, with Reproaches, the base Offspring of an impatient Mind.

III. Lawyers.

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

Heart. Every one knows that several of them entertained too high a Notion of the Necessity of Martyrdom, and this precipitated them to embrace it. The Generality of them seemed to think it unlawful to engage in a War, to go to Law, to bear publick Offices, to take an Oath, to carry on Trade, to marry a second Time, or receive Interest for Money; all which is impossible to prove evil in themselves, either from Reason or Scripture. Thus too great a Generation for the uninformed Simplicity of those first Ages seemed to have incurred our Author's Indictment into the Protestant Revolution of Ecclesiastical Councils, and Principle as appears from Book I. Chap. II. §9. where my Remarks on that Subject may be seen at Length.

3. I have been pretty large in this, in my Preface on Puffendorf, §4, and to, that the Fathers of the Church, of whom our Author speaks in this Place, are but indifferent Matters, and even had Guides in Law and Morality. I have not charged my Opinion since Father Cellieri, a Benedictine Monk opposed me on that Head in a Book in 1617, entitled, An Address for the Morality of the Fathers of the Church, published at Paris in 1718. I could easily make it appear that I have been so far from dealing in false Accusations, that I have advanced nothing on the Subject in Question, but what may be demonstrated either by the Confession of my Author himself, or the Weakened State of the Reasons he offers in Favour of these ancient Doctors of the Church, whom he undertakes to justify at any Rate. Their Cause is not in very good Hands, since their Apologists, on one Side, does not understand the State of the Question; and on the other, discrediting the Force of his Proofs, calls in Invincible and abstruse Language to his Assistance; not to mention an Infinity of trifling Things, nothing to the Purport.

LIV. 1 This Irnerius, or, as some call him, Wernusius, lived at the Beginning of the 13th Century; some make him a Milanese, others a German. The Roman Law had been for some Ages, if not absolutely unknown and out of Use in the West, at least but little known or followed. The Digest in particular seemed then quite buried in Oblivion. But the famous Pandects of Florence being found at Amiens, in the Kingdom of Navarre, when the Town was taken by the Emperor Lodovico II, in the War which he made, in Concerning his Pope Innocent II, in the Year King of Sicily, the Inhabitants of Pisa, who had furnished the Emperor with some Ships, defir'd that Copy, as a Compendium of their Services, and obtained it. The Table of Learning was then beginning to revive, and Professors in all Sciences had been lately settled at Bologna. Peto, one of that Number, undertook to explain the Roman Law. But he did not succeed in that Point. Irnerius, who had been Professor of the Liberal Arts at Ravenna, took his Place. He was called La-
the Knowledge of the Belles Lettres with the Study of Laws. For the first I have a great De-
fence; for they both supply us with Reasons, and those often the very best, to demonstrate what
belongs to the Law of Nature; and also often give Testimony to it, as well as to the Law of
Nations; yet so as that, they as well as others, often 4 confound these Words, use and often
call that the Law of Nations, which prevails among some Nations only, and that not by a sort
of tacit Agreement, but by Imposition of one another, or even by a formal Convent. But again,
these Things, which really belong to the Law of Nations, they often handle promiscuously and in-
discriminately with those that belong to the Roman Law, as appears from the 6 Title concerning
Captives and Postliminy. Therefore we took Pains to have those distinguished.
LV. The second Clause, being regarded by of the Divine Law and ancient Histories, stated to 2. Those of
determine all Controversies between Kings and Nations from the Roman Laws, to which they
sometimes joined the Canon Law. But these were likewise hindered, by the Inflexibility of their Times,
discovering the true Sense of those Laws, though otherwise fuggacious enough in seeing into
the Nature of Equity: From whence it comes, that they often make very good Overtures for new
Laws, at the same Time that they are but bad Interpreters of Laws already made. But they are
then chiefly to be attended to, when they give Testimony to such a Curiou, as now in our Time
paffes for a Law of Nations.
LV. I. The Prefmurs of the third Clause, confining themselves within the Limits of the Roman 3. Modern
Law, and either nearer, or but lightly, meddling with this Law common to Princes and Nations,
are scarce of any Use to us in our Subject. Amongst those, Covarruvias 1 and Valquez 4, two Spaniards.
Spaniards, have joined Scholofh Subtilty with the Knowledge of Laws and Canons, so that they
could not forbear treating of the Controversies between Nations and Kings; the one with a great
deal of Freedom, the other more modestly, and not without some Exquisite of Judgment. The
French have with moft Care attempted to introduce History into the Study of Law, amongst whom
Frenchmen. Bodin 1, and Hotman 4 are in great Esteem, the one for a continued Treatise, the other for some
feattered Questions. Their Decisions and Reasons will often furnish us with Matter for the Search
of Truth.
LVII. In this whole Work there were three Things that I chiefly proposed to myself, to render VII. The Pro-
ceedings of my Decisions as evident as possible, to dispose the Matters to be treated of into a Sign and Or-
der observed through the whole Work explained.
LVIII. I have forbear meddling with those Things that are of a quite different Subject, as the
giving Rules about what it may be profitable or advantageous for us to do: For they properly
belong to the Art of Politicks 1, which Aristotle rightly so handled by itself, that he mixed noth-
ing foreign with it: Bodin on the contrary has confounded it with that which is the Subject of this
Treatise. Yet in some Places I have made mention of the usefui, but by the by, and so dis-
tinguished more clearly from a Question of the Jutf.
LIX. He will do me wrong however shall think that I had Regard to any Controversies of the present
Age, either already riefen, or that can be foreseen to arise. For I profess truly, that as a
Mathematician consider Figures abridged from Bodies, so I, in treating of Rights, have with-
drawn my Mind from all particular Facts.
LX. As to the Style, I was not willing, by joining a Multiprick of Words with a Multiprick
A concise way of Things to be treated of, to create a Diffaff in the Reader, which Advantage I confided in.
I believe therefore followed, as much as I could, a concise way of speaking, as convenient for such as
undertake to infirn; that so, they who are employed in publish Affairs, may, as at one View,
see, both what Kinds of Controversies usually arise, and also the Principles by which they may be
turned to. Burgeon, where he died in 1590, about 70 Years of Age. We meet with the most confiderable
Particulars relating to the Life, Character, and Writ-
tings of those two celebrated Lawyers, and the chief of their Successors in Mr. Gra
tiam's Original Parts Civili,
L. I. § 1790. Life, to the End of the Book.
5 See Note the third on Pufendorf, Law of Na-
ture and Nations, Book II. Chap. III. § 23.
6 See Book III. Chap. XX.
LVII. (1) Diego Covarruvias was born at Toledo,
and was the fifth Professor of Canon Law at Salamanca.
He enjoyed several publick Employments, and died Bishop of Segovia, in 1613. His Works have been
printed several Times, in two Volumes in Fole.
2 Fernando Vasquez, was Scholar to Covarru-
vi8. His Controversy Libri is the chief Piece used in
this Work. It is divided into six Books, and has
been more than one Impression. Our Author has some
Quotations from his Book De Successionibus & usuos co-
lectandis, which makes three Volumes in Fole.
3 See Book IV. Chap. VII. 1a. July Bonaventura, died in 1587.
The Work here meant by our Author, is his famous
Treatise Of the Commonwealth, which is extant both in
Latin and French; but the Latin Edition is the better
and more compleat. That which I make use of is
printed at Paris, in 1622.
4 Francis Hotman, a Native of Paris, and de-
scended from a Silesian Family, died at Bird in 1590,
after having written a great Number of Books. His
Quodiones Libri, the Treatise here meant, appeared in
1573.
LXIII. (1) Good Policy ought to authorize nothing
again the invariable Rules of Justice, and those of
the Machiavellians, which makes the Advantage of the
State, or those who rule it, the only Principle, is
false and abominable. However, the 34th and the 35th
were really two different Things, even in Politicks;
as will be easily comprehended by one single Ex-
ample taken from the Matter of the Work before us.
Before engaging in a War, it is above all Things ne-
cessary, that a just Cause should suffice for doing it.
But how good forever the Reasons for such a Step may
be, if Circumstances do not allow of taking Arms,
without adding to the Prejudice of the Publick Good,
if there is Danger of losing as much as, or even more
than will be gained, it would then be contrary to good
Policy.
decided; which being known, it will be easy to suit the Discourse to the Subject Matter, and enlarge upon it as much as they please.

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

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

H. GROTIUS.
H. GROTIUS

OF THE

Rights of WAR and PEACE.

BOOK I.

CHAP. I.

What War is, and what Right is.

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

II. 1. Being then to treat of the Right of War, we must consider what that War is which we are to treat of, and what the Right is which we search for. Giccro defines War a Dispute by force. But Custom has so prevailed, that 1 not the

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

3 See B. II. Chap. XI. § 1. Num. 5.
4 For since there are two Ways of disputing Things, one by Debate, the other by Force, &c. De Offic. Lib. I. Cap. XI. See Pufendorf, B. V. Chap. XIII. where he treats of other Ways of deciding Differences in the independent State of Nature.
5 Philo the Jew considers as Enemies not only such as actually attack us by Sea or by Land, but also those who make Preparations for either, those who erect Batteries against our Ports, or Walls, though no Battle is given. De Specialib. Lib. II. p. 790. Edit. Paris. Servius, on Ver. 545. of the first Book of the Envid.

1 Quo jus sit alter
Nec pietate fort, nec bello major & armis,

A

Makes
Of the Rights of

Book I.

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

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

III. 1. Since we intitle this Treatise Of the Rights of War, we design first to enquire (as I said before) whether any War be just; and then what is just in that War?

For Right in this Place signifies merely that which is just, and that too rather in a negative than a positive Sense. So that the Right of War is properly that which may be done without Injustice with Regard to an Enemy. Now that is unjust which is repugnant to the Nature of a Society of reasonable Creatures. So Cicero says, it is unnatural to take from another to enrich one's self; which he proves thus, because, if every one were to do so, all Human Society and Intercourse must necessarily be dif-

III. Right, as it is an

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scribed, and divided into that of

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e.

Makes this Remark. This is not an idle Repeated, for the Word Bellum, (War) includes Conclusis, and Multiures, taken against the Enemy; that is a Skill in Military Affairs. Whereas the Word Arms, (Arms) is used only to express the very Act of employing Forces: thus the former relates to the Mind, the latter to the Body. The same Commentator, on Ver persec. 547, of R. VIII. says: Bellum is the whole Time employed in making the necessary Preparations for fighting or in Acts of Hoftility; and Praetium depends on an Engagement. This is perhaps more correct.

6. For not only those who are at War, stand in several different Relations to other Persons, who observe a Neutrality, by Virtue of which they do many Things that by no Means relate to a State of Hoftility; but they also may and frequently do act towards each other, as if they were not Enemies; so in such Cases the Use of Force, and the Laws of War are suspended. This Takes place when two Enemies enter into an Agreement, or Treaty; as the Author flews at large in the proper Place. Gronovius, in a Note on this Place, and Huber De jure Civitatis, Lib. III. Sect. IV. Cap. IV. § 2. allow of no Difference in the Main between Cicero's Definition, and that given by our Author. It is sufficient however, if the latter is more clear and extensive than the former. Otrechett, in his Difertation De raison du Hoftilite; and Klose in the Collection published in 1704, has defined our Author's Definition against the mistaken Criticisms of some Commentators.

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

ing up our Author's Meaning, we must say something on the last Words of this Paragraph, which stand thus in the Original: Vetus est etiam a dispositionibus, quibus & corpus, dispositionibus. Here the Commentators are silent, not excepting Gronovius, a Critic by Profession; who only explains πάτω by other Greek Words, signifying any Sort of Unhappiness. But this neither shews the Reason of our Author's Etymology, nor his Application of it. At first sight it might be imagined that the Text is faulty; and I know some have been of Opinion, that πάτω ought to be repeated in this Place; but we find πάτω in all the Editions of this Work; and I firmly believe I have found out what our Author Means, and what induced him to propose the Etymology of this Word, which he tacitly derives from πάτω. He took πάτω in the Sense which some Lexicographers give to πάτω, deber, and at the same Time was thinking of Plato's Etymology of πάτω, Pain, which he derives from πάτω, to suffer, because, says he, when we suffer Pain, the Body suffers a Disposition; in Ccelotino, p. 419, Vol. I. Edit. H. Steph. Our Author in Imutation of that ancient Philosopher, derives πάτω from πάτω for the same Reason; for on a Separation of the Parts of the Body, it follows that those which before appear'd only as one continued whole, by their Union, become more perfect Principles. And the Principles of the Philosophy in which our Author was educated, helped him more over to form this Etymology; for we know that according to those Principles, Pain is caused by a Disposition of Continuity.
War and Peace.

1. War honour is inherent to the §7. who Participation be Promised, much 6. § transmitted "vidtd another the be kind add, Husband called. were, Right § what 16. and Cap. Ser-

2. But as in Societies, some are equal, as those of Brothers, Citizens, Friends and Allies. And others unequal, and 14, 18 by Preeminence, as Aristotelian terms it; as that of Parents and Children, Masters and Servants, King and Subject, 15 God and Man: So that which is 18 takes Place either among Equals, or amongst People whereof some are Governors and others governed, considered 18 as such. The latter, in my Opinion, may be called the 2 Right of Superiority, and the former the 1 Right of Equality.

IV. There is another Signification of the Word Right different from this, but yet arising from it, which relates directly to the Person: In which Sense Right is a moral Quality annexed to the Person, enabling him to base, or do, something justly. I say, annexed to the Person, tho' this Quality sometimes follows the things, as 18 Services of Lands, which are called real Rights, in Opposition to Rights, 19 merely personal, not because the first are not annexed to the Person, as well as the last, but because they are annexed only to him 20 who posseffes such or such a Thing. This moral Quality when 21 perfect, is called by us a Faculty; when imperfect, an Aptitude: The former answers to the A3; and the latter to the Power, when we speak of natural Things.

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

11 I have quoted this Law in my first Note on §14 of the Preliminary Discourse. 12 De tra. Lib. II. Cap. XXXI. 13 In XLVIII. he says thus: We ought to ob-serve carefully and religiously the Laws of this Society, which unites us all together, and teach us that there is a Law common to all Mankind. The Reader may likewise fee what S. CHRYSTOSM. says on this Subject on x Cor. Chap. XI. v. 1 Grotio. 14 καθὼς. But the Philosopher makes this Distinction with regard to Friendship, which is the Bond of Societies. The Friendships already men-tiond are, founded on Equality . . . . But there is another Sort of Friendships, established on Principles superior to that, such as that between Father and Son, the Elder and the Younger, Husband and Wife, and between every Prince and his Subject. Ethic. Nicom. B. VIII. Chap. VI. VII. 15 Concerning this Society, see PHILO the Jew, on the Christian Society. Nabo smoked (from his Wine) p. 281, 282. Ed. Paris. PLUTARCH also hath something on the same Subject in his Life of Numa. p. 62. Ed. Web. Vol. I. Grotius.

I am surprized that our Author has not quoted the following remarkable Passages of Cicero, which is much more explicit, and more to the Purpose than those, to which he refers us. Since therefore nothing is more excellent than ReaLion, which is common to God and Man, the first rational Society is between God and Man. For where there is a Participation of Reason, there is also a mutual Participation of right Reason. Now this being a Law, we are to con-clude a Society between the Gods and Men founded on Law. Further, where there is one common Law, there is likewise a common Right; those who hold these in common, are to be of onekind, as it were, fellow-citizens. De Legib. Lib. I. Cap. VII. But, properly speaking, there is no Law, or Right common to God and Man. See PUFFENDORF B. II. § 3. and Chap. III. § 5, 6. As also Mr. PROMAGNIUS's Differenciation called, Philosophia juris, de Obligat. & Action, which is the third in the Collection printed at Leipz. Cap. I. § 8, 8c.
ed. 1. A Power either over our selves, which is term'd 23 Liberty; or over others, such as that of a Father over his Children, or a Lord over his Slave. 2. 24 Property, which is either complex, 25 or imperfect. The last obtains in the Cae
de of Farm, for Incidence, or Pledges. 3. The Faculty of demanding what is due, and to this 32 answers the Obligation of rendering what is owing.

VI. Right strictly taken is again of two Sorts, either private and inferior, 28 which tends to the particular Advantage of each Individual: Or eminent and superior, such as a Community has over the Persons and Estates of all its Members for the common Benefit, and therefore it 39 excels the former. Thus a regal Power is above 39 that of a Father and Master; a King has a 33 greater Right in the Goods of his Subjects for the publick Advantage, than the Proprietors themselves. And when the

23 Hence the Roman Lawyers very well called this Liberty Facultas, Grotius.

This Definition occurs twice in the Body of the Law: Libertas est 


arum, § I. In order to understand it thoroughly, it will now be read Mr. Norwood's excellent Commentary on the first Part of the Pandects, p. 29. See Pufendorf's Remark on the Manner, how this natural Power of Man over himself is to be understood, in B.I. Chap. I. § 19.

24 The Scholar on Horace says the Word jus is taken for Property in Right to a Thing. Jus pro Domino. Grotius.

Our Author probably had the following Passage in View: Permutat Dominos, & cedit in altera iura. Lib. II. Ep. II. v. 171.

On which the Scholar says: In altera iura, id est, in alterius Dominium. See Pufendorf, B.IV. Cha. IV. § 2.

25 Ut Jusfr��trarum, Jus Pignoris, says our Author. As these Words stand, they intimate that the Use-

fructury, and the Creditor have a Sort of Right of Property, though imperfect, the former to the Goods in his Possession by virtue of his Tenure, the latter to the Thing pledged in his Hands for Security of the Debt. But, if we reason conformably to the Ideas of the Law of Nature, neither of them has any such Right, of Property, properly so called. The whole Matter is, that the Enjoyment of the Goods by the Usefructuary, till the Time of the Tenure is expired; and the Detention of the Pledge by the Creditor till he is pay'd, renders the Property imperfect, of which the Matter of the said Thing, who remains foxy facch, has not all the Profit, or full Exercise, during that Time. But our Author had the Niceties of the Roman Law in View, which allows an Usefructuary Creditor, & a real Action for recovering the Possession of another Man's Goods, in the same Manner as if they were the real Proprie-
tors of them; and thus they are often considered as such, and the Right to them near to that of Property: Jus dominus proprum, say the Interpret.

27 Creditorium: Debtum. Short, and very proper Expressions, taken from the Roman Law. See what I have said on Pufendorf B.I. Chap. I. § 20. Note 3, of the second Edition: and B.V. Chap. XI. § 1. Note 5. The learned Gronovius, without Reason, refrains the Terms in Question to Contractts of Loan, which properly so called. It is utterly unwriting, that he did not observe, that our Author here imitates the Language of the Roman Lawyers; and the more so, because some other Commentators, much less skil'd in Criticism, have perceived this Allusion. In my Opinion it may be affirmed, without the least Hesitation, that by the Word Credi-
tum, we are here to understand, not only the Right a Man hath to demand what is due to him by Virtue of some Contract, Bargain, Promise, or Law; but also the Right we have to require Satis-

faction for any Damage or Injury received; all which is included in the Idea aff'd to that Word by the Roman Lawyers. Creditorum Apellationum non hi tantum accipit, qui possessionum creditorum, sed omnes, quib乌 ex quilibet causa debitor; ut si quid ex emptis, vel ex locis, vel ex aliqua debitor: Sed efi ex deletis debeat, nisi violator creditorum hanc accipit. Digest. Lib. I. Tit. XVI. De rerum leg. II. var. B. V. Chap. I. § 20. See Pufendorf, B.III. Chap. XVII. § I. I believe our Author does still farther, and extends the Word Creditorum to the Right of punishing, and that of Debtum to the Obligation of omitting to condign Punishment. I am induced to think so, because first the Perfect Right, to which the Debtum & Creditori

um in Question relate, answers to the Law of Nature, or Natural Right, properly so called, of which the Author has spoken in his preliminary Discourse, § 8. Now one of the General Rules of that Law is, that those who violate its Maxims, dehors to be punished. See what I have laid on § 10. Note 7. It is very probable therefore, that our Author, while he was enumerating the several Things which may be required in Rigour, would not forget the Punishment of Criminals. Secondly, because he elsewhere actually ranks Debtum ex pnn, or ex pecunia in the same Article, as things, which we may demand of another in Rigour. B. III. Chap. XIII. § 1, 2, and makes a Right to punish belong to jufllitiam expetix, which is the Matter of Perfect Right. B. II. Chap. XX. § 13.

28 This takes in all those Rights, natural or ac-
cquired, with which each Man is invested, independ-
ently of the Relation of a Citizen, or Member of the State. The Author produces Examples of this kind which are sufficient for making the Matter very intelligible. See what he says concerning Promissi, B. II. Chap. XI. § 8. and Chap.

XIII. § 20.

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

30 So that a Subject ought to obey his Prince prefera-

tly to his Father and his Master. And the Prince, to follow a Father and a Master more or less Power over their Children, and Slaves, as he shall judge most conduclive to the Public Good. See B. I. Chap. V. § 7, and 28.

31 This is the Observation of Philo the free, who says: Certamly Silvius, Gold, and all other ma-

terials, when whichSubjects therefore to, belong to those who govern, than to those in Poffiffion of them, wv nmpro(l of Noah's Planting, p. 222. Edit. Parif. Philo the younger declares, that a Prince, to whom the Poffessions of every one of his Sub-

jects belons, is as rich as all of them together. Fe-stop. Chap. XVII. And a little after: What the Case is, that this is not hisown See John of Salisbury in his Polity. Lib. IV. Cap. I. p. 335. Edit. Lowd. 1659. Grotius.

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and Peace.

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is more obliged to contrithe Exigencies of the State require a Supply, every Man
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bute towards it, than
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VIII. I. 'Tis expletive Juftice, Juftice properly and ftridlly taken, which refpedls vin. 0/
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or perfeB Right, and is called by Ariftotk a-vm^ActiCnyJi, 'Jufiice of^^^^J'^'^^'._
Contradis, but this does not give us an adequate Idea of that Sort of Juftice. For, buti'vejuGoods, which are in the Poffeflion/;"™'^^.
if I have a Right to demand Reftitution of
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commendation of Trajan, Eft quod Cafar non fuum videat, &c. That 0^{'ix fees Jomethivg
and that the Prince's Empire
•which is not his own
Cap. L. Num. 3.
is now larger than his Patrimony.
Befides, there is fomewhat extravaEdit. Cellar.
trary, in

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gant, or at leaft too figurative, in the Expreffions of
the antient Writers, quoted by our Author, as well
as in thofe of the Moderns, who imitate them.

Goods of each Subjed
Sovereign than to a foThe whole Truth of the Matter is,
reign Prince.
that in cafe of a preffing Neceffity, the Sovereign
may, for the publick Advantage, difpofe of the
Goods of his Subjefts, even againft their Will, in
But he
the fame Manner as if they were his own.
then afts, not as Proprietor of fuch Goods, but as
Head of the Society, in favour of which every one
of its Members is engaged, either expreflly or tathe

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a Sacrifice.

See what is faid,
B. II. Chap. XIV.

Chap. III. § 6. Num.i,.
§ 7. and B. III. Chap. XX. § 7.
32 And confequently, the Sovereign may dif^
charge a Debtor from the Obligation of paying, either for a certain Time, or forever, if the publick
have an Example of this in
Good requires it.
I.

We

XXIII. Cap. XIV. Num. 3. which is
After the fatal
here produced by GronoviUs.
Battle of Canna: ; Marcus Junius Pera, the Dilator ordered publick Notice to be given, that /(^^
iuould pardon all ivha had been guilty of capital
Crimes, and exempt from Payment all fuch as ivere

LivY,

Lib.

in Chains for Debt, if they luo-uld

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Philofopherufes this Word when
he treats of Diflributive Jujiice, by Vertue of which
we are to give every one what is due to him, according
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Chap.Wl. §9,10. of

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And the
Cap. LIII.
Author of a Treatife on Rhetorick, afcribed to that
great Orator and Philofopher, makes Juftice confift
in rendering to every one his due, (Jus) according
II.

Merit, (pro DiGt^rr ate cujufque) Ad Her-en.
HuBER, in his Treatife De
Cap. II.
&' in
Jure Civitatis, and his PraleSi. in Injiitut.
PandeSt. quotes thefe two Paffages wrong, as if he
dignitatem tribuit
had read ques ciiique jus fuum
falfe Quotation,
of
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Authority
fole
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on
and
he pretends that Cicero exprefles perfeff Right by
the Term Jus, and imperfeSi Right by Dignitas.
to\{is

Lib. III.

&

Example of feveral
which confer more
or lefs ot this imperfeil Right ; which I fhall here
fee down, tranflated from the Author's Note on
z

Cicero

has given us an

Degrees of Merit and

this Place.

Fitnefs,

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T'^^'n.our Children., ^""^ ^^'"£^
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q-i^j

in Society,

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this Treatife.

fans of the greatejl Worth,
to whom we ?nay leave our EJIates.

Cap. XI.

IV.

ChriJi. Lib.

I.

De

Benef.

Lib.

Augustin, De DoSlr.
XXVIII. and XXIX. Gro^

See

Cap.

Sene-

IVe look out for P er~
(or Merit, digniffimos)

fays,

St.

TIUS.
Author's Criticifm in this Place, has been
for the Word S:;»2^'A^«y/*», according to Aristotle's Senfe of it, exprefles all Dealings Men may have one with another, and in which
I

Our

juftly cenfured,

any Inequality appears that ought to be redrefled by
the Exercife of the Species of Juftice in queftion.
The Philofopher, (Ethic. Nicom. Lib. V. Cap. V.)
diftinguilTies thefe TLvmxy^xyiA.rx.la. into voluntary^ by

which he underftands Contrails properly fo called,
of Sale, Loans, Bail, TruJls, Hiring, is'c.
and Involuntary, under which he comprehends all
Sorts of Damage and Injuries done to another ; either clandeftinely, or by open Violence; in fhort,
what the Roman Lawyers call Delirium, and which
the learned Gronovius improperly compares to
^afl contractus, which, according to them, Non
as thofe

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mojl indebted^

ving Advice, Converfation, Exhortations, Confolations, and Jometimes even Reproofs, take Place chiefly
De Offic. Lib. 1. Cap. XVIII. See
in Friendfhip.

including both perfeSi and imperfeSi Right: His
Words are, Jujlitia ejl habitus animi, communi utiInvent. Lib.

tions, r.or is

Country <h"

mufl think of our Relations, with whom we live in a ^^,^_
good Under/landing, and whofe Fortune is mojl comThe neceffary Supports
monly united ivith our own.
of Life are therefore principally due to thofe whom I

ex maleficio fub/iantiam capiunt
VIII.
The fame
HI. Tit.

TEM. De

ow

Next to thefe are
hold thefirji Rank.
and our whole Family, tvho depend on us alone, and
In the next Place we
can have no other Refuge.

to his Merit. Ethic. Nicom. B. V. Chap. VI. But I
find that Cicero ufes the Latin Word Dign'.tas.,
which anfwers to the Greek 'a?U , in a large Senfe,

litaie confervaia,

let

whom

to

XX

InstitUT. Lib.
Commentator (in

Example of a Perfon in pofof another Man's Goods may relate to Aristotle's Permutative JuJlice) obferves, that ever
fince the Eftabliftiment of Property, there has been
a tacit Agreement among all Men, by which each
of them is obliged to reftorc the Goods of another.
This is a falfe Principle, laid down by our Author
himfelf, B. II. Chap. X. §1. in which he has been
followed by PUFENDORF, 5. IV. Chap.X.ll\. §3.
I have confuted them both, in my Note on the
I am not
Paflage of the latter, here referred to.
therefore furprized that Gronovius grounds his
Argument on it ; for befides that he had a better
Talent at commenting on the Thoughts and Expreflions of others, than at examining and confidering Subjects of this Nature, he thus found an Argument ad hominejn, againft GrotiUs, in favour of hi?
dear Aristotle. But it is very ftrange that he has
not added a Remark, very proper for fupporting his
Criticifm, and the more lb, as it depends on a
order to fhew, that the

grammatical Nicety, viz. that the Word sWPiAa/f**
does

C

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p^;^


Of the Rights of the People.

Book I.

6 Of the Rights of the People.

Chap. 1.

The Right of the People to govern by Representation. — 1st. They have a right to think and to speak for themselves, and to be heard in all matters which concern them. — 2d. They have a right to be represented in the government by deputies, who shall have the power and authority to act for them. — 3d. They have a right to petition the government for a redress of grievances. — 4th. They have a right to vote for the persons whom they shall choose to represent them in the government. — 5th. They have a right to be taxed only for the purposes of the government, and to be represented in the taxation. — 6th. They have a right to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures. — 7th. They have a right to be free from unreasonable restraint of their liberty, or from being deprived of their lives, liberty, or property, without due process of law. — 8th. They have a right to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures. — 9th. They have a right to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures. — 10th. They have a right to be secure in their persons, houses, papers, and effects, from unreasonable searches and seizures.

Thus, 9, the Shares are made by a Comparative Proportion, and if only one Person does not signify the Foundation of the Obligation arising from the Justice under Consideration, but only the Object or Matter on which this Sort of Justice is employed, which Aristotle therefore calls, διαιρήσεις, or διαίρεσις, as in the context of a conversation, Lib. V. Cap. V. and ἄρματον, γνώσις ἢ ἀλήθεια, or алъɛνη ἢ ἀλήθεια, Cap. VII. that is, corrective fijicile in Man Dealers one with another, or barely corrective, Justice, a Term which Interpreters would have done well to preserve, as much more expressive of the Philosopher's Sense than that of commutative Justice, which contains a very different Idea. Thus when our Author says, it is not by Virtue of a Contract, (ἀκατεχθέν) that the Prefecessor of another Man's Goods is obliged to restore them, it makes nothing against Aristotle, according to whose Principles, eunlarne is here a Determination of what belongs to another; but the Obligation of restoring, is founded on an Inequity subsisting to the Precedence of the Proprietor; an Inequity which the Justice under Consideration requires to be redressed. To which it may be added, that Aristotle's Corrective or Permutative Justice, does no more answer exactly to our Author's Expositive Justice, than the Distributive Justice of the former does to the Attributive Justice of the latter, and that there is a wide Difference between those two Distinctions, both in regard to their Foundation, and the Extent of each particular Member. But all this is of little Consequence in the Main, and it would be better to leave the Philosopher with his Division, which belied that it is very defective, is useless at present, as few have observed it. See Pufendorf, B. I. chap. VII. § 12. Mr. Thomas's Institutions juris Divini, Lib. I. Cap. I. § 106. As also the Principia juris, secundum ordinem dispositarum; by Mr. Westenberg, Prefessor at Franeker, Lib. I. T. p. 17, &c.

2. Epstein, Ethis. Nican. Lib. V. Cap. VII. p. 65. Edit. Paris, Vol. II. Or, as Aristotle more frequently calls it, συνοδεύς. — It is not the same Thing. See Note 1. on this Paragraph.

4. For Distributive Justice in question regulates the Erasure or those Virtues, which consist in doing such Things in favour of others, as cannot in Rigour be demanded, and directs a proper Application of the Acts of those Virtues, by a prudent choice of Persons the most worthy, to feel the Effects of them. See the second Note on Paragraph 7th, and what has been said in the Preliminary Digresses, § 19, and the Noses of that Place; as also our Author, B. II. Chap. I. § 9. Num. 1.

§ The Author has here in view, chiefly the Distribution of Rewards and publick Employments; for he shews, in these Occasions ought to prefer Persons of most Merit, and greatest Abilities, no private Person can in Rigour demand this Preference. See Pusendorf, B. I. Chap. VII. § 11.
regulated, according to Aristotle, the Merit of the Perfon to compare, is the Quantity of the Things theirfelves, to the Quantity of what is given to one, is to the Quantity of what is given to another, as the Merit of one is to the Merit of the other. This evidently appears from Ethic. Nicon. Lib. V. Chap. VI. § VII. and particularly from a Passage where the Philofophers confider the Diftribution of Meritive or Permutative Justice, as oppofed to Diftribution, is concerned. (4) viz. Proportion is to be observed, fo that the Quantity is not whether a Man of good or bad Character obferves, or commits Adultery, but that the Law confiders no other Difference than that of the Damage fuffered, looking on them as equal in other Rejpects. Lib. V. Cap. VII. p. 53. Edin. Paris. An Oppofition, which plainly intimates, that in the other fort of Justice, a Regard is paid to the Quality of the Perfons, as well as to the Advantage or Difadvantage arifing to either of the Parties. So that in a Contractive Society, which belongs to Aristotle's Con¬ tractive or Permutative Justice, according to him, no REGARD is to be had to the Quality of the Perfon; and as Grammar obferves, if the Prince of Orange puts 1000 Crowns, for Example, into the India Company's Stock, he receives no more Dividend than a private Perfon, who depofits the fame Sum. Nor does our Author pretend he does; though he confiders this fo much. All he means in that in the Administration of Contractive or Permutative Justice, Men do not always obferve each an Arithe¬ matical Proportion, as Aristotle defcribes; for upon dividing the Profits amongfeveral Propofitors, who have engaged in a Partnership in unequal Shares, it is certain, that Geometrical Proportion must be ob¬ served, and that the other is not fufficient. It is true, this is not a Geometrical Proportion, by which the Merit of the Perfons is compared with Things; and that is enough that the Things themselves are compared together, that is, each Perfon's Share with that of others, and with the Loss or Gain, of which each to have his Part. It is also true, as Puer¬ dorf obferves, R. I. Chap. VII. § 9. the Shares of the Partners may be equal; in which Cafe, there will be a perfect Equality in the Division of the Profits. But as they may be, and very frequently are unequal, it may justly be affirmed, that the Ufe of Arithe¬ matical Proportion is not fufficient in Contracts, which is all our Author contends for.

10. Some reply, that the Cafe is not poifible, but all this can be fhewn with Certainty, that it is feldom happens. Others fay, that Geometrical Proportion is obferved even in that Cafe, because the Merit of that Perfon, who alone is capable of an Employment, is compared with the want of Merit in all the other Subjects. But then the Competition is not made between Things of the fame Kind, and consequently, Geometrical Proportion cannot take Place here. In reality, the whole Difpute is of very little Importance; and how faulcy forever Aristotle's Division may be, our Author had better have prop¬ ored his own, than have given himfelf the Trouble of reconciling it with the other, as he has rectified it; for they are still very different at the bottom, as will plainly appear on a careful perufal of that great Philofopher's Moral Treatifes.

11. I am inclined to think the Author here had in view a Passage of Aristotle, where he fays, that Diftribution always follows Geometrical Pro¬ portion. For, continues the Philofopher, upon a Dif¬ tribution of the Publick Money, it muft be made in Proportion to what each has contributed. Ethic. Nicon. Lib. V. Cap. VII. p. 62. I fuppofe the Philofopher designed to fpeak of the following Cafe: Several private Perfons have refurred the State with Money for the Demands of the Publick, and that in different Sums; the proper Officers are inclined to remunerate them, but the Sum defign'd for that End, is not fufficient for the Payment of all the Creditors; fo each receives in Proportion to what he lent. But this very Example may serve to fhew, how little Justice there is in Aristotle's Ideas. For, properly fpeaking, here is no Comparison between the Degree of the Merit of the Perfons, and the Quant¬ ity of the Things, but only between what is advan¬ ced, and what is refurred. If it be faid that each Perfon deferves more or lefs to be reimbafed, as he had lent more or lefs, it may be eafily fhewn, that this Circumstance is but a very ambiguous Proof of more or lefs Merit; for it may, and often will hap¬ pen, that those, who have frnrted the largest Sums, have not lent fo much in Proportion, as Perfons of smaller Fortunes, who perhaps have very much fhrewed themfelves to aflift the Publick, whilst the former have fuffered little or no Inconvenience, by depriving themfelves for some Time of a Sum, very inconsiderable in comparison of what remained in their Hands. Now can it be doubted, that on this Supposition, they, who have exprfcd moft Zeal for the publick Good, and have fuffered moft by promoting it, deserve to receive in Proportion to a larger Share of the Sum, which is not fufficient to difcharge the whole Debt, than they whole Debt is in itself the moft considerable? I reafon here on the Principle eftablifhed by our Lord Jesus Chrift, in regard to Alms, in the Judgment of our poor Widow's Charity, and who gave only two small Pieces of Money for the Ufe of the Poor. Mark xii. 42, &c.


13. See the fame Writer, Lib. II. of the Cyropad.
IX. There is also a third Sense of the Word Right, according to which it signifies the same Thing 1 as Law, when taken in its largest Extent, as being a Rule of Mental Actions, obliging 2 us to that which is good and commendable. I say, obliging:

for 3 Counsels, and such other Precepts, which, however honest and reasonable they be, lay us under no Obligation, come not under this Notion of Law, or Right. As to Permission, it is not 4 properly speaking an Action of the Law, but a meer Indifference, subject to his Direction, in which he leaves every one the Liberty of doing as he pleases. This is not a mere Inaction, or Negation of Action, as our Author pretends, but a real positive Act, though commonly tacit, by which the Superior or Legislator makes an Abstemation of his Right. So that, as the Actions commanded or prohibited, are regulated positively by the Law, so far as it imposes an indispensible Necessity of doing the former, and forbearing the latter, the Actions permitted, are likewise positively regulated by the Law in their own Way, and accordingly to their own Nature, i.e. the Law either originally gives a Power of doing or not doing them at Pleasure, or confirms and Leaves Men in Possession of a Liberty, which it might have taken away either entirely, or in Part. There is no manner of Necessity of an express Permission, which seldom falls in practice. The power of the Legislator sufficiently infers a positive Permission of whatever is neither enjoined nor prohibited. Thus when God, who alone can regulate all the Actions of Men, of what Nature forever they be, forbid the Jews the Use of certain Animals for Food, as he might, if he had pleased, extended the Prohibition to several other Kinds, by his only prohibiting some Particulars, he actually and positively allowed them the Liberty of eating or not eating all others. As to human Laws, either they turn on Things already commanded or prohibited in some manner by Divine Law, natural or revealed; and in that Case, they give as much as in them lies, a Permission of doing several other Things of that Kind, where they are silent; which is a necessary Consequence of Impunity; Or they relate to Things otherwise indifferent in themselves; and then they are merely a privilege whatever they do not forbid; there being an Infinity of Actions of such a Nature, that a Man inwrought by a Law may have a Liberty of doing them, which the Law of Nature allows only to a lawful Superior, where the Authority of the Legislator sufficiently infers a positive Permission of whatever is neither enjoined nor prohibited. This is the Reason of the aboveJurisdiction of the Courts, as respects the Laws of Nations. The Liberty of doing every Thing, subject to what the Authority of the Superiors of States enjoineth, or forbiddeth, is a mere Indifference, or the negative part of every Law. The Extent is thereby made by our Author to be as large as the reach of the Superior, in whom is vested the Sovereignty of the Nation. Men are free on all Occasions, so they act not according to the Laws, and so as not to commit any Offence; but every Person is continually under the Power of the Laws, and under their Authority in all Cases of Offence.


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

4. See Puffendorf, B. I. Chap. VI. § 1. I cannot be of our Author's Opinion in this Point. Permission is as real an Effect of the Law, taken in its utmost Extent, as the strongest and most indispensible Obligation. The Superior, who gives being to the Law, has a Right of positively directing either the Actions of those who depend on him, or of letting those of a certain kind; regard of all those Actions, he has a Power of imposing a Necessity of acting or not acting in a certain manner. But no Superior exercises his Authority to excessive; there is always a considerable Number of Things
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action, unless as it obliges every other Person not to hinder the doing of that, which the Law permits any one to do. I add moreover, that the Law obliges us to that which is good and commendable, not barely to that which is just: because Right in this Sense does not belong to that Matter of Justice alone (such as I have before explained it) but also to that of other Virtues; tho' otherwise, whatever is conformable to this Right, may also, in a larger Acceptation, be termed a Right. Of this Right, thus taken, the best Division is that of Arisotyle, into Natural and Voluntary, which he commonly calls Lawful Rights; the Word Law being taken in its stricter Sense: Sometimes also an Injurious Right. We find the same Difference among the Hebrews, who when they speak distinctly, call the Natural Right דברי אדם Precepts, and the Voluntary Right דינים Statutes, the former of which the Septuagint call διακεκαθαριζων, and the latter διάκεκαθαριζειν.

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

2. The Actions upon which such a Dictate is given, are in themselves either Obligatory or Unlawful, and mutat, being underdone to be either commanded

all such as depend on the Legitimator, or only to some in Particular. From all which it appears, in my Opinion, that the Author had no Reason for excluding Permissions from the Idea of the Law. To which may be added what I have said on this Subject against Pufendorp, who is of the same Opinion with Grotius. B. I. Chap. VI. § 15. Note 2. By way of Supplement for this Omission, and some others, I am of Opinion that Law should be defined as I have already defined it, in a Note on the Abridgment of The Duties of a Man and a Citizen. B. I. Chap. II. § 2, of the left Editions; The Will of a Superior sufficiently notified in some manner or other, by which Will he directs either all the Actions in general of those who depend on him, or at least all those of a certain Kind, so that, in regard to such Action, he either imposes on them a Necessity of doing or not doing certain Things, or leaves them at Liberty to act or not act as they shall judge proper. We have an Example of this in a Law made by Zakusius, infusing a Penalty on those, who should drink Wine against the Physician's Orders. Grotius. This severe Law made the Offence capital, if we may believe EliaP. Ed. Paris. Lib. II. Cap. XXXVII. See Pufendorp, B. I. Chap. VI. § 4. in the Text and Notes. To which we may add what EliaP says of the Lacedemonians and Romans, Lib. III. Cap. XXXIV. with the Note of the late Mr. Perieius. 7 That we say: It is just to acknowledge Favourers, to have Compassion for the Poor, to be liberal to those who want our Assistance, to take a prudent Care of our Health and Fortunes, &c.

8. In his Ethic. Nicom. Lib. V. Cap. X. where he makes a Distinction between the ἀνθρώπων ἔθιμαν, and ἀνθρώπων ἐσχήμαν, as making part of what he calls ἀνθρώπων ἐσχήμαν, Civic Laws. So that his Division is not exactly the same with that of our Author. See my Preface to Pufendorp, § 24. p. 97, 98. of the second Edition.

9. That is, for a Constitution absolutely depending on the Will of the Legitimator. 10 See s. e. n. The Philosopher makes use of this Explication, when speaking of Justice. Adirop. Lib. VI. Notes. EliaP. Ed. Paris. Ethic. Nicom. Lib. V. Cap X. 11. 63. Vol. II. Ed. Paris. 11 Thus Mois in the Guide it the Dutiful, Lib. III. Cap. XXVI. Grotius. See Selden, who also adopts this Rabbinical Remark, in his Trestite, De Jure Nat. & Gent. sensuum Disciplinam Hebræorum, Lib I. Cap. X. p. 119, 120. But our Author here gives us to understand, that this Division is not always observed, as he expressly acknowledges in his Commentary on St. Luke i. 6. See Mr. Le Clerc, on Genesis xxvi. 5. and in his Additions to Dr. Hammond's Notes on Rom. viii. 4.

X. (1) Philo the Jew, in his Treatise, where he undertakes to prove that every good Man is free, speaks thus, Right Reason is an Authorizing Law, not corruptible or lifeless, written by this or that mortal Man, on Papers or in eminent Pillars, but incorruptible, and engraved by an immortal Nature on an immortal Mind, p. 871. Edit. Paris. Will you enquire where the Law of GOD is? Says Ter- Tullian, when you compose a common Law expounded to every one's Pleasure, and written on the Tables of Nature? De Coronell Militis. Cap. VI. The Emperor Marcus Antoninus declares, The End to be preserved by all rational Creatures, is to follow the Reason and Laws of the most ancient Cosmologiche, Lib. II. § 16. See a Fragment of Cicero's Trestite De Republic. Lib. III. quoted by Lactantius, Lib. VI. Cap. VIII. St. Chrysostom has several thoughts on this Subject, in his twelfth and thirteenth Homilies On the Statues. What Thomas Aquinas says, Secundo Sensuum, VII. 2. and Scotus, III. Dist. 17. is not unworthy our Notice. Grotius.

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

3 Altus delictus, aut illicitus per se. The Author here supposes we should be under an Obligation of doing or not doing certain Things, even tho' we were not answerable to any one for our Conduct. We are not to be surpriz'd that his Notions on that Subject are not entirely just, since we see at this Day not only the Generality of Philosophers and Scholastick Divines, but also some Authors, other- wise very judicious, and far from being Slaves to the Schools, strenuously maintain, that the Rules of the Law of Nature and Morality do in themselves impose an indispensible Necessity of conforming to them, independently of the Will of GOD. Some however, reason so as to make it seem a mere Diff
manded or forbid by God himself; and this makes the Law of Nature differ not only from Human Right, but from a Voluntary Divine Right; for that does not command or forbid such Things as are in themselves, or in their own Nature, Obligatory and Unlawful; but by forbidding, it renders the one Unlawful, and by commanding, the other Obligatory.

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

pate about Words. I shall endeavour to put the Question in a clear Light in a few Words, and then the Foundation of the Negatives, which I take against the Author. This Note may be joined to what I have said on the same Subject in my Preface to PMFENDRY, § 6. p. 56. Second Edition. The Question here is not whether we can discover the Ideas and Relations, from which the Spleen of the Rules of the Law of Nature and Morality are deduced, absolutely from the Will of an intelligent Being. It must be acknowledged with the Patrons of the Opinion which I oppose, that these Rules are really founded on the Nature of Things; that they are agreeable to the Order conceived necessary for the Beauty of the Universe; that there is a certain Proportion or Disproportion, a certain Fitness or Unfitness between most Actions and their Objects, which give a Beauty to Form, and a Deformity to others. But it cannot follow from this Concession, that we are, properly speaking, obliged to do or not to do such a Thing. The Fitness or Unfitness, which may be termed the natural Morality of Actions, is indeed a Reason for acting, or not acting; but then it is not such a Reason as imposes an immediate Obligation, and is implied in the Idea of an Obligation. This Necessity can come only from a Proper, that is, from some intelligent Being existing without us, who has a Power of restringing our Liberty, and prescribing Rules for our Conduct. If there were any Obligation independently of the Will of a Superior, it must be laid on us either by the Nature of the Things themselves, or by our own Reason. Now the Nature of Things cannot impose any Obligation properly so called. The Relation of Fitness or Unfitness between our Ideas, can of itself only oblige us to acknowledge such a Relation; something more is necessary for obliging us to make our Actions conformable to it. Nor can Reason of itself lay us under an indubitable Necessity of following those Ideas of Fitness or Unfitness, which it places to our View, as grounded on the Nature of Things. For, first, the Passions oppose these abstracted and speculative Ideas with sensible and affecting Ideas, they shew us in several Actions contrary to the Maxims of Reason, a Relation of Pleasure, Content, and Satisfaction, which attend them, as soon as we receive to perform them. If our Understanding diverts us from such Actions, the Inclination of our Heart carries us toward them with much more Force. Why then should we comply with the former, preferably to the latter, if there is no external Principle, but this one Inclination. On such Supposition, are not the Inclinations of our Heart as natural as the Ideas of our Mind? Do they not arise from a certain Disposition in our Nature? You will say, Reason evidently shews us that we shall be more conformably to our Interest, by observing the Rules which the Passions, than in being guided by our Passions. But the Passions will dispute this Advantage, and even pretend it lies on their Side, because the Satisfaction which they offer is present and certain, whereas the Interest to which Reason would engage our Attention, is future and distant, and perhaps therefore to be looked on as less certain. Even: hot we are convinced that all Things well considered, it would be advantageous to us to listen to the Dictates of Reason, is not every one at full Liberty to renounce his Interest, while no other Person is concerned in his acting conformably to it, or involved with a Right of revoking he should content it as much as it is in his Power? How much soever a Man acts in contradiction to his real Interest, he will, on this Supposition, be only imprudent: He will be guilty of no Violation of any Duty or Obligation, properly so called. But fearfully that ought be considered, by observing what is sufficient for proving the Thesis here advanced, is, that our Reason, considered as independent on the Being who endowed us with it, is at the Bottom nothing but Sheep. Now no Man can impose on himself an immediate Obligation, or impose himself on another in such a particular Manner. The very Notion of Necessity implies, that it cannot come at the Pleasure of the Person subject to it; otherwise it would be ineffectual, and reduced to Nothing. If then the Person obliged, and the Person who lays the Obligation be one and the same, he may disengage himself from it, when, and as often as he pleases; or rather there will be no real Obligation; as, when a Debtor succeeds to the Estate and Rights of his Creditor, the Debt ceases. In a Word, as Sane-Ces very well observes, properly speaking, No Man can any thing to himself.... The Word Owe takes Place only between two. De Bonis, Lib. V. Cap. VIII.

From all which I conclude, that how conformable soever the Maxims of Reason be to the Nature of Things, and the Combination of our Passions, they are by no Means obligatory, till this same Reason has discovered the Author of the Existence and Nature of Things, whole Will gives those Maxims the Force of a Law, and imposes an indubitable Necessity on us of conforming to them, by Virtue of his Right to restrain our Liberty, as he judges proper, and prescribe what Bounds he pleases to the Faculties we received from him. It is true, GOD can command nothing contrary to the Ideas of Fitness or Unfitness, which Reason shews us in certain Actions; but still the Obligation of complying our Conduct by those Ideas proceeds only from his Will. The Question is not, Whether that Will be arbitrary or not? It is still that alone which, properly speaking, imposes the Necessity. If, supposing an Impossibility, we could reasonably persuade ourselves, that the Divine Judgment was constant, as the Epicureans, a Being who does not interest himself in the Actions of Men, requires nothing at their Hands, has no Concern for their living well or ill; whatever Ideas we might entertain of Virtue, Fitness, or the Duty, the Consequences of such a Divine would not be sufficient for imposing an indubitable Necessity of taking those Ideas for our Rule, even tho' we believed he himself acted conformably to them, as far as the Perfection of his Nature requires; for Example is not in itself a found Foundation of Obligation. In short, that
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Nature is not repugnant; as some things, we have now said, are called Jilfet, because they have no Injustice in them; and sometimes by the wrong Use of the Word, things which our Reason declares to be honest, or comparatively good, tho' they are not enjoined us, are fast to belong to this Natural Law.

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

5. As for the Reft, the Law of Nature is so unalterable, that 11 God himself cannot change it. For tho' the Power of God be infinite, yet we may fay, that there are fome things to which this infinite Power does not extend, because they cannot be expreffed by Propositions that contain any Sensé, but manifeftly imply a Contradiction. For Inheritance, as God himfelf cannot effect, that twice two fhould not be four; so neither can he, that what is intrinfly Evil 12 fhould not

that the Will of GOD is the Source of all Duties appears from this Consideration, that when they who are in Poftifion of a Religion, praife the Rules of Virtue, and the Manners of the Law of Nature, they ought to do, not principally and profecifally because they acknowledge fuch Rules conformable to the natural and invallible Ideas of Order, Fitness, and Justice; but becaufe GOD, their Supreme Maker, wills that they should follow them in their Conduct. And, in Reality, it would otherwise be unneceffary for GOD to give any Orders on that Head, becaufe they would be already obliged to act in that Manner: The Will and Authority of GOD would, on this Suppofition, be no more than a Sort of Accofery, which, at mofl, would only make the Obligation stronger.

I have treated this Matter more at large in my Refleffions on The Judgment of an anonymous Author; or the late Mr. Lenontz, printed in 1718, at the End of the fourth Edition of my Translation of the Ab- bridgment of Pufendorf's Book On the Duties of a Man and a Citizen.

6. He feels here of fuch Things as are neither commanded nor forbidden by the Law of Nature, in regard to which we are left to our Liberty to act as we judge proper, unlefs a lawful Superior makes fome positive Law in that Point; as it is in his Pover, which is agreeable to the Law of Nature only in the Manner here fpeciffd, not being immu- table, as our Author obferves elsewhere, B. I. C. II. § 7, n. 1. But it is evident from what I have faid, Note 5, on the preceding Paragraph, that there is a Natural Law of bare Perfifion, as well as one which is obligatory; and thus the Things which the Author mens, may very well be considered as belonging to Natural Law, in the former Acceptation of the Term.

7 Our Author, in another Part of this Work, mentions Conflufion, Divorce, Polygamy, B. I. C. II. § 6, n. 2. the Action of a Person, who difco- vers to another, what he is not by the Law of Contract obliged to discover: (B. II. C. XII. § 9, n. 2.) The Care of declaring War in certain Cases, where it may be omitted without any Violation of Natural Law: (B. III. C. III. § o. n. 6.) The Vow of Celibacy, Second Marriages, and the like, (B. III. C. IV. § 2. n. 1.) as fo many Examples of Things belonging to this Café. What we shall fay on thofe Places, and on B. I. C. II. § 1. n. 3. will help to explain the Principle here laid down by our Author, and fhew wherein he has mifapplied or extenfed it too far. See alfo Pufendorf, B. I. C. III. § 22.

8 See Pufendorf, B. II. C. III. § 15. Note 5, and § 25, 74.

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

9 The Words of the Emperor Julian on that Subject are, Besidef that, by which we are all convinced, without Inftrument, of the Exiftencc of fome thing Divine, there is a fecord Law, foured and directed by Nature, which orders us entirely to abstain from another Man's Property, and allov us not to make any Attempt on it, either by Word or Action, or even in our Secret Thoughts, &c. Orat. VII. p. 209. Edit. Spalnbirum. The Philofopher Chrifti- puff, as represented by Cicero, faid, There is no Injustice in faking one's own Advantages, but it is contrary to Equity to take away from another. De Offic. Lib. III. Cap. X. Grotius.

10 Theft and Audacity are in their own Nature Evil and Injurious. Digest. Lib. L. Tit. XVI. De Furiorum fentencias. Leg. XLII.

11 For the Daily abfurd Violence: It is his Will that all Men fhould remain in quiet Poftifion of their own Goods; but to Repine is allowed. Riches unjustly acquired are to be remenfenced, for the air and Earth are common to all Men, where, when they intro- ceive their Poftifion, they are not to detain or take away what belongs to others. Helen. V. 900, &c.

12 Compare this with what Pufendorf fays, B. II. C. III. § 1.

13 See Mr. Clarke's Ontog, C. XIV.

14 The Diftribution of moral Good and Evil, of Virtue and Vice, being eftablifhed on the neceflary Congruity or Incongruity, which we perceive between certain Ideas, found on the very Nature of Things, to fay that Good becomes Evil, and Evil Good, as long as the Things remain the fame, implies a Contradiction. If therefore God fhould command a Thing in which we find a neceflary In-
not be Evil. And this is Aristotle’s Meaning, when he says, ἣν ἔχειν χάραξεν, &c. Thus some Things are no sooner mentioned than we discover Depravity in them. For as the Being and Essence of Things after they exist, depend not upon any other, so neither do the Properties which necessarily follow that Being and Essence. Now such is the Evil of some Actions, compared with a Nature guided by right Reason. Therefore God suffers himself to be judged of according to this Rule, as we may find, Gen. xviii. 25. Isa. v. 3. Ezek. xviii. 25. Jer. ii. 9. Mich. vi. 2. Rom. ii. 6. iii. 6.

6. Yet it sometimes happens, that in those Acts, concerning which the Law of Nature has determined something, some Sort of Change may deceive the Unthinking; tho’ indeed the Law of Nature, which always remains the same, is not changed; but the Things concerning which the Law of Nature determines, and which may undergo a Change. As for Example: If my Creditor forgive me my Debt, I am not then obliged to pay it; not that the Law of Nature ceases to command me to pay what I owe, but because what I did owe ceases to be a Debt. For as Arrian rightly argues in Epitetus, ους αυτοι τω δεσμηδεξεις ήν τω Εφεσιον, αλλα δει περιναι και τη σωσεις, και μη διαλεγεις αυτη. Non sufficient, &c. To make a just Debt, it is not enough that the Money was lent, but it is also requisite, that the Obligation continue undischarged. So when God commands any Man to be put to Death, or his Goods to be taken away, Murder and Theft do not thereby become lawful, which very Words always include a Crime; but that cannot be Murder or Theft, which is done by the express Command of him who is the Sovereign Lord of our Lives and Estates.

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

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

Τιν δὲ γαρ ἀνθρώπους νόμος, &c.

Jupiter

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

1. Ethic. Nicom. B. II. C. VI. The Application of this Passaige is not entirely just. Aristotle is not here speaking of the Morahty or Immutability of Moral Evil. He means no more than that some Passions and Actions are of such a Nature, that they can be innocent in no Case, nor in what Man ever they are admitted. Of this Sort are a malicious Joy at our Neighbour’s Misfortunes, Impudence, Envy, Adultery, Theft, and Murder; whereas some other Passions and Actions are Good or Evil, as a just Medium is observed, or as we departed from it, and give into either Extreme: Such are Fear, Confidence, Defire, Aversion, Anger, Compassion, Joy, Sorrows, the Actions of giving or receiving, of speaking or being silent, &c. But, whether the moral Evil, always inherent in the former Sort of Actions and Passions, and sometimes in the latter, is absolutely inseparable from them, even by the Will of God, is another Question, on which the Philosopher says nothing either directly or indirectly, which leaves us Room to suppose he had it in his Thoughts.

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

16 See Preliminary Discourses, § 49. n. 3, and B. I. C. II. § 2. num. 1. B. II. C. VII. § 2. n. 3, and B. II. C. XI. § 9. num. 2. 17 This is treated of in B. II. C. II. § 2. 18 See B. I. C. III. § 1, 2, and B. II. C. XX. § 8. 19 (1.) See Putendorf, B. II. C. III. § 2, 3, &c. Bunts have not a power of forming abstracted or general Ideas, as Mr. Locke has shown in his Essay on the Human Understanding, B. II. C. XI. §
Chap. I. War and Peace.

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

Cicero in his first Book of Offices remarks, that we do not say Horats and Lions have any justice. And Plutarch, in the Life of Catn the Elder, says, "From the Nature observe Lions and Justice, only towards Men. And Lactantius, in his fifth Book, says, We find that all Animals, distillate of Wisdom, follow the natural Beasts of Self-Love. They injure others to procure themselves some Advantage; for they know not what it is to hurt with a View of hurting, and with a Sense of the Evil that is in it. But Man, having the Knowledge of God and Beccih, abhors from hurting others, 'tis to his own Detriment. Polybius having related in what Manner Men first engaged in Society, adds, they knew not any one offending his Parents or Benefactors, they could not but resent it, giving this Reason for it, 'tis very unlikely that they should (as other Animals) pass by an Action so repugnant to their Nature, without reflecting on, and testifying their Displeasure at it.

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

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

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

3. Sir W. D'Arcy. V. 276, &c. Edit. Cleric. 4. Jovell makes the same Observation, Sat. XV. v. 143, &c. It is that which distinguishes us from Beasts. And it is also upon that Account that we only, of all Animals, have obtained a wonderful Capacity of apprehending divine Things, of inventing and exercising divers Arts. This Understanding we derive from Heaven, which the other Animals, whole Bodies are formed to look towards the Earth, are entirely deprived of.

The common Creator of the Universe has given to them Souls endowed only with Sense; but to us he has moreover given Reason, that a mutual Affection might encline us to ask and give mutual Affinity, to unite together, and to form Nations, &c. St. Chrysostom says, We ought not to transfuse the Rules of Justice, even in regard to uninspired Beings, and such as are void of Sense. On VII. C. of Epis. to the Romans. Grotius.

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

Nor does our Nature differ in any Thing more from that of Beasts, to which we attribute Strength, as a Horse and a Lion, but never Justice, Equity, or Beneficence, for they have neither the Use of Reason nor Speech. De Off. B. I. C. XVI. Our Authors might have added a Passage from Aristotle, where that Philosopher observes, that 'We never say Beasts are temperate or intemperate, but by a Metaphor, the one Species of Animals differs widely from another, in the natural Desire of Generation, and Greediness in Eating. Ethic. Ncom. Lib. VII. Cap. VII. p. 92.

6. Cap. XVII. Num. 50, 51. Edit. Cellar. (Polyb.) Lib. VI. Cap. IV. In regard to what the Philosopher says of Offences committed against Parents, we have an Example of that Kind in Ham, and the Punishment of his Crime, Gen. D. 25, &c. C. Con溲r obserdes, That we are naturally inclined to join in our Indignation with those who have been injured; for, says he, we immediately become Enemies to the Offenders, &c. we have no Share in the Injury. Hom. XIII. De Statu. The Scholast on Horace, Sat. III. Lib. I. v. 97, remarks, That Our Sentiments of Indignation upon hearing of a Murder, are different from that which arises in our Soul when we are inform'd of a Robbery. Grotius.

8. Pliny, in his Natural History, Lib. VIII. Cap. V. speaks of a Sort of Sense of Justice in Elephants, which he terms divinatium quaedam judicii. The same Writer, Lib. X. Cap. LXXIV. tells us, on the Credit of another Author, that in Egypt, an Aphis was known to kill one of his own Young, for having killed the Man's Son who entertained and fed him. Grotius.

9. Seneca, says, that wild Beasts are not, properly speaking, subject to Anger, but have a Sort of blind Impetuosity in its stead. Brutus, says he, are void of human Polity, but have certain Impulse resembling those Motions. De Ira. Lib. I. Cap. III. Or the same Author observes, that Beasts are not susceptible of Vice, properly so called, but that we find in them something that resembles Vice. Contra Celsum. The Peripatetics said, The Lion seems to be angry. Porphyry. De nobis animadversis, Lib. III. p. 369. Edit. Lugd. 1660. Grotius.

XII. (1) This Way of proving the Existence of the God...
Of the Rights of

Book I.

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

There's a Passage in Heidet to this Purpofe, very much commended.

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

2. Opp. & Dier. verf. 205. But the Passage is not well applied in this Place; for the Poet means only that we ought to endeavour at securing a good Reputation in the World, because falfé Reports always make some Impreffion, and prejudice the Person to whose Difadvantage they are fpread. "Ου ωςίεις αὐτὸλοις, Are not entirely without Effect."


4. Aristotle maintains, that "What all Men conceive in a certain Maner, is really fuch as it appears; and that, Whenever attempts to difcredit fuch a Belief, will advance nothing more worthy of Credit." Ethic. Nicom. Lib. X. Cap. II. p. 130. Edit. Paris. Seneca, undertaking to prove that no Duty is more evident than that of Gratitude, gives the following Reafon for it: How different however the Opinions of Men may be on other Subjects, they will all unite in declaring that a proper Return is to be made to those who have deferved well of us. Epift. LXXVI. Quintilian fays, I will therefore call the Content of the Learned, the Standard of Language, and the Content of good Men, the Rule of Life. Lib. I. Cap. VI. To the fame Purpofe, Josephus, in the Tent Hillion. There is no Nation in which the fame Cufoms are generally eftabli{h'd: One City frequently differs from another in this Point, but Justice is equally proper for all Men, being extremely ufeful both in the Greeks and Barbarians. At our Laws have a ftrong Regard to that Virtue, they render us, if religiously obviouf, benevolent and friendly to all Men. This is what we are to receive from Laws: Nor are others to profefs an ACLU to them, on the Account of the Difference between their Institutions and ours, but rather to conijider whether our Laws have a Tendency to promote Pravity and Virtue, for this is the common Concern of all Man-kind, and is of itself fufficient for maintaining human Society. Antig. Judic. Lib. XVI. Cap. X. Ter- tullian fays, that Whatever is equally received by great Numbers of People, is not an Error, but a re- al Tradition. De prefcript. adv. Harrr. Cap. XXVIII. Grotius.

None of these Quotations, except the two firft, are to our Author's Purpofe: That of Quinti- lian seems rather to intimate the contrary of what he would prove; for it is well known, that good Men were never the Majority; and that great Maff of Rhetoric had a little before declared, that Cuf- tom, if it received its Name from the Practice of the Majority, will give nof permissible Precepts, not only for forming a Stile, but also for regulating our Lives. The Passage of Josephus comes to no more than this: That the Practice of Justice is e- qually useful to all Men, but there is nothing in it that intimates that all Men entertain the fame Ideas of the Virtue. Sextus Empiricus. Adv. Mathem. Lib. VII. § 134, 135.

6. I know not whence this is taken; for I do not find it in any of chofe Books where it might be fuppofed that Philofopher has faid any Thing of this Nature.

7. Tusculan quaet. Lib. I. Cap. XIII. Epift. CXVII.


11. Justin Martyr makes this Exception, Except such as being paffified with impute Spirits, and corrupted by a bad Education, evil Cufoms, and unjust Laws, have lost their natural Ideas, Celen, cum Typhophone. Philo the few obferves, that If it is surprising any Man should be fo blind, as not to perceive certain Properties of Things, which are as clear as the Sun. In his Trefis proving all good Men to be free, p. 371. Edit. Paris. St. Chry- sostom cautions us against forming a Judgment of Things from the Opinion of such as have a corrupt Mind. In his Homily on the Divinity of Jesus Christ. Grotius.

Chap. I. **War and Peace.**

Mind: But if it does not appear so to Men of weak and disturbed Judgments, it argues nothing to the Purpoze; for we all allow Honey to be sweet, tho' it may r afte otherways to a sick Perfon. To which agrees that of Plutarch, in the Life of Pom- pery, *φωνα μιας, &c.* "No Man either was or is by Nature a wild and uncollectable Creature, but some have grown so by admixing themselves to Vice, contrary to the Rules of Nature; and yet those, by contrading new Habits, and by changing their Method of living, and Place of abode, have returned to their natural Gentlenes. Aristoteles gives this Description of Man, as peculiar to him, ἀνθρωπον ᾨρώδειον. *Man is by Nature a mild Creature. And elsewhere, διὰ τοῦ σωτηρίου, &c.* 10 To judge of what is natural, we must consider those Subjects that are rightly disposed, according to their Nature, and not those that are corrupted.

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

XIV. We will begin with the Human, as more generally known; and this is either a Civil, a left extensive, or a more extensive Right than the Civil. The Civil Right is that which results from the Civil Power. The Civil Power is that which governs the State. The State is a compleat Body of free Persons, associated together to enjoy peaceably their Rights, and for their common Benefit. The left extensive, and which is not derived from the Civil Power, though subject to it, is various, including in it the Commands of a Father to his Child, of a Master to his Servant, and the like. But the more extensive Right, is the Right of Nations, which derives its Authority from the Will of all, or at least of many Nations. The Right, because there is scarce any Right found, except that of Nature, which is also called the Right of Nations, common to all Nations. Nay, that which is reputed the Right or Law of Nations in one Part of the World, is not so in another, as we shall shew hereafter, when we come to treat of *Prisoners of War,* and *Pollinomy or the Right of Returning.* Now the Proofs on which the Law of Nations is founded, State; but has a different Origin, as shall be shown in the proper Place. The Sovereign in this Cafe can only lay a Restraint on that Authority, as far as the Publick Good requires.


15 St. Chrysostom says the same in his eleventh Homily On the Statutes. *Philò the Jew* is larger on this Point. Nature, says he, when it produced the offspring of all living Creatures, made them sociable, and disposed to Concord. She also gave them the Law of Speech, for promoting an Harmony and a Conformity of Manners. On the Decalogue, p. 763. Ed. Paris. And in another Place, Man is the most tractable of Animals, being by Nature endowed with the Gift of Speech, by which the most savage Poissons are charmed. Thus human Natures, &c. On the Immortality of the World, p. 945. Grotius.

16 Poli. Lib. I. Cap. V.

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

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

2 For there were Parents and Children, Masters and Servants, before there were Princes and Subjects. The Authority of a Father over his Child, of a Master over his Servant, &c. is by no Means founded on the Will of the Civil Power, and the Obligations incumbent on Men as Members of a State; but has a different Origin, as shall be shown in the proper Place. The Sovereign in this Cafe can only lay a Restraint on that Authority, as far as the Publick Good requires.

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


5 B. III. Chap. VII. IX.
and the fame with theo" of the unwritten
Civil Law, viz. continual Use, and
the Testimony of Men skilled in the Laws.
For this Law is, as Dia Chrysostom well ob-
serves 6, *semehs Bic 2 zerv, the Work of Time and Custom.
And to this purpose emi-
nent Historians are of excellent Use to us.

XV. The Divine voluntary Law (as may be underfood from the very Name)
is that which is derived only from the 5 Will of GOD himself; whereby it is
distinguifhcd from the Natural Law, which infone Senfe, as we have faid above,
may be called Divine alfo. And here may take Place that which Aquavclus faid,
as Plutarch relates in the Life of Alexander, (but too generally) that 3 GOD does
not will a Thing because it is juft; but it is juft, that is, it lays one under an
difpensible Obligation, because GOD wills it. And this Law was given either
to all Mankind, or to one People only: We find that GOD gave it to all Man-
kind at three different Times. Fifthly, Immediately after 5 the Creation of Man.
Secondly,

Are the Right of
Book I.

6 Orat. LXXVI. De Conflantia
XV. (1) We have not followed this passage on this
fubject in one of the Author's Epiftles, E SALMA-
hus, in his Treflate Df Ufuriis, frequently dif-
putes about Words. Thus (p. 589, 685.) he
finds much of his Time in oppofing the Epiftet
Voluntary, which I have employed as a proper
Term for characterizing and diftinguifhing non-
natural divine Law. But he did not observe that
CicerO calls a bad Action Facinus voluntarium,
and oppofes voluntarius to neceffarius. God was
at full Liberty not to create Man. The Moment
he is determined to create Man, that is, a Na-
ture framed with Reafon, and formed for a So-
ciety of an excellent Kind, he necessarily appro
of fuch Actions as are fuitable to that Nature,
and as necessarily disapproves of thofe which are
contrary to it. But there are feveral other Things
which he commands or prohibits, becaufe he
thought it fuitable, and not becaufe he could
not act otherwise. I do not fee what more pro-
per Word could be found for exprifing this Sort
of Law, which is not invariably attached to the
Name of Man, and for establishing which the
free Determination of the Divine Will inter-
2 I have produced and explained the Paffage of
Plutarch, to which our Author here alludes, in
my Remark on Pufendorf, B. II. Chap. III. § 4.
3 I do not underftand what polite Laws the
Author means, which God delivered at the begin-
ing of the World, and which are ftiil obligato-
ry, as foon as they are known. It is probable he
understands by those Terms the fervent Sorts of
Incent in the Collateral Line relating to the fourth
of the fix Commandments, which he, with the
Rabbins, fuppofes were given to Adam and Noah,
thougly they are only dilguifhed by the Name of
the latter, as is elfe the Seventh, concerning Abili-
tance from Blood, which we find prefcribed to
Nefed, chap. x. See Num. 4, in the following
Paragraph, and Chap. II. of this Book, § 5. Num.
5. B. II. Chap. V. § 13. num. 2, 5, 6; as elfo
Selden, De fure Nat. & Gent. jufta clipeipofum
Hebraeum, Lib. I. Cap. X. But all this is ground-
only on one very certain Tradition, which can
never receive great Force of a General Law, duly pro-
mulgated; as will appea more evidently from what
I shall fay on the Places here referred to.
We shall fliew in Note 4 on B. II. Chap. V. § 13.
that the Confequence drawn from Levit. XVIII.
20. is not well founded. Others, as in our Hochtetter, Professor at Tubingen, in his Col-
legium Pufendorfianum, Exercit. III. § 19.) with
more Reafon refer this to the Prohibition given to
our first Parents in regard to the Tree of Knowledge
of Good and Evil. Gen. ii. 16, 17. iii. 2, 3.
But, then a Husband Law and two or more Wives, and
lleratory to their Poverity, had they remained in Pa-
raflhe, yet as the Matter of the Prohibition was
but of short Duration, and the Law could never take
Place afterwards, it is to no Purpofe to make it
an Example of a universal polite Law. The
same Author, and several others, after Mr. Thoma-
suits, who fhirf reduced this Sort of Laws to a Sy-
tem, but afterwards ruined his own Edifice; tho
e Authors, I fay, place the Prohibition of Polygamy
and Divorces among the universal polite Laws gi-
ven to Adam; and pretend to find it in Gen. ii.
24, as alfo the Obervation of the Sabbath, ibid. v.
3. the Authority of a Husband over his Wife, iii.
16. the Ufe of Sacrifices, iv. 5. But, firft, tho'
Moses fays, A Man fhall leave his Father and his
Mother, and fhall cleave unto his Wife; and they
fhall be one Fiefh. Nothing can hence be conclufed
either for or againft Polygamy or Divorce. The
Expression, Shall be one Fiefh, in ifself means no
more than that there fhall be the stricte Unioo
between a Man and his Wife; but it does not imply
that a like Tie cannot at the fame Time subsift be-
 tween any other Mafter and a Wife. And all
that can be inferred from the fame Text, in re-
gard to the Diffolution of Marriage, is, that it
ought not to be admitted rashly, and without fome
good Reafon. The Word Fiefls, according to
the Hebrew Idiom, signifies all Ties, both of Affinity
and Connection, as in De. 21. 15. and Gen. 24.
Thus Laban fays to Jacob, Thou art my Bone and
my Fiefh, Gen. xxix. 14. that is, I own you for one
of my Relations. As therefore all the Relations of
a Man are his Fiefls; fo, in the fame Way of Spea-
mimg, a Man may be faid to be one Fiefh with fome
Wives. Secondly, In regard to the Sabbath, it is
owned by the most judicious Divines, that when
Moses, after the History of the Creation, fays,
GOD bleffed the Seventh Day, and sanctified it, he
speaks by Anticipation, and only touches by the
way on the Reason why GOD afterwards instituted
the Feft of the Sabbath, fo confiderable among the
Jews. Thirdly, When GOD fays to Eoe, Thy
Defire fhall be to thy Husband, and he fhall rule over
thee, the Penalty confists rather in the Neceffity laid
on Wives, in confequence of Sin, of obeying all
Husbands, who have extraneous Power to command them in certain Cases, and to a cer-
tain Extent, that Right being grounded on the Law
of Nature, and not barely on Divine Politive Law;
as we fhall fee in the proper Place. Fourthly, The
fourth Chapter of Genesis gives only one Ex-
ample of Sacrifices offered by two Sons of Adam;
but there is not the lefit Ininition, that GOD
had commanded them to render him that Kind of
exteror Worthip. It is not probable indeed, that
Men
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WAR and PEACE.

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

XVI. Of all the Nations of the Earth, there was but one, to whom GOD peculiarly vouchsafed to give Laws, which was that of the Jews, to whom Moses thus speaks, \( \text{Deut. iv. 7.} \) What Nation is there so great who hath GOD so nigh unto them, as the LORD our GOD is in all Things that we call upon him for? And what Nation is there so great, who have Statutes and Judgments so righteous, as all this Law, which I set before you this Day. And the Psalmist, cxlvii. 9, 20. He showed his Word unto Jacob, his Statutes and Ordnances unto Israel. He hath not dealt so with any Nation, and as for his Judgments they have not known them. Neither is it to be doubted, but that those \( \text{Jews} \) (among whom Trypho \( \text{alio} \) in his Disputes with \( \text{Jafusin} \) do egregiously err, who think that Strangers too, if they would be saved, \( \text{must submit to the Yoke of the Mosaic Law: For a Law obliges only those, to whom it is given. And to whom that Law is given, itself declares,} \)

Men should so soon have thought of it, without some \( \text{Direction, as Mr. Le Clerc very well observes;} \) but it does not thence follow, that GOD had then prefcribed that Practice, in that form of an universal and perpetual Law for all Mankind.

4. Of this Sort are usually faid to be the Prohibition of eating Blood, Gen. iv. 4. and the Punishment of Murther, v. 6. But, \( \text{First, The Prohibition of eating the Flesh of Animals, with their Blood or Life, was a Sort of Symbolical Law, for diverting Men from Cruelty towards one another, at a Time when a Tendernefs in that Particular was of the greatest Importance for the Multiplication of Mankind. See Mr. Le Clerc's Comment on the Place. Besides, we know not with the least Certainty, that any but the moral Part of this Law was to be obligatory at all Times, and in all Places; and such as pretend it not allowable, even under the Gospel Dispensation, to eat the Blood of any Animal, have been sufficiently confuted. \( \text{Secondly, When God fays,} \) When he laid his Blood be shed. This is not a Law, properly fo called, but a bare Declaration of the just Punishment which Murtherers are to fear, either from Man or from GOD, by an Effect of the Divine Providence. \( \text{See the following Chapter, § 5, note 2.} \) This is evident from the preceding Words, where God fays, At the Hand of every Blood I will require it: (the Life of Man) At the Hand of every Man's Brother will I require the Life of Man. To which he adds, by way of Confirmation, Whose blood be shed, &c. For in the Image of GOD made he Man. From this Palliage misunder-flood, some Lawyers, as the late Mr. Cocceius, Professor of Law at Franfort on the Oder, (Differit. De Sacrafandi Iulium fuc. § 29, &c.) infer that even at this Day no human Power can pardon a Murtherer. See a Differention of Mr. Thomasius, printed at Hall, in 1707, and entitled, De Jure aggressandi Principis Ecceadici in eorient Hominiz. in which he opposes this Error. See alfo the following Chapter, § 5, note 5.

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

XVI. (1) Some Commentators, as well Lawyers or Criticks as Divines, inveigh strongly against this Affirmation of our Author; but they only copy the common Places of Scholastick Divinity. This need not have given them so much Trouble, had they but considered, that the Quotation concerning the Salvation of the Pagans ought not to be brought into this Dispute, as being nothing to the Purpose. For whether the Heathens could or could not be saved, without some Knowledge of JESUS CHRIST, either distinct or typical, it is still certain, that the Law of Moses, as such, had no Obligation on the Pagans. This Law was undoubtedly directed only to the Hebrews, as our God ther observes; and an infinite Number of Pagans, who neither did or could know that there was such a People in the World, to whom GOD had given particular Laws, being therefore in an absolute Im-possibility of having any Acquaintance with them, it cannot be reasonably faid, they were under an Obligation of observing them. Thus supposing that the Efficacy of the Sacrifice of JESUS CHRIST cannot be extended to such as have not had the Affidence of Revelation, though through no Fault of their own, that it should never happen, that they will not be condemned for not submitting to Laws of which they neither had nor could have any Knowledge; but for a Multitude of other Sorts. Their being deprived of such a Means of Salvation, which GOD was not obliged to allow them, will be their Misfortune, not their Crime. As to those Pagans who lived in the Neighbourhood of Judea, and thus had it in their Power to embrace Judaism, as GOD did not forbid their being received when they offered themselves, so neither did he command them to be circumcized, to qualify them for sharing the Advantages of the Mosaic Law. Gronovius was sensible of this, and even gives a Rea-son for it, which evidently fcews the Laws of Moses, as such, did not oblige the Pagans. The Prophets, says he, were not to encroach on the Functions of the Moiffiah, who alone was to unite the Nations, call all Men, and render the Church universal. Eusebius, in his Evang. Dema. fays, The Law of Moses was delivered only to the Jews, and that while they remained in their own Country. Whence he infers, that therefore there was a Necessity of another Prophet, and another Law. Lib. I. Cap. I. See Mr. Le Clerc's Prologomena to the Eccl. Hist. Sect. I. Cap. VIII. § 10.

2. The learned Gronovius objects, that the Laws of the Decalogue are universally obligatory, tho' the short Preface which utters them in is adressed to Israel, whom GOD had brought out of Egypt. But, beside that the fourth Commandment, relating to the Observation of the Sabbath, was only for the Jews, as appears from the whole Tenor of the Words in which it is drawn up; and that the Reafon of the Fifth, that by Days, &c. evidently proves the fame in regard to that; if the Pagans lay under any Obligation to practice the moral Parts of the Decalogue, it was not as they were a Set of Laws delivered from Heaven on Mount Sinai, but...
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Of Israfel; and we read everywhere that the Covenant was made with them, and that they were chosen to be the peculiar People of GOD, which Maimonides owns to be true, and proves it from Deut. xxxiii. 4.

But among the Hebrews themselves there always lived some Strangers, Ἰουδαίοι καὶ ἑφεσάνιοι τῷ σεώ, 1 Pisces Persians, and such as feared GOD, as the Syrophcilian Woman, Matt. xv. 22. And Cornelius, Acts x. 2. one ἑπετρήθη ἐκλέγων of the devout Greeks, Acts xvii. 4. in the Hebrew, אלכד� ידך the Righteous amongst the Gentiles; as it is read in the Talmud, Title of the King 2, and he who is such a one is called in the Law יִשְׂרָאֵל a Stranger 3 simply, Lev. xxii. 25, or, שן检修 a Stranger, and a Sojourner, Lev. xxv. 47. Where the Obulder Paraphrast calls him, an Ungcircumcised Inhabitant. These, as the Hebrew Rabhins say, were obliged to keep the Precepts given to Adam and Noah, to abstain from Idols and Blood, and from other Things, which shall be mentioned hereafter in their proper Place; but not the Laws peculiar to the Jews.

And therefore, tho' it was not lawful for the Israelites to eat of any Beait that died of itself, yet it was allowed 7 to the Strangers that dwelt among them, Deut. xiv. 21. There are only 8 some

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

3 Ἐνδεικτικὴ γὰρ ἐφεσάνιοι τῷ σεώ, ἢ ἑφεσάνιοι, as our Author, who has taken this from the Epiteth given to Cornelius the Centurion, Acts x. 2. This Sort of Strangers are likewise called simply, οἰ ἑφεσάνιοι ἐκλέγων, Greeks who feared God, Acts xvii. 4. For nothing is more groundless than the Assertion of Gronovius, who says, They were so called in relation to their Conversion to Christianity, not in regard to their former State. It is impossible to give into this Thought, if we read the Words of St. Luke with as little Attention.

4 And Tit. ii. 3-9. Grothius.

The Quotation of Tit. ii. 3-9, as we are told by Boeckler, on the Credit of Wagenseil, Net, p. 175.

5 Of such Persians see also Exod. xii. 45. Grothius.

6 Such a Stranger is distinguished from a Proselyte, or circumcised Stranger; as appears from Num. ix. 14. Maimonides talks much of these pious uncircumcised Persians, in his Treatise On Identities, Cap. x. 8. The same question is in his Com. on Mifna, and elsewhere, says, that such pious Gentiles will partake of the Happiness of the World to come. St. Chrysostom, in his Exposition of Romans ii. has these Words, Οὐ τίνος Ἔκλεγον, of what Sort of Jews, and of what Sort of Greeks does he here differ? Of those who lived before the Appearance of Christ, for he has not yet brought his Discourse down to the Times of Grace. To which he adds, He (the Apostle) here speaks not of the idolatrous Greeks, but of such of them as worshipped GOD, of Men who follow the Dictates of natural Reason, if Men, who except only that they do not observe the Jewish Ceremonies, practize all the Duties of Pity. He instances in Melchisedek, 24, the Ninevites, and Cornelius the Centurion. He afterwards repeats it, that the Test of Greek, the Apostle means not an Idolater, but a pious and virtuous Man, not subject to the Ceremonies of the Law. He pursues the same Ideas in explaining those Words of St. Paul,

1 Cor. ix. 21. To them that are without Law, as without Law. And in his XII. Homily on De Stato, he observes, that the Apostle using the Word Greek, does not thereby mean an Idolater, but a Man who worships one GOD, without being tied down to the Observations of the Jewish Rites; such as keeping

of the Sabbath, Circumcision, and the several Sorts of Purifications; but yet makes the Study of Whigs and Piety appear through his whole Conduite, Grothius.

This Sect, at his Entrance in this Note, seems to appropriate the Term Proselyte to such Pagans, who had entirely embraced Judaism. But it is well known, that the other Strangers, fretted among the Jews, were likewise called Proselytes, because, in Reality, tho' they were not subject to the Observations of the Mishiaf Ceremonies, they were absolutely obliged to renounce Pagan Idolatry, and make a Profession of worshipping the one true GOD, the Creator, which was the great and fundamental Article of the Jewish Religion. Therefore these were termed Proselytes of the Gate, to distinguish them from the Proselytes of Tyre, or such as were naturalized. The learned Gronovius is mistaken, when he tells us that Cornelius forbade making an open Profession of Judaism, for Fear of losing his Post in the Army. Nor, says that Commentator, could he have retained the Title of a Roman Citizen, which was a requisite Qualification for bearing Arms in the Roman Troops; or at least, for enjoying an honourable Employment in them. For, besides that we find nothing in the whole Account given of him, Acts x., which gives us any such Rule, as would have imposed that, he was not publicly a Proselyte of the Gate, as the Example of St. Paul, who, tho' a Jew by Birth, was a Roman Citizen, of itself sufficient to defeat this Argument? And is it not surprising, that Gronovius should entirely forget, or take no Notice of so well known an Example? See Origs Romana, by the late Baron Spanheim, Exerc. I. Cap. XVII. which affords a great Number of Instances and Authorities to this Purpose. See also what our Author says in the following Chapter, § 7. num. 7. Here the learned Gronovius replies, that this proves only, that GOD allowed these Strangers Liberty of Confidence; but it does not thence follow, that they were exempt from all Obligation of submitting to the whole Law. But, since GOD absolutely required they should observe certain Laws, he is against Identities, that they were permitted even to live in the Country, he plainly discharged them from the Obligation of submitting to the rest. This is infinuated in the Reason given by the Pagans under Cor. xiii. 1, that he is not a true GOD, than art an holy People, with the LORD thy GOD. That is, You Israelites ought not to eat of what is forbidden by the Laws, established for you in particular: but these Strangers are dispensed with
with that Point, because those Laws were not given for them. So that it is surprising our Commentator should alledge those Words as a Proof of what he afferts, when they make directly against him.

Such as the Prohibition of working on the Sabbath Day, EXOD. xx. 9

To the Passages of Scripture produced by our Author, we may add the Testimony of Josephus. De Belo Jud. Lib. II. Cap. XXX. p. 809, 810. Ed. Lips. See Mr. Le Clerc on Eorah vi. 10. The learned Gronovius pretends that GOD allowed Strangers to pray and offer Sacrifices in the Temple of Jerusalem, only with a view of rendering them in some Manner tributary to the Jews; as he permitted that People to carry off the Spoils of the Egyptians, and Heram King of Tyre to furnish Solomon with Materials for building the Temple. But this great Critick did not observe Solomon's Words at the Dedication of the Temple, 1 Kings viii. Moreover, concerning a Stranger that is not of thy People Israel, but cometh out of a far Country for thy Name's sake, ... Have thou in Heven, thy Dwelling-Place, and do according to all that the Stranger calleth it thee for; that all People of the Earth may know thy Name, to fear thee, as doth thy People Israel. From which it is evident, that GOD accepted the Homage of Strangers, when offered with pious Dispositions, as Solomon supposed they might be; so that GOD had a very different View on this Occasion from what our Commentator pretends: Nor is the Passage quoted from Tacitus, for proving that the Jews were enriched by the Offerings and Presents of the Pagans, well applied. Every one of that detestable People sent their Tribute thither, in Contempt of the Religion of the respective Countries in which they lived; and thus the Jews grew rich. Pagninus quippe, foresit Religionum patris, Tributa & Slices ilium conprehendit, unde aucta Judaeorum rer. Histior. Lib. V. Cap. V. where Tacitus evidently speaks of the Money which the Jews themselves derived through several Parts of the World, transmitted every Year to Jerusalem; Money raised by the Sale of their First-Fruits. That this was their Practice, appears from the Passages of Philo and Josephus, quoted by Justus Lipsius in one of his Notes, which Gronovius himself has infected in his Edition of the Latin Historian, from whom the Passages are taken, p. 824.

10. See Josephus, where he treats of Solomon's Temple. Grotius.

The Place allotted for Strangers, was called the Court of the Gentiles. The Jewish Historian, in several Parts of his History, speaks of a Prohibition against putting the Limits of it. See Antiq. Jud. Lib. XII. Cap. III. Lib. XV. Cap. vi. Dr Bell's Jud. Lib. VI. Cap. XIV. Contra Apion, lib. II. There is no Mention of this Court in the Old Testament; but from Ezekiel xiv. 7, &c., it may be inferred, that there was originally an Inclosure round the Court of Israel, where Strangers were allowed to enter, and perform their Devotions. See Selden, De Jure Nat. & Gent. Judae. Hebr. Lib. III. Cap. VI.

11. We have a Reference to the same Purpofe in St. Hilary, on Matt. xii. Grotius.

Our Author, in his Treatise of The Truth of the Christian Religion, B. V. § 7. joins to the Example of Moysë, who did not exhort Jehos, his Father-in-law, to embrace the Ceremonies of the Law, which he had delivered to the Israelites by Divine Direction. He likewise observes, in a Note on that Place, that some of the Mosaic Laws were irremediable to the Generality of other People; as those relating to the First-Fruits, Tents, and solemn Feasts, which were to be observed in only one Place in Judea, where it was impossible for all the Nations of the World to come. See John of Damascus, Lib. XIII. Cap. XVII. Ptolom. Lib. I. De Vita Hierod. 25 quoted by Ammonius under the Word ιεροσαειν, Selden, De Jure Nat. & Gent. Secund. Hebr. Lib. II. Cap. II. and 245 19th Note on this Section.

13. That Father of Historians speaks of the Egyptians and Ethiopians, and the People of Celas, Lib. II. Cap. XCI. IV. He afferts that the Ufe of Circumcision was derived from the Egyptians to the other two Nations, as also to the Phenicians and to the Syrians, who inhabited Philistia, by whom he underilands the Jews, who, according to him, acknowledge the Truth of this Account, as far as it relates to them. See also DioDorus of Sicily, Lib. I. Cap. XXVIII. and Lib. III. Cap. XXXII. p. 171 and 115. Ed. H. Stroph.


16 In his Dialogue with Tryphon, where he speaks of the Idumaeans.

17 In his Answer to Celsius, Lib. V. where he observes, that the Egyptians, and the People of Colchis had not the same Reason for Circumcision, that the Jews had. See the Præf to this Chap. of that Cer-

emony; and that the Jews themselves made a Dis-

tinction between their Circumcision and that used by the Ishmaelites of Arabia, tho' the People mentioned were Descendants of Abraham, and Is-

mael was the Brother of his Nation, had been cir-

cumcised by the Hands of that Patriarch, Pag. 263. Ed. Cantab.

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

19 He says, Herein XXX. § 30. that the Egyp-

tians, the Saracens, or Ishmaelites, the Samaritans, the Idumeans, and the Hebrews, were circumcised as well as the Jews; but that most of them People used that Ceremony out of Custom, without assigning any Reason for it, and by no Means with a View of obeying the Divine Law which pre-

scribed it: Hence we may observe, that tho' the first Perfons who neglected Circumcision, and thus occasioned its being abolished among the Nations descending from Abraham, were to blame, yet the Law of Circumcision ceased to oblige their Pote-

rity, who had no Knowledge of that Institution: So that the Action of Hyrcanus, who forced the Id-

umaeans to be circumcised, must necessarily be con-

sidered as violent and unjust, and not authorized by him who is the sole Master of Men's Consciences. Besides, the fame Wagenzeit, mentioned in Note 2 of this Paragraph, observes, after Boeckler, that Maimonides says the direct contrary of what our Author advances in this Place, viz. that all Abra-

ham's Pottery were obliged by the Law of Cir-

cumcision, and that the Jews forced the Idumaeans to observe that Ceremony.


21 In his third Quæstion on Exodus.

22 Those Ethipians whom Herodotus ranks among the circumcised, seem to have deflected from the Pottery of Keturah: St. Ephraimius calls them Hebrews.

The Hebrews were part of the Idumæans; and our Author does not remember that he himself found so, in his Notes on The Truth of the Chriftian Reli-

gion, Lib. I. § 16. p. 60. Ed. Amster. Cleric. He both there and here oppofes the Truth of the common Opinion, in his Letter concerning the Or-

igin of Circumcision, viz. that it was derived from the Hebrews to all other Nations. But, could he have what Sir John Marsham and Doctor

Senener have written on that Subject, I imagine he would have changed his Opinion, and acknow-

ledged, that Circumcision was practiced among the Egyptians before God made it a Sign of his Co-

venant with Abraham, and his Descendants, to whom it prevailed: So that Circumcision is in different Manners, and with a different View than those which induced the Egyptians to use it. See Mr. Le Clerc on Gen. viii. 8. &c.

23 St. Chrysostom understands this of natural Inheritance; for the Hebrews, &c. In the same Speech.

24 By which he adds, That are the Objefts of our Wonde-

r, because they stood not in need of a Law, . . . . .

Confidence, and the Life of Reason, are sufficient, in-

stead of a Law. Tertullian afferts, that Be-

fore the Law of Muses, written in Tablets of Stone, there was an unwritten Law, which was understood naturally, and observed by the Patriarchs, Not. Jud. Cap. II. To these may be added, a Thought of Socrates, If Men would govern a State well, they ought not to fill the Particls with Letters, but to confume the Maxims of Justice on the Minds of the Citizens. Areop. p. 128. Ed. H. Steph. Gro-

tius.

This Passage is a little too far fetched. For even positive Laws, and several other Things, not de-

rived from natural Light common to all Men, may be carved on the Mind or Soul, by Force of Instruc-

tion and Practice: So that what the Author con-

ceives to be the true Sense of this Passage, rather defpares in itself that the Rules of Justice, tho' grounded on natural Reason, are but little known, and generally neglected.

24 This is the Apostle's true Meaning, the Word Nature and natural Things are often so used, that the Greeks and Latin Authors, in Opposition to the Way of Instruction, which gives us the Knowledge of certain Things. We find St. Paul, speaking of a Custom estabhlished in his Time, says, Dut not Na-

ture itself teach you, that if a Man hath long Hair it is a Shame unto him? But if a Woman hath long Hair it is a Glory unto her. 1 Cor. x. 14.

15 This Exposition is justified by daily Observa-

tion; several Things are learnt without a Master, which are looked on as what we know naturally.

Much more then may it be said, that the Gentiles, who were deprived of Revelation, did of them-

selves, and without that Assistance, know the Pre-

cepts of Morality, which the natural Light of Rea-

fon led them to discover, and which were the fame with those prescribed by the Law of Moses to the Jews; so that when a Pagan acted according to those Precepts, He did by Nature the Things con-

tained in the Law, Rom. xi. 14. Which proves the Work of the Law (that is, the moral Precepts of the Law) written in his Heart, or in his Mind, v. 15. that is, not only could easily form such Ideas, and retain them in his Memory. See, concerning this last Exposition, Mr. Le Clerc's Ars Critica. Tom. I. p. 163. &c. Edit. 4.
elf excusing one another. And again, in the 26th Verfe, If the Uncircumcised keep the Righteousnes of the Law, shall not his Uncircumcision be counted for Circumci-

cion? And therefore, Ananias the Jew, in the History of Josephus, did very

well inuenf Israels Adiebenus, (25 Tactus calls him Ezates) that GOD might be

rightly worshipped, and well pleased with us, tho’ we were not circumcised.

Now the Reafon why fo many Strangers were circumcifed (among the Jews) and by that Circumciſon obliged to keep the Law, (as St. Paul expounds it, Gal. v. 3.) was partly that they might be naturalized; for Profelytes (called by the Hebrews

25 The Jew, making some Abatement in this Point, owns to Justin Martyr, that If he perfifted in that Manner of phiſopherizing, he bad some Hopes left of a better State. Grotius.

24 Such Profelytes were therefore admitted to the Celebration of the Paſtover. Grotius. See Ezev. vii. 19, 47, 48.

29 St. Paul frequently argues against this Opinion, particularly in his Epitodes to the Romans and Galatians.

25 In the left Editions of this Historian, and in those which have the beſt Reputation among the Learned, we find Traies, which was probablity the true Name of that Adiœbician Prince, who was convereted to Judaism, with his Mother Helena.

26 Typhon the Jew, making some Abatement in this Point, owns to Justin Martyr, that If he perfifted in that Manner of phiſopherizing, he bad some Hopes left of a better State. Grotius.

27 That is, according to his Deference with Typhon, observes, that A Preſbyter, who re-

ceives Circumciſion, is ranked among the (Jew-

28 Such Profelytes were therefore admitted to the Celebration of the Paſtover. Grotius. See Ezev. vii. 19, 47, 48.

29 St. Paul frequently argues against this Opinion, particularly in his Epitodes to the Romans and Galatians.

30 See what I have laid in my Second Note on this Paragraph.

XVII. (1) That is, which confifts ſolely in the Silence of the Law. For Silence alone is not an inconceivable Proof, that the Legiflator approves of what he doth not pereb. We can only infer from it, that he does not defign to employ the Means in his Power for hindering Men from doing Kach Things. The only Caeſe in which Silence can be taken for a Mark of Approbation, is when it clear-

ly appears, that the Legiflator defigned to forbid whatever he judged to be evil. Now we have no Reaſon to believe that GOD defigned to forbid, positively, by the Law of Mofes, every Thing that is any way evil. On the contrary, it was even neceffeary, that he should not prohibit some Things. In reality, when GOD gave written Laws to the Jewih Nation, he acted rather as the tem-

poral Mafter and Sovereign of that People, than as the perfect Teacher of Mankind in general. For
Of the Rights of

Law, is not to the present Purpofe) is either compleat, and without Reserve, which gives us a Right to do something with an entire Liberty in all Respects; or left compleat, and with Reserve, which gives us only an Impunity with Men, and a Right to do a Thing, fo as that no Man fhall moleft and hinder us. From the firft of these Perfronts, as well as from a positive Precept, it follows, that what the Law allows, cannot be contrary to the Right of Nature. But as to the latter, the Cafe is entirely different: But it seldom happens that there is Occasion to draw that Confneunce with Certainty 3; for the Terms which express the Per-

mission which Reafon all the Punishments, with which he threatens the Offenders, were of a temporal Nature. As there fore there is no Civil Society, whose Interprets permits that every Thing contrary to some Virtue, or some Law of Nature, should be at tended with fome Penalty; GOD would have added contrary to his own Wisdom, if, in Quality of Civil Legiflator of the Jews, he had not lent several Things in themselves evil unpunished, and a safe- quently, been fient on fuch Articles, even particularly when he had to do with fo great and fubftant a People. Thus, for Example, Murder was punished with Death, Levit. xxvi. 21. Num. xxi. 16, 17, 32. And that with good Reafon: A Civil Society, in which its mightily in another with Impunity, could not fuffice; but fome Motions of Anger as tended only to do fome Injury, were not prohibited, because the Legiflator had annexed a Punishment to a Thing of common among all People, and from which the Jews, in particular, would have much Difficulty to abftain. The Regulation would have pro- duced more Harm than Good. See Matt. v. 21, etc. See St. Chrisrotom, on the Clofe of Rom. vii. Grotius 4. I fhould think that we ought to reafon in a different Manner on Detract from what we use to do on Human Laws. The Perfront granted by human Laws, however it may be given, never of itself implies any Approbation of the Legiflator, but only fuppofes that he judges proper not to punish the Thing in Queftion. The Reafon is, that the Design of Legiflation, considered in this, is to make the beft Provision in their Power, for the Regula- tion of each Man's exterior Actions, in order to secure the publick Safety and Tranquillity: and not, properly speaking, to make Men good. But the fame Thing cannot be faid of GOD. In what Manner forever he acts, he always propofes making Men virtuous; and confquently, all positive Per- fronts from him are certain Proofs of Approbation. He may indeed be silent in regard to certain Things which imply fome Vice, and leave them unpunifh'd in this World, for the Reafon given in Not. i, on this Paragraph: and that the rather, because, on due Consideration, it will appear that the Evil of fuch Things may be easily difcovered by Confequences drawn from their Conformity with what is exprefly prohibited, or their Incompatibility with what is clearly commanded. But GOD cannot positively permit the leaft Thing evil in its own Nature, even when he acts as a temporal Monarch, for that Character does not divert him of his SAC- nity, but he will may and ought to be thought to approve of every Thing, at leaft as innocent, which he permits either in express Terms, or by a neceffary Confequence from fome formal Law or Ordi- nance. Thefe then, in my Opinion, are the Confequences which may be drawn from the Divine Legiflation, when the Reafons deduced from the Nature of Things, which must always be consider- ed, appear doubtful. First, When GOD permits a Thing in certain Cases, and to certain Perfronts, or in regard to certain Nations, it may be inferred, that the Thing permitted is not evil in its own Nature. For he would act in Contradiction to himself, if he authorized any evil, in any Circumstances, or in Pavour of any Perfront. For Example, end. xxi. 2, 3. Perfront is given to kill a Thief in the Night, but not in the Day: Whence we may safely conclude, against the Opinion of fome Doc- trors, too folid on that Point, that when we reafon in a like Manner fo far as to kill him, tho' he at tempts only our Goods, this Defence is not crimini- fally in itself, or contrary to the Law of Nature. GOD forbid the Jews to lend Money to another on Interest; but he permitted that Practice in regard to Strangers, without excepting the Hebrews. Thefe together prove that the Thine in evil not is evil and unlawful in its own Nature, whatever from fome Divines and Lawyers may pretend. The Confequence is demonstrative, and fufficient to ju- fify fuch Contracts, when reduced to lawful Bounds. The Law of Moses, Deut. xiii. 17, forbids Kings to multiply Wives to himself, left they should induce him to violate the Law: This Prohibition implies a tacit Perfront, both for them and all other Men, to have more than one Wife, without which it would be fuperfutuus: Polygamy therefore is not in its own Nature evil and unlawful. Secondly, When GOD regulates the Manner of a Thing, or makes fome other Regulation in regard to that Thing, which necessarily fooposes it permitted; we are to enquire whether this is one finge exceptional Adtion, or a Thing either by itself or by its Confequences, re- duced to a Habit, or a continual Practice. In the laft Cafe, a Perfront always implies a real Appro- bation of the Thing in Queftion, as in its own Nature lawful. Thus it is impossible that GOD should permist the Practice of Robbery, Piracy, Adtion, Duelling, etc. under any Sort of Conditions. When therefore we find him direct- ing the Manner of Divorces, and regulating certan Cales which fuppofe the Perfront of Polyga- my, as in Deut. xxi. 15, we may very reafonably conclude, that neither Divorces nor Polygamy are effentially contrary to the Law of Nature. See our Author's Application of this Principle in the following Chapter, § 2, num. 2. in order to fhew, that all Sorts of War are not in their own Nature unjust. But when it is one finge Adtion, which does not only imply a. Perfront, but an inadmissible, or only no more than Impunity, without any Prejudice to the Divine Sacrity. Of this Kind is the Perfront granted by the Law of Moses to the Re- wenger of Blood, that is, to the nearest Relation or Heir of a Perfon killed without any Malice or pre- meditated Design, this Reversion of Blood was al- lowed to kill such an involuntary Murtherer, if he found him out of his Affymen, even tho' he had been declared innocent by the Judges; He fhall not be guilty of Blood, Num. xxi. 37. But it does not follow, that GOD considered this Adtion innocent before the Tribunal of Confequence, and con- formable to the Law of Nature, but only, that he thought proper to grant an Impunity in that Cafe, before the Civil Judge, to a Man who had killed another
milion being equivocal, it is better to have Recourse to the Principles of the Law of Nature, in order to discover what Kind the Permission is of, than to conclude from the Manner in which the Permission is conceived, that the Thing permitted is conformable or not conformable to the Law of Nature.

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

The third Observation may be this; whatsoever was enjoined by the Law of Moæs, which relates to those Virtues that CHRIST requires of his Disciples, ought now as much, if not more, 6 to be observed by us Christians. The Ground of this Observation is, because what Virtues are required of Christians, as Humility, Patience, Charity, &c. are to be practised in a 7 more eminent Degree, than under the State of the Hebrew Law, and that with good Reason too; because the Promises of Heaven are more clearly propos’d to us in the Gospel. Wherefore the old Law, in comparison with the Gospel, is said to be neither perfect nor 8 faulty, Heb. vii. 19. viii. 7. And CHRIST is termed the End of the Law, Rom. x. 5, but the Law only our Schoolmaster, or Guide, to bring us unto CHRIST, Gal. iii. 24. Thus the old Law concerning the Sabbath, and 9 that relating to Tythes, shew, that Christians are obliged to set apart no leas than the seventh Part of their Time for the Worship of GOD, nor no leas than the tenth Part of their Income for the Maintenance of those who are employed in Holy Affairs, or for other Sacred and Pious Uses.

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

4. JESUS CHRIST, for Example, has aboli'd all the Laws in general, which related to the Distinction of Meats. If therefore any Civil or Ecclesiastical Power pretend to oblige Men to Abstinence from any Sort of Food, on a Principle of Religion, such an Attempt is an open Violation of the Christian Liberty, establisht by our Saviour. I suppose this done on a Principle of Religion; for the Case will be widely different, if the Ue of certain Meats are prohibited for good Reasons, founded on the Interest of the State. The Sovereign has an undoubted Power to impose such Abstinence in that View; as he may be allow’d to decline making the worldly Political Regulations in the Messiah Law his Model, when they are not fitted to the Confinement of the State under his Government.

5. Thus JESUS CHRIST having expelled the Husband’s unlimited Permission of putting away his Wife for any Cause whatever, and without any other Reason than his own Will; a Christian Prince cannot make a Law, permitting Divorces in that Manner, only obliging the Husband to testify in a Writing delivered to his Wife, that he will have no farther Commerce with her.

6. Christian Liberty has done no Prejudice to Innocence; the Law of Party, Sanctity, Humanity, Truth, Fidelity, Chastity, Justice, Mercy, Benevo-

4 6. We ought to shew greater Degrees of Virtue, because we have now a plentiful Edition of the HOLY SPIRIT, and the Advantages resulting from the Coming of CHRIST are very great. CHRYSTOST. De Virginitate, XCIV. See the same Father, in his Discourse, tending to shew that Vice is occasioned by Negligence. De Jujcurrn III. And on Rom. vi. 14. vii. 5. As also St. IRENAUS, Lib. IV. Cap. XXVI. The Author of Sympathetico Scripturae, among the Works of St. AThanasius, writing of Matt. v. observes, that our Lord enlarges the Extent of the Precepts of the Law. GROTIUS.

7. The same Ue is made of this Law, in regard to Christians, by St. IRENAUS, Lib. IV. Cap. XXXIV. And St. CHRYSTOST., on the Clef of the last Chapter of 1 Cor. and on Ephef. ii. 10. GROTIUS.

CHAP. II.

Whether 'tis ever Lawful to make War.

HAVING viewed the Sources of Right, let us proceed to the first and most general Question, which is, Whether any War be Just, or, Whether 'tis ever Lawful to make War?
I. 1. But this Question, as well as those which follow, is to be first examined by the Law of Nature. Cicero learnedly proves, both in the third Book of His Bounds of Good and Evil, and in other Places, from the Writings of the Stoicks, that there are two Sorts of natural Principles; some that go before, and are called by the Greeks κατά τά μετά πάντα φυσικά, The first Impressions of Nature; and others that come after, but ought to be the Rule of our Actions, preferably to the former. 5 What he calls The first Impressions of Nature, is that Infinit whereby every Animal seeks its own Preservation, and loves its Condition, and whatever tends to maintain it; but on the other Hand, avoids its Destruction, and every Thing that seems to threaten it. Hence comes it, says he, that there's no Man left to his Choice, who had not rather have all the Members of his Body perfect and well shaped, than maimed and deformed. And that 'tis the first Duty of every one to preserve himself in his natural State, to seek after those Things which are agreeable to Nature, and to avert those which are repugnant.

2. After that follows, (according to the same Author) 6 the Knowledge of the Conformity of Things with Reafon, which is a Faculty more excellent than the Body; and this Conformity, in which Decorum consuits, ought (says he) to be preferred to those Things, which mere natural Defire at first prompts us to; because, tho' the first Impressions of Nature recommend us to Right Reafon; yet Right Reafon should still be dearer to us 7 than that natural Infinit. Since these Things are undoubtedly true, and easily allowed by Men of solid Judgment, without any farther Demonstration, we must then, in examining the Law of Nature, first consider whether the Point in Question be conformable to the first Impressions of Nature, and afterwards, whether it agrees with the other natural Principle, which, tho' posterior, is more excellent, and ought not only to be embraced when it prefers itself, but also by all Means to be sought after.

3. This last Principle, which we call Decorum, according to the Nature of the Things upon which it turns, sometines confuits (as I may say) in an indivisible Point; so that the least 8 Deviation from it is a Vice; And sometines it has 

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

6 The Author does not here speak of the Application of the general Maxims of Decorum, and the Law of Nature to particular Cases, as the Commentators on this Work have imagined, who in- 

Molius nos
Zennis præcepta moununt: Nee enim omnis, quantum
Pro vitl facienda poot

Sat. XV. v. 105, Gt. Grotius.

Aulus Gellius, quoted by our Author in his Margin, says, When we are reduced to that Strait, we are obliged to expose ourselves to suffer some exterior Inconvenience or Damage, rather than be wanting to the inviolable Rules of Decorum, Lib. XII. Cap. 34.

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

4
tween Things that are opposed after another Manner, as between Black and 
White, there is a Medium, which either partakes of both Extremes, or is equally 
removed from both. The last Sort of Decorum is most commonly the Subject of 
Laws both Divine and Human, which by prefcribing Things relating thereto, 
render them obligatory, whereas before they were only commendable. But the 
Matter in Question is concerning the first Sort of Decorum. For, as we have said 
above, when we enquire into what belongs to the Law of Nature, we would 
know whether such or such a Thing may be done without Injustice; and by
orjust we mean that which has a necessary Repugnance to a reasonable and fociable 
Nature.

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

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

7 The Emperor Justinian congratulates him-
sf, on having given the Force of a Law to a Thing of this Nature, which the ancient Lawyers had on-
ly advised, viz. That neither the Heir, nor any one under his Jurisdiction, should be admitted Witnesses 
to a Will. Instruct. Lib. II. Tit. X. De Tit. a-
adimandis, § 10. See the Theodosian Code, 
Lib. III. Tit. VII. De secundis Nuptiis, Leg. II. 
With Godfrey’s Comment on that Law, Vol. I. 
p. 238.

8 De Cyri Instruct. Lib. II. Cap. III. § 5. Edit. 
Octav. 

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

10 The same Observation is made by Martial, 
III. Epigr. 18. v. 2.

Vindulique incerti fratre pravis ad poemum.

Porphyry says, that Every Animal knows which 
Part of him is weak, and which strong: That he 
takes Care of the former, and makes use of the lat-
ter, as the Panther of his Teeth, the Lion of his 
Claws and Teeth, the Hors of his Hoofs, and the 

263. Ed. Engd. 1620. Irrational Animals, says 
St. Chrysostom, carry their Arms on their Bo-
ties, thus the Os has his Horns, the wild Bear his 
Tusks, the Lion his Claws: But GOD has given 
me Arms different from my Body, to show that Man 
is a tame and feeble Creature, and that I am not 
used to employ those Arms at all Times; for sometimes I 
quit my Dart, and at others I handle it: That I 
might therefore be free from Incurability, and not 
be obliged to carry my Arms always with me, he has 
made them separate from my Nature. De Genes, 
Horn. XI. This Passage agrees with that quoted 
from Galen in the Text. Grotius.

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

12 As the Body of Man is formed in such a Manner, 
that he cannot, like other Animals, provide for 
his own Defence and Security, by Horns, Teeth, or 
Fights; Nature has given him a strong Breast, and 
Arms, that he might defend himself with his Hands, 
and by protecting his Body as a Shield. Cassel-
dorf, De Animis, p. 296. Edit. Paris. Grot-
ius.


14 See Pufendorf, B. II. Chap. V. § 1.

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

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

Armique in armatus sumere jura sumunt.

II. Proved by History.

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

II. What I have said already, that every War is not repugnant to the Law of Nature, may be further proved from sacred History. For when Abraham, with the Affiintice of his hired Servants and Confederates, had vanquished the four Kings which had plundered Sodom, GOD was pleased, by his Prieft Melchisedech, to approve of his Action; for thus said Melchisedech to him, Blessed be the most high GOD, who hath delivered thine Enemies into thine Hand, Gen. xiv. 20. Yet had Abramam, (as appears from the History) taken up Arms without any special Warrant from GOD, but moved thereunto by the Law of Nature, being a Man not only very holy, but also very wise, as is testified of him even by Strangers, as 2 Berjias and 3 Orpheus. I shall not instance in the seven Nations, whom GOD delivered up to be destroyed by the Israelites, because they had a special Commission from GOD to execute this Judgment upon them, for their notorious Atrocities. Wherefore those Wars in Holy Writ are called, in a literal Sense, Battles of the 3 LORD, as being undertaken by the Command of GOD, and not the Will of

15 De Offic. Lib. III. Cap. V.
16 De Offic. Lib. I. Cap. XI.
17 Epift. ad Familt. Lib. XII. Ep. III.
18 Digest. Lib. XLIII. Tit. XVI. De vi & de vi armata. Leg. I. § 27.
19 De Aeterna, Lib. III. v. 492.

3 Our Author found the Expressiion in this Sense, in 1 Sam. xvii. 47, where David says to Goliath, All this Assembly shall know that the LORD saith not with Sword and Spear, for the War (Battle, E. B.) is the LORD's, and he will give you into our Hands. But it is more natural to understand by these Words, The War is the LORD's, that the Success of the War depends on GOD; as Mr. L. E. CLERC explains them. Nor does our Author produce any other Paffage to the same Purpofe; he even gives a different Explication, at the Cufp of this Paragraph, to a Text which at first Sigh might seem proper to be alluded to in this Place. He was thinking of the Rubbinian Distinction between commanded and voluntary Wars. On which fee CURTUS, De Rep. Hils. Lib. II. Chap. XIX. SCHICKARD, De Jure Regii, Cap. V. and STEDEN, De Jure Nat. et Gent. &c. Lib. VI. Cap. XII.
Man. It is more to our Purpose to remark, that the Israelites, under the Conduct of Moses and Jephtha, having by Force of Arms repelled the Amalekites, who attacked them, Exod. xvii. GOD approved the Conduct of his People, tho' he had given no Orders upon that Head before the Action.

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

III. What we have here proved from Holy Writ, may be also confirmed, by the Consent of all, or at least the wisest Nations. Every Body knows that nice Passages of Cicero, where treating of the Right of recurring to Force, in defence of one's Life, he renders this Testimony to Nature, 1 This (says he) is not a written, but a Law born with us, which we have not learned, received, or read, but taken and drawn from Nature itself; a Law to which we have not been formed, but for which we are made; in which we have not been instructed, but with which we are imbued, that if our Lives be brought into Danger by Force or Fraud, either by Robbers or Enemies, all Means that we can use for our Preservation, are 2 fair and beneficial. And again, This, Reason has taught the Intelligent, Necessity the Barbarians, Customs the Nations, and Nature herself the wild Beasts, at all Times to resist by any Means whatsoever, all Forces or Violence offered to our Bodies, our Members, or our Lives. Caius the Lawyer says, 3 Natural Reason allows us to defend ourselves against Danger. And Florentinus the Lawyer, that 4 It is but just, that whatever any one does in defence of his Body, should be held lawfully done. 5 Jephthas observes, That it is a Law of Nature, fixed in all living Creatures, to be dearful of Life; and that we therefore look on them as our Enemies, who would openly deprive us of it.

This Principle is founded on Reasons of Equity, so evident, that even in Beasts, which (as I said before) are not susceptible of Right, but have only some flight Reflembance of it, we distinguish between the Attack and the Defence. When Ulysses 6 had said, that An Animal 7 without Knowledge, that is, without the Use of Reason, is incapable of doing Wrong, he immediately adds, When two Rams, or two Bulls fight, and one kills the other, it must be considered, (according to Lu-
Of the Rights of

I.

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

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


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

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

5 Lit. XLI. Chap. XII.

5 Digest. Lib. I. Tit. I. De just. & Jure. Leg. V.

2 Cornelius Nepos, in his Life of Themistocles, says, that General freely owned to the Lacedemonians, that the Athenians had, by his Advice, fortified their Temples and Houses with Walls, in order to defend them more effectually against the Enemy; an Action allowable by the common Law of Nations. Viz. Them. Cap. VII. num. 4. Ed. Collect. Grotius.

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

6 Lit. XLI. Chap. XII.


8 from which it appears, that Florentin, in this Law, spoke of what our Author terms the Law of Nature, whether the Question concerns the Law of Nature or the Law of Nations, in the Manner used by the antient Lawyers in explaining that Distinction. The same is to be said of Law V. of the same Title, quoted by our Author, as the first, Note 1. for when the Lawyers refer War to the Law of Nations, they only mean, that whereas the natural Instinct, common to all living Creatures, prompts Man to defend himself in the best manner he can; Reason, which is the Principle and Rule of the Law of Nations, forbids them to make War, even in their own Defence, without a just Cause, and directs them to keep within certain Bounds. See Cujas on the Laws in Quel. Vol. VII. p. 25, 29, &c. Ed. Frobst.


9 This is the same Passage as that quoted by our Author, B. III. Chap. VI. § 27. in his Notes on Pliny, Hist. Nat. Lib. VII. 150.
Chap. II. 

WAR AND PEACE.

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

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

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

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

Kalos ἡ τήνος, &c.

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

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

But

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


5 Contactum as communiun. The Author here alludes to the Defilement or Uncleanliness, which the Antients thought was contrived by touching a Man who had killed another, even innocently or lawfully. See Potenдорff, B. II. Cap. V. § 10. Note 2. And Elian, Vet. Hist. Lib. VIII. Cap. V. with the late Mr. Perizonius's 4th Note; as also Everihard Fith, Antig. Homic. Lib. I. Cap. VI. But these Confused and Obscure Ideas were not being in Cain's Time.


7 Orestes, v. 511, &c.

* In Lib. III. De Bell. Pelopon. § 45. Edit. Oxen. Servius, on B. of Virgil's Aenid. v. 1136, 140, observes that All the Punishments inflicted by the Antients were pacific; which he concludes from the Pharis Lebre commissus, used in that Place. The same Inference is drawn from those of Scesus expenditure, which occurs II. Lib. x. 229. and Pompæa pamus, B. VI. v. 20, alluding to the Practice of those early Times, when Money was delivered by Weigh. Pliny tells us, that The first capital Sentence was passed in the Asopog. Hist. Nat. Lib. VII. Cap. LVI. p. 478. Edit. Hack.

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

8 Or rather, he had not been guilty of such a Crime; but promised himself Impunity, on the Supposition of his committing it hereafter: For
But as before the Flood, in the Times of the Giants, Murders were very frequent and common; that the same Licentiousnes might not become customary, after the Restoration of Mankind, GOD was pleased to restrain it by more rigorous and effectual Means. Having then abolished the Indulgence of former Ages, he put Men in Possession of their natural Right; he expressly permitted what Nature dictated not to be unjust, and declared every Peron innocent that killed a Murderer. When Civil Tribunals were erected, that Permission, for very strong Reasons, was transferred solely to the Judges; yet so, that some Track of that antient Custom was to be seen, in the Right granted to him that was next of Kin to the Peron killed, even after the Law of Mofes; of which 18 I shall treat more largely hereafter.

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

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

Hither we may refer that antient Tradition among the Hebrews, that GOD gave more Laws to the Sons of Noah, which were not all recorded by Mofes, as thinking it enough to include them, afterwards in the peculiar Laws of the Hebrews. Thus it is plain from Levit. xviii. that there was an 16 antient Law against incestuous Marriages, tho' not mentioned by Mofes in its proper Place. Among those Commands of GOD to the Sons of Noah, they say 14 this was one, that not only Murderers, but also Adulterers, Incests, and Rapines should be punished with Death, which the Words of Job seem to confirm; and even the Law of Mofes gives Reasons for these capital Punishments, 13 which Reasons suit no Lees with other Nations, than with the Hebrews themselves; and particularly it is said of Murder, that the Land cannot be cleaned but by the Blood of the Slayer. Besides, it would be absurd to think, that whilst the Jews were allowed to secure their publick and private Safety by capital Punishments, and to defend themselves by War, all other Nations and Powers should be denied the same Privilege; and yet that the Prophets should never have intimated to those Nations and Powers, that GOD condemned every Kind of War, and all Use of the Sword of Justice, as they frequently admonished them of other Sorts of Sins which they were guilty of.

the Words of Moses will admit of that Sense.

Grotius.

It does not fully appear that Lamech promised himself Impunity, by Virtue of GOD's Prohibition in relation to Cain, when he said, Gen. iv. 25. 24. I shall pay, (I have slain) a Man to my wounding, and a young Man to my heart. If Cain shall be avenged sevenfold, truly Lamech seventy and seven-fold. I think it much more probable, that this Speech of Lamech is a mere Redomontado, and a Boast of his Strength, by which he imagined himself able to take a Revenge for the least Injuries done to him, more extensive than the Punishment with which those who should kill Cain were threaten'd. On considering Mr. Le Clerc's Comment on the Place, this will appear the most natural Explication of the Words; so that they are of no Use towards establishing the Consequence our Author would draw from them. It is sufficient for his Purpose, that nothing can be inferred from them in favour of the Opinion he opposes, concerning GOD's Prohibition in relation to Cain; for even supposing that Prohibition extended to all other Cales of the like Nature, it was founded on a manifest Reason, on the Cessation of which, that is, on the Multiplication of Mankind, the Prohibition vanished of itself.


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

Nay,
War and Peace

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

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

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

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

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


15 An ancient Lawyer has drawn a Comparison between the Laws of Moses and the Roman Law, under this Title, Oscilla Minutiorum & Romanae Legum. Peter Pithou published that Work for the first Time, at Paris, in 1572; of which we have lately been presented with a beautiful Edition, in the Jurisprudentia Ante-Substantiace, by Mr. Schulting, a learned Professor of Law at Leyden.

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

2 This Inference is not altogether just. The Law of Nature, rightly understood, requires us in certain Cases to facrifice our Lives for others, when a considerable Advantage may result from such an Action to the Publick. Thus we find the wife Pagans thought it their Duty to die for their Country. The Christian Religion therefore, only furnishes us with much more powerful Motives for the Practice of this Duty, by proposing the certain Hope of a Life to come, which will make us ample Amends for the Loss of the present. It is the Will of JESUS CHRIST, that we suffer Death for the Gospel; but this is no more than an Extention or Application of the Law of Nature, because nothing is more advantageous to Society, than a sincere and judicious Profission of the Christian Religion, and consequently, than the courageous Resolution of such as shall sacrifice their Lives for the Interest of its holy Doctrines.

3 Epistl. ad Zenam. We meet with a like Thought in Origens Philalethea. Grotius.

4 The famous Rabbi Abarbanel, on Deut. xxiii. 21. says, the Law allowed the Jews to hate those People. Grotius.

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

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

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

But how? He explains this in another Place: He is the Minifter of GOD to thee for Good; if thou do ill, be afraid, for he heapeth not the Sword in vain; for he is GOD's Minifter, an Avenger to execute Wrath upon them that do Evil. Under the Right of the Sword, is figuratively comprehended every Sort of Punishing.
ment, as that Expression is also taken, sometimes among the Lawyers; but yet to, that the true and effectual Use of the Sword, which is the principal Part, be not excluded. The second Pfalm may not a little help to explain this Place, which Pfalm, tho' it was really verified in the Perfom of David, yet does it more fully and perfectly relate to CHRIST, as we may learn from Acts iv. 25. xiii. 33. and Heb. v. 5. Now that Pfalm advieth all Kings to kill the Son with Reverence, that is, to shew themselves his Servants as Kings, as St. Anfhin rightly expounds it, whose Words relating to this Subject I shall here set down. 6 In this Kings ferve GOD, according to the Divine Command, as they are Kings, when they promote Virtue, and disapprove Wickednes in their Kingdom, not only in Things that have Relation to human Society, but also in what regards Religion. And in another Place, 7 How then do Kings ferve the LORD in Fear, unlefs by prohibiting, and punishing with a religious Severity, all Transgressions of the Commandments of the LORD? For he ferves GOD one Way as a Man, and another as a King. And a little after, Herein Kings ferve GOD as Kings, when they do for his Service what they could not perform unlefs they were Kings.

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

Neither does it prejudice our Argument, that the Sovereign Powers, at the Time when St. Paul wrote this, were not Christians. For first, this is not universally true; fince Soganus Panitis, Vice-Prætor of Cyprus, had long before profefled the Christian Faith; to fay nothing of what is reported of the 9 King of Edofia, perhaps intermixt with fome Fables, but which seems to be founded on fome Truth. Besides, the Question is not about the Perfons, whether they were Christians or Infidels; but whether that Function, exercized by Infidels, contained in it any Thing contrary to Piety; which we fay the Apostle denies, where he fays it is or-

3 See Mr. Noon's Tractate, De Jurisdictione & Importa, Lib. I. Cap. IV.

4 The Lawyers ufually make this Diffinction between the Right of the Sword, and the Power of punishing Criminals without putting them to Death: Thus, for Example, they fay, No Man can transfer to another the Power of the Sword which is given him, or that of infifting any other Punishment. Digest. Lib. I. Tit. XVII. De Divinis Reg. Ju- ris. Leg. LXX.

5 Though this Proof, and feveral others which follow, have a direct Tendency to prove only that Princes and Magistrates, even under the Gospel Dispensation, may, and ought to punish certain Crimes with Death; yet they are to his Purpose, not only for the Reafon given at the End of Num. 10. of this Paragraph; but also for another more Strong and direct, which he ought not to have omitted, viz. Because there can be no plausible Foundation for condemning War absolutely, but on a Suppofition, that the Right of taking away a Man's Life, efpecially of that a Man's Life of some temporal Advantage, is incompatible with Christian Clemency. Now, if a Prince may and ought to put any of his Subjects to Death, when guilty of certain Crimes, which are sometimes prejudicial only in regard to some temporal Interest, Why may he not innocently take Arms against Strangers? Why should be be more tender of the Lives of Strangers than of those of his own Subjects? See what our Author says farther on capital Punishments. B. II. Chap. XX. § 12, 13.

6 Contra Grefion. Grammatic. Lib. III. Cap. LI.

7 Ad Bonif. Ep. L.

8 In order to complete our Author's Argument, we muft add what he himfelf fays afterwards, that the Sovereign Power in itself, and according to the Practice of all Nations, includes the Right of making War, and that of punishing certain Crimes with Death. See my 9th Note on this Paragraph.

9 Edofia is a City in Oronius; and the Name of Argarna very common in that Country, as appears from several Medals, from Tacitus, Ap- plan, and from the Fragments of Dio Capito- linus, lately published. (Excerpt. Varo. p. 476.) as well as from Pieces which have been long ex- ecuted. Grotius.

This Story of Argarna's Epistle to JESUS CHRIST, and our Lord's Answer, both produced by Eusebius, Hist. Eccl. Lib. I. Cap. XIII. is no better than a mere Fable. See Mr. Du-Pin's Preliminary, Ditertation on the Bible. B. II. Chap. VI. § 2.

K.
of the Rights of

Book I.

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

_3._ The third Argument is taken from 11 the Words of St. _John_ the Baptist, who being asked by the _Jewish_ Soldiers, (many thousands of whom served the Romans, as appears from Josephus, and other Writers) _What they should do to flee from the Wrath to come_, he did not bid them quit their Military Employment, which he ought to have done, if it had been GOD'S Will, but only to abstain from Extortion and Falsely, and to be content with their Pay. But to these Words of the Baptist, which plainly allow of a Military Life, many object, that what the Baptist preferred, did differ so much from what our Saviour commanded, that he seemed to preach one Doctrine and CHRIST another. But this I cannot agree to. For both _John_ and our Saviour declare the Sum of their Doctrine, in the same Terms, _Reign ye, for the Kingdom of Heaven is at hand_. And CHRIST himself says, the Kingdom of Heaven, (that is, the new Law, for the _Hebrews_ used to call their Law by the Name of Kingdom) began to suffer Violence from the Days of _John_ the Baptist. _John_ is said to preach the Baptism of Repentance for the Remission of Sins; so are the Apostles said to do in the Name of CHRIST. _John_ required Fruits meet for Repentance, and threatens Damnation to those that did not bring them forth. He also requires Works of Charity above the Law. The Law is said to continue unto _John_; that is, from him a more perfect Law did begin. And the Beginning of the Gospel is reckoned from _John_. _John_ is called greater than the Prophets, because he was sent to give Knowledge of Salvation to the People, and to preach the Gospel: Neither does _John_ ever distinguish JESUS from himself by any Difference of Doctrine, (tho' what _John_ declared more generally and indefinitely, and by Way of Elements, CHRIST, the true Light, delivered clearly and distinctly) but only by this, that JESUS was the promised Messiah, that is, a spiritual and heavenly King, who should give the Power of the HOLY GHOST to those that believed on him.

_4._ The fourth Argument is this, which seems to me of no small Weight. If it were not permitted to punish certain Criminals with Death, nor to defend the Subject by Arms against Highwaymen and Pyrates, there would of Necessity follow a terrible Inundation of Crimes, and a Deluge of Evils 12; since even now that Tribunals are erected, it is very difficult to restrain the Boldness of profligate Perfons. Wherefore if it had been the Design of CHRIST to have introduced a new Kind of Regulation, as was never heard of before, he would certainly have declared in most distinct and plain Words, that none should pronounce Sentence of Death against a Malefactor, or carry Arms in Defence of one's Country, which we no where read that he did; for what is brought to this Purpofe, is either very general or obscure. But Equity itfelf, and common Sense, teaches us to restrain Words that are general, and favourably to explain thofe that are ambiguous, and even to recede somewhat from the Propriety and common Acceptation of the Words, in

10. St. Chrysostom makes this very plain in his Observations on this Text. Grotius.

11. Teemar, in his Notes, quotes two Passages from St. Augustine, where he employs this Example to shew that War is not absolutely condemned by the Gospel. In the first he reasons thus, If all Wars were condemned by the Christian Doctrine, the Soldiers in the Gospel, when they asked Advice, for the Security of their Salvation, would rather have been commanded to lay down their Arms, and entirely renounce their Profession; whereas it is only said, Do Violence to no Man, neither accuse any falsely, and be content with your Pay. Now when they are commanded to be content with their Pay, they are not forbid to continue in the military Profession. Epift. V. The other Passage is taken from his CV. Epiftile, where that Father reasons from the Example of David, and the two Centuries.

12. St. Chrysostom says, that To this End Tribunals were erected, Laws made, Punishments appointed, and various Kinds of Penalties enjoined. Serv. ad Patrem fidel. Grotius.
W A R  a n d  P E A C E.

order to avoid that Senfe which may bring along with it the greatest Inconve-
niencies 13.  
5. The fifth Argument may be this, that it cannot by any good Reason be
proved, that the Laws of Mofes, which regarded the Punishments of Crimes,
were abolished, till the City of J e r u s a l e m was destroyed, and with it the Form
of the State, without any Hope of re-establishment. For neither is there in the
Law of Mofes any Term fixt to that Law; neither does CH R I S T or his Apostles
ever speak of the abolishing of that Law, unless so far as it may seem compre-
hended (as I said) in the Destruction of the J e w i s h Government. Nay, on the
contrary, St. Paul says, that the High Prieff (at that Time) was appointed to
judge according to the Law of Mofes. And CH R I S T himself in the Preface to
his Precepts, said, that he came not to destroy the Law, but to fulfil it; which is
easily underftood to refer to the ceremonial Part; for the Lines of a rough Draught
are compleated, when the Picture appears in all its Perfection. But as to the J u-
daical Law, how can it be true, if CH R I S T, as some imagine, abolished it at
his Coming? And if the Obligation of that Law continued as long as the J e w i s h
State subsifted, it follows, that the J e w s, even fuch as turned Christians, if 14 they
were called to the Magiftracy, could not avoid it, nor judge 15 otherwife than M o-
fe had prefcribed.

Having thoroughly consider'd all Things, I cannot indeed find the leaft Reaon,
why any pious Man, that heard our Saviour pronounce those Words, should take
them in any other Senfe. I own, that before the Time of the Gofpel, fome Things
were tolerated (either as to outward Impunity, or even in regard to Confiience,
which I have not now Occasion or Leifure strictly to examine) which CH R I S T
did not allow to his Followers; as, for Infance, to put away a Wife for every
Offence, and a Perfon injured to feck Reparation by Cure of Law: But tho' be-
 tween CH R I S T's Precepts and fome Perfcriptions, there is a certain Difference,
yet there is no Contradiction: For he that keeps his Wife, and he that parts with
his Right of taking Vengeance, does nothing contrary to the Law, but acts moft
agreeably to 16 the Intention of the Law. It is quite otherwise in a Judge, whom
the Law does not allow, but command, to punish a Murderer with Death; and
if he neglects it, he fhall be guilty before G O D. If CH R I S T had forbid fuch a

13 To which add, that if the Gofpel absolutely condemned War and capital Punishments, fuch
Christians as observed the Precepts of their Religion with the greatest Exactness, would thereby be in-
evitably expos'd to become a Prey to Villains and U f u r p e r s, which is not agreeable to the Goodness
and W i t h o f God.
14 Either there is fome Ominifion in this Place, (tho' all the Edifions agree) or our Author exprefles
himfelf improperly. If the Political Law continued in force, it follows indeed, that the J e w s,
when converted to Christianity, ought, if Magi-
frates, to judge according to thofe Laws; but it
by no Means follows, that they could not on any
Account, or for any Reafon, decline the Magif-
tracy. The Author probably means, that they
cannot decline it merely because the Exercife of it
was attended with the Obligation of paffing Sen-
tence of Death for certain Crimes. I find nothing,
at leaft in the Books of the Old Testament, from
whence it can be inferred, that every one called to
the Magiftracy was obliged to accept of that Charge.
The J e w s acknowledged no fuch Obligation, as ap-
ppears from a Paffage of the Talmud, quoted by
Buxtori, in his Floril. Hebraic. p. 151, where
it is faid, that the ancient Sages declined publick
Offices, and excuf'd themselves from undertaking
the Station of a Judge, 'till they faw none elfe
would accept of it; and that even then they did not
take Place in the Council, but at the earnft In-
terfay of the People and Elders.
15 The J e w s, however in our Saviour's Time,
had not the Power of Life and Death, but were
under a Neceffity of obtaining the Roman Gover-
nor's Permiilion for executing a Criminal. See
our Author's Commentary on Matt. v. 22, and
on John viii. 11. So that they only declared, ac-
cording to their Law, each or fuch a Perfon guilty
of a capital Crime; which fuppos'd, however, that
J E S U S CH R I S T had not abolifhed the political
Law, and, confequently, is fufficient for our Au-
thor's Purpofe, whatever that panifhing and injudi-
cious Divine Omnifcer may lay.
16 For, besides that every one may renounce the
Benefit of a Law, without doing any Thing con-
trary to that Law; the Defign of that Law which
allowed of Divorces, was not to put Men on dif-
mifing their Wives, but to provide for the Securi-
ty of the Wife, who would have been expos'd to
very bad Treatment, among fuch a People as the
J e w s were, if a H u f b a n d had not been at Liberty
to difmit her when the became disagreeable to him.
So that the Intent of the Legiflator was to prevent
the greater Inconvenience; and nothing would have
been more pleafing to him than to fee H u f b a n d s
keep their Wives, while they gave no juft Cause
for a Separation. This is what the Spirit or nobler
Part of the Law required, tho' that Part was leaft
fituated by the Generality of the J e w s. The fame
would to he faid of the Law of the Satisfaction allowed
w J 11 the Injured, for hindering private Perfons from
doing themselves Justice by violent Means, to which
the J e w s were strongly inclined.
Perfon to put a Murderer to Death, he would have ordered, something directly contrary to the Law, he would have abolished the Law.

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

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

8. The eighth Argument is drawn from the Conduc't 17 of St. Paul, when he understood that the Jews lay in Wait for him; he immediately acquainted the Commander of the Roman Garrison with it, and when the Commander had fent Soldiers to convoy him safe to Caerfaren, he did not refufe it, neither did he in the leaft intimate, either to the commanding Officer or the Soldiers, that it was dif-pleasing to GOD to repel Force with Force; and yet this is that St. Paul, who neglected no Opportunity himfelf, of warning Men of their Duty, or to blame the Neglect in others. 2 Tim. iv. 2.

9. The ninth Argument is, becaufe the proper End of any Thing that is honest and obligatory, must alfo be honest and obligatory: To pay Tribute is honest; and alfo a Precept obliging the Conffience, as St. Paul expreffes it; and the End of Tribute is, 18 to enable the Sovereign Powers to protect the Good, and restrain the Wicked. 19 Tacitus speaks appofitely to this Purpofe, Nations can have no Peace without Arms, no Arms without Pay, and no Pay without Taxes. To which agrees that of St. Austin. 20 For this Caufe we pay Tribute, that Soldiers may have Money to buy them Nefceffaries.

17 The Council of African makes use of this Paffage, to justify the Resolution of imploiring the Allifiance of the Powerfull against the Factious; Against whose Fury we may call for such Defence as is not unlawful, or defiroy'd by the Scripture; since the Aposthe Paul, as we read in the Book of Acts, secured himfelf against a Conspiracy of fac- tious Men by a military Force. And St. Augus- tin frequently urges this Example, as in his Lib. Epifile to Bonifacius, and in CLIVth. to Publilia, where he fays, that If the Soldiers, who guarded St. Paul, had fallen on his fettious Enemies, the Apostle would not have thought himfelf guilty of the Effuflion of their Blood. And Epift. CLIXV. he obferves, that St. Paul took care to provide himfelf with a strong Guard for his Defence. Gro- tius.

The fecond of thefe Paffages of St. Augustin may be found in the Canon Law, Conf. XXIII. Quæft. V. Con. VIII.

18 Tributum autem facin or, &c. The Defign of raising Taxes is, &c. Here fome Commenta- tors charge our Author with advancing an incon- clusive Reafon; for, fay they, Taxes are raised, not only for supporting War, but also for defraying fe- veral other neceffary Expenfes in Time of Peace. This is certain, nor does our Author himfelf deny it, or fay it is the only Defign of impofing Taxes. It is fufficient that this is one, and even one of the moft coniderable Ends propofed. Mr. Barbe- rae therefore tranflates the Words thus, Minist er aufti qui tef de ces faires de charges impofees aux Œuvres? Ne eft pas, entre autres, que les Pouffci- ences ayent de quoi fournir aux Dépendans, &c. But with what View are fuch Burthens laid on the Sub- ject? Is it not, among other Considerations, that the Powers may have wherewithal to defray the Expen- ces, &c. To which he adds, that this Verfoon, made conformably to the Author's Thought, leaves no Room for Criticism; and that Mr. Vand- er Mullen has done Justice to the Author in this Place.

19 The Hiftorian puts this Speech in the Mouth of Petilius Cerialis, Hist. Lib. IV. Cap. LXXIV. Num. 2.

20 Contra Fanft. Lib. XXII. Cap. LXXIV. p. 299. Tom. VI. Edit. Eras. Bafii. 1518. This Paffage (in which our Author writes proper neceffi- faria militis, instead of proper kella secundaria militis, as the Words stand in the Edition here specifed, which probably he used) is quoted in the Canon Law, Conf. XXIII. Quæft. I. Con. IV. but not exactly in the fame Terms, and among some short Extracts of what goes before, or folowas.
Chap. II.  
WAR AND PEACE.  

37  

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

11. The eleventh Argument is, that in the Revelation of St. John, some Wars of the Righteous are foretold, with manifest Approbation, Chap. xviii. 6, and elsewhere.

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

VIII. Let us now fee the Reasons for the contrary Opinion, that the pious Rea-der may more eafily judge which are the moft weighty.

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

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

2. The Author here alludes to a Passage in Ta-itus, relating to Piso, as the learned GRONO-VUS has observed on this Place. Petium armis Rempublicam, utique reus est piffer, utte veniam. Annal. Lib. III. Cap. XIX.

This eleventh Argument occurs both in the first Edition of the Work before us, and in that of 1652, which the Author affirms he had carefully revised. I make this Observation, because it is omitted in several Editions, which was probably the Printer's Fault, who skipped over two Lines, being misled by the Resemblance of the Words Undecimum and Duaeclima. This Article was wanting in the Edition of 1642, the last published in the Author's Life Time; but it had been reformed before my Edition appeared. 

VIII. (1) St. CHRYSOSTOM explains this Pro- phecy of the universal Peace established by the Foundation of the Roman Empire at the Time of our Saviour's Birth. It is forstid, says that Father, not only that this Religion shall be well established, and immovable, but also that it shall bring much Peace on the Earth; that the several Jurisdictions and Monarchies shall be destroyed, and that there shall be one Kingdom raised above all the others, the greatest Part of which shall enjoy Peace in a more per- fect Manner than before: For formerly deftrucfors and Orators bore Arms, and went to the War. But since the Coming of CHRIST, that Paffice has been abolished, and military Employments are confined to a particular Rank of Men. 'Dificoura on the Divi- nity of CHRIST. We have already the fame Ex- planation in EUSEB. De Prap. Evang. Lib. I. Cap. X. p. 8. Edit. Rob. Steph. GROTIUS.

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

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

2. The second Argument brought to defend their Opinion is out of those Words, You have heard it has been said, an Eye for an Eye, and a Tooth for a Tooth; but I say unto you, ye shall not fay so. Which answers to the Greek Word ὑπερὰνων him that injures thee; but if any Man strike thee on the one Cheek, turn to him the other alfo. From hence fome infer, that no Injury is to be repelled or revenged, either publicky or privately; but this the Words do not imply; for CHRIST does not here speake to Magistrates, but to thofe that are injured; nor of all injuries neither, but of fuch as are more, as a Box on the Ear, for the Words following limit thofe that go before, however general they may at first appear. So in the following Precept, If any Man will fay thee at the Law, and take away thy Coat, let him have thy Cloak alfo. Our Saviour does not forbid absolutely to have Recourfe to Law, or to take Arbitrators in order to decide a Difference. This is evident from the Interpretation of St. Paul, who does not prohibit every Kind of Law-Suit, but only would have Christians not go to Law with one another before the Heathen,

5 St. Cyprian explains the Text thus, JESUS CHRIST commands you, not to demand the Re-stitution of what is taken from you. De Paientia. And St. Irenæus fays, that our Lord here commands us, not to be f CORSEREL Men who cannot hear to be defrauded; but to be cheerful, as if we had freely given what is taken from us. And if any Man shall compel thee to go a Mile, go with him too. That is, fays the fame Father, that you fhould follow him like a Slave, but go before him like a Freeman. Lib. IV. Cap. XXVI. Libanius, who had read the Gospels, commends those who did not go to Law for the Recovery of a Coat or a Cloak, Orat. de Gnodid比赛中 Revers. St. Jerom fays, that When any Man would take us, and take away our Coat by ftritious Cashion, the Gofpel directs us to grant him our Cloak alfo. Dialog. I. Adv. Pelag. Tom. II. p. 374. Editt. Bohf. Grotius.

The Paffage of St. Cyprian, here quoted by our Author, is in his Treatise De Eo Paternae, p. 216. Lib. VII. Fell. Brum. But it does not fully appear, that that Father defigned it as an Explanation of the Words of the Gofpel that follow.
and that from the Example of the Jews, amongst whom it was a received Maxim, that  
He that brings the Cause of an Israelite before Strangers, profanes the Name of  
GOD; but CHRIST, to exer=cise our Patience, would not have us dispute for 
Things that may be easily recovered, as a Coat, or a Cloak with a Coat, if one 
rarr a Nique of being deprived of both; nor prosecute our Right according to Law, 
however well founded it may be. Apollonius Tyaneus \(^6\) saith, It was not like a 
Philosopher to sue for a little Money. The Praetor (said Ulpian \(^7\)) does not disapprove 
the Action of a Man, who had rather lose his Substance than be engaged in a Mul-
tiplicity of Law-Suits, for the Recovery of it; for this Asserion to Suits of Law is 
not to be condemned. What Ulpian here lays to be approved of by good Men, is 
what CHRIST himself commands, chusing the Subject of his Precepts from Things 
most honest and commendable: But we cannot justly infer from hence, that a Pa-
rent or Tutor ought not to defend by Law, when he is forced to it, what his 
Child or Pupil cannot subsist without. For a Coat or Cloak is one Thing, and 
one's whole Maintenance another. In Clement's Continuations, it is said of a Chri-
Hian, if \(^8\) he have a Suit depending, Let him endeavour to make it up, \(\therefore\)  
it be somewhat to his Loff. What therefore uses to be said of moral Things in general, 
may be applied here, that they do not constrict in an indivisible Point, but have in 
their way a certain Extension.

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

Our Saviour adds, Give unto him that asks of thee, \(^10\) and from him that would 
borrow of thee, turn not away. If these Words were understood without any Re-
striction, it would indeed be very hard. He that takes not care of his own Family 
is worse than an Infidel, says St. Paul. Let us then follow the Explication of St. 
Paul, the best Interpreter of his Master's Law, who exhorting the Corinthians to 
Charity towards the Poor at Jerusalem, says, Not that others should be eaged and 
you be burlonned; but that by an Equality, \(^11\) your Abundance should supply their 
Wants; that is, (to use Livy's Words on a like Occasion) \(^12\) That out of your Plen-
ity, you may relieve the Necessities of others. As \(^13\) Cyrus did towards his Friends, 
according to Xenophon. Let us nile then the same Equity in explaining the Precept 
we have just now mentioned, viz. Refill not Evil, but if any Man, &c.

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

\(^6\) Vit. Apol. Tyen. Lib. II. Cap. XV. (XXXIX. Edit. Oxon.)

\(^7\) Digest. Lib. IV. Tit. VII. De alienat. judiciis, mutandis causis factis. Leg. IV. § 1. This Law 
considered in itself, does not relate to the Ac-
tion of sacrificing some Part of our Property, ra-
ther than engage in a Suit of Law. The Cafe 
is widely different; for the Perfon here supposed 
to avoid the Multiplication of Law-Suits, is in Posses-
sion of the Goods of another Man, who fees the 
Proprietor disposed to recover them into his own 
Hands. See Mr. Nourse's excellent Commentary 
on the first Part of the Digest. p. 203, 204; for 
I should be too long in this Place, if I undertake 
to give the Grounds of this Explication, which sup-
ports an Acquaintance with the Niceties of the Ro-
man Law.

\(^8\) Lib. I. Cap. XLV.

\(^9\) Cicero recommends making large Abatements of 
our Right, and avoiding Law-Suits and Quar-
rels, even familiars to our own Prosecutors. De Offic. 
Lib. II. Cap. XVIII.

\(^10\) Justin Martyr says, that our Saviour's 
Design in laying down this Precept, is to engage 
\(\therefore\) to the Practice of Patience and Civility to all 
Men, and to avoid Paffion. Apol. II. Groti-
us.

\(^11\) The same Father explains this of that Clear-
fulness with which we ought to divide our Sub-
stance with the Indigent; and the Care we ought 
to take to avoid Offenation in all our Actions. Apol. 
II. And in another Place, communicating our 
Goods to every needy Perfon. St. Cyprian says, 
We are to refuse our Alms to no one. Tertin. Lib. 
III. Cap. I. Grotius.

\(^12\) I will give to the Indigent, says Seneca, but 
so as not to reduce myself to Poverty. De Benef. 
Lib. II. Cap. XV. St. Chrysostom, on the Pac-
fage of the Epistle to the Corinthians here quoted, 
observes, that GOD requires of every one according 
\(\therefore\) to his Abilities only. And to explain himself more 
fully, he adds, That the Apostle commends the Thes-
falonians for giving more than they could afford; but 
not oblige the Achaians to do the same. Gro- 
tius.

\(^13\) Lib. VI. Cap. XV. Num. 9.

\(^14\) Cyroped. Lib. VIII. Cap. II. § 11. Edit. 
Oxon.
Of the Rights of

Book I.

self, not indeed by his own Hand, but by the Law of Retaliation before the Judge; which the Law of the Twelve Tables afterwards established. He that breaks a Limb, let him suffer the like. As CHRIST required of his Disciples a higher Degree of Patience, he was so far from approving this Demand of Revenge in the Person injured, that he does not allow some Injuries to be repelled by Force, or Law. But what Sort of Injuries? Such as might be easily born; not but that it is praiseworthy to suffer even grievous Injuries without demanding Satisfaction; but that he is contented with a more limited Patience: Therefore he propofs the Example in a Box on the Ear, which does not indanger Life, nor maim the Body, but only declares a certain Contempt of us, which diminishes nothing of our Merit. Seneca, in his Book of the Constancy of a wise Man, distinguishes an Injury from an Affront. The former (said he) is by Nature more grievous, the other more light, and is hard to digest only for those that are very delicate; it offends, but does no hurt. Such is the Weakness and Vanity of our Minds, that some Men think nothing more insupportable; thus you will find a Slave, who bad rather be scourged than take a Box of the Ear. And the fame Author in another Place, An Affront is left than an Injury, which we may complain of, rather than revenge; and which the Laws have not judged worthy of any Punishment. So one in Paccius, I can easily bear an Injury, if it be without an Affront. So another in Cæcilius, I can easily bear Misfortune, if not the Result of an Injury done me; and even an Injury, united accompanied with an Affront. And in Democritus, Be a Grief, a free Man, are chiefly when given as a Mark of Contempt. And the fame Seneca a little lower fays, That Grief (arising) from an Affront, is a Pain moved by a Meannefs and Narrownefs of Mind, affected by some disfiguring Action or Word.

Therefore in such a Cafe, CHRIST enjoins Patience; and left any one should object the trite Proverb, By bearing an old Injury you invite a new one; he adds, we should also rather bear a second Injury than repel the first: Because from thence no Hurt comes to us, but what confifts in a false Imagination. To turn the Creek, is a Hebraism for to bear a Thing patiently, as appears from If. l. 6, and Jer. iii. 3. To turn the Face, is used by Tacitus, and Terence in the fame Senec.

3. The third Argument is usually taken from the following Words in St. Matthew, You have heard it has been said, thou shalt love thy Neighbour, and hate thine Enemy;

15 This was not literally a Punishment of Retaliation; for no Criminal was to lose an Eye or a Limb, according to the Law of Moses, which only imposed a Fine on such as wounded any one, if Death did not ensue. An Eye for an Eye, a Tooth for a Tooth, are therefore only proverbial Expressions; the Sense of which is, that every Man should be punifhed by the Judges, according to the Enormity of his Crime. See Mr. Le Clerc on Exod. xxi. 24. and Deut. xix. 21.

16 This Law ordered a strict Retaliation, unless the Criminal could prevail with the Person injured, to come to an Accommodation. See A. Gellius, Næth. Atticus. Lib. xx. Cap. I. and Festus on the Word Talio.


19 In his Polibas.

20 These Words are taken from a Piece intitled Palaedica, and are quoted by Nonius Marcellus, in p. 79. Edit. Paris. as well as thofe of the preceding Note. Gronovius conjectures, that the lafb Words should be read Nif ejus circumfand Consequeret, instead of Nif ejus confat Continuous.


22 De Constanid Sopdrdus, Cap. V.

23 Veterem formis injuriam, invitae novam, This is one of PUBLIUS SYRUS’s Sentences, prefented by AULUS GELLIUS, Næth. Atticus, Lib. xvii. Cap. xiv. It is the 753d in GRUTER’s Collection: On which fee his Notes, published at Leyden in 1708.

24 It is a glorious Virtue, says ST. CHRYSTOS TOM, to give the Offender more than he requires, and exceed the Bounds of his vicious Designs, by the Greatness of our own Patience. In VII. ad Romanos. Grotius.

25 The fame Father fays in another Place, that An Affront either judgt or falls to the Ground, according to the Disposition of those who suffer, not according to the Intention of those who offer it. Orat. I. De Statuus. Grotius.


27 Sa. Qui patet melius, qui bodic ujque ex praed? quid?

Addiph. Att. II. Scen. III. Perf. 7. See also CRITO’s fift Epitile to Aristoc, page 145. Vol. I. His Oration for Sextus Rufius, Ch. xlix. page 205. And again against Verres III. page 32. Ed. Graevii, where the fame Expression is used in the fame Senec.

Enemy;
Chap. II.

War and Peace

41

Enemy: but I say unto you, love your Enemies, bless them that curse you, and pray for them that despitefully use you, and persecute you. There are some who think both capital Punishments and Wars repugnant to this Love and Kindness (to be shown) to our Enemies and Persecutors. But that is candidly answered, if we consider well the Words of the Law of Moses, to which our Lord opposes this Precept. The Hebrews were commanded to love their Neighbour; that is, those of their own Nation; for 50 is the Word Neighbour to be understood, as appears from Lev. xix. by comparing the 17th Verse with the 18th. Nevertheless, the Magistrates were commanded to put to Death Murderers, and other notorious Offenders: Notwithstanding this likewise, the seven Tribes justly made War upon the Tribe of Benjamin for their horrid Crime. So also Doeid, who fought the 99 LORD's Battles, did recover by Arms the Kingdom promised him from Ishcobeth.

But let the Word Neighbour more largely extend to all Men whatsoever; for all are received into common Grace: no People are now condemned by GOD to utter Destruction; yet what was formerly lawful against the Israelites, will still be as lawful against all Men: Since it was then commanded to love them, as it is now to love all Men. But if you urge, that under the Evangelical Law there is required a greater Degree of Love; this may also be granted; provided also it be allowed, that all are not to be 39 equally loved, but a Parent (for Instance) more than a Stranger: Thus also we are to prefer the Good of the Innocent to that of the Guilty, and a publick Good before a private one, by the Law of a well regulated Charity. Now out of Love to the Innocent, arise capital Punishments and pious Wars. See the moral Sentence which is in Prov. xxiv. 11. CHRI\*S Precepts then of loving and promoting the Good of every one, are to be obeyed, unless a greater and juster Love interpose: It is a known Old Saying, 31 that To spare all is as cruel as to spare none. Besides, we are commanded to love our Enemies from the Example of GOD himself, who makes his Sun to rise upon the Wicked; but the same GOD does even in this Life punish some wicked Persons, and will do it very severely in the next. By which at the same Time are solved all the Arguments that use to be drawn from the Meekness that is prescribed to Christians: For the GOD is called gentle, merciful, long-suffering, yet Holy-Writ does every where declare his Wrath against 30 obstinate Sinners, that is, his Design to punish them; and the Magistrate is appointed to be the Minister of this Wrath. Moses is famed for his extraordinary Meekness, yet he punished Offenders, and that capital. We frequently are commanded to imitate the Mildness and Patience of CHRIST; but yet it was CHRIST who 31 grievously punished the rebellious Jews, and will condemn the Wicked at the Day of Judgment for their Crimes. The Apostles imitated their Master's Gentleness, 32 yet they used the Power given them from GOD in the Punishment of heinous Sinners.

38 The Prefbyntr were placed on the Level with the Hebrews in this Particular, and the Laws which prohibited doing an Injury to another, were also extended to those uncircumcised Inhabitants, of whom we have spoken, Chap. I. § 16. This is acknowledged by the Talmudists. Grotius.

29 See § 2. of this Chapter, Num. 3 at the End.

30 Tertullian says, The first Degree of Goodness is that exercised toward Relations; The second, That employed on Strangers. Against Marcin, B. IV. Chap. XVI. St. Jerom having acknowledged himself obliged by the Divine Precepts to love his Enemies, and pray for his Persecutors; asks, Whether it is just that he should love them like his near Relations? and that no Difference should be made between an Enemy and a bosom Friend? Against Pagan. Dial. I. V. II. page 274. Ed. Boh. Grotius.

31 These are SENECA'S Words, Non tam omnis ignorare Crueldatis quam nulli. De Clementia. Lib. I. Cap. VII. St. Chrysostom, speaking of human Punishments, says, These Things are not done by Men out of Cruelty, but out of Passion. In I. ad Cor. iii. 12. &c. And St. Augostin, to the fame Purposes, As there is sometimes a punishing Compaignon, so there is also a tender Cruelty. Ep. LIV. to Macedoniam. The Emperors VALENTINIAN, THEODOSIUS, and ARCADIUS, in the third Law of the Theodosian Code, De defenso\*ribus civitatum, speak thus. Let all Protectors be removed, which by favouring the Guilty, and affisting the Criminal, encourage the Growth of Wicked-ness. (This Law occurs in almost the same Terms, under the same Title, in the Theodosian Code, Leg. VI.) TERTULLIA declared, that To commit a Crimes, and to force the Guilty from Punishment, were Actions equally culpable. Procop. Gothici. Lib. III. Cap. VIII.


33 See likewise Matt. xii. 41. Luke xiv. 14, 27. St. Chrysostom, having enumerated the Calamities which befell Joraphile, adds, And to shew you that CHRIST himself did all this, bear him foretelling it, both in Parables, and in clear and express Terms. In Romans xiv. See also his second Oration against the Jews, where he has something to the fame Purposes. 34 Shall I kill ? Shall I cut off a Limb? For
The fourth Objection is taken from Rom. xii. 17. Render to no Man Evil for Evil: Provide Things meet in the Sight of all Men: If it be possible, as much as lies in you, live peaceably with all Men: Dearly beloved, 35 revenge not your own selves, but rather give Place unto Wrath; for it is written, Vengeance is mine, I will repay, faith the LORD: Therefore, if thine Enemy hunger, feed him; if be a thirsty, give him Drink; for in doing thou shalt heap Coals of Fire upon his Head. Be not overcome of Evil, but overcome Evil with Good. But here also we may give the same Answer as to the former Passage; for when 36 GOD said, Vengeance is mine, I will repay, at the very same Time capital Punishments were in Use, and there were written Laws touching Wars. We find likewise an express Command to do Service to one's Enemies, that is, to those who were of the same Nation; without Prejudice however to the Right of inflicting capital Punishments, even on the Israélites themselves, and taking up Arms against them for just Reasons, as we have said above. Wherefore neither can the same Words now, or the like Precepts, those taken more largely, be wrested to such a Sense; and the less, because the Division of Chapters was not made by the Apostles, or in their Time, but 37 much later, for the Convenience of Readers; and for the more easy quoting of the Places: And therefore, what now begins the thirteenth Chapter, Let every Soul be subject to the higher Powers, and what follows, was formerly joined to those Precepts of not taking Revenge.

But in this Discourse St. Paul says, that the publick Powers are GOD's Ministers, and Revengers to execute Wrath (that is, Punishment) upon those that do Evil: Most plainly distinguishing thereby, between the Revenge that is exercised in GOD's Stead, for the publick Good, and that ought to be referred to the Vengeance which GOD has referred to himself; and that private Revenge which is intended only to satisfy the Resentment of an Injury, and which the Apostle had a little before forbid. For if we would comprehend even that Revenge which is required for the Sake of the publick Good in that Prohibition, What would be more absurd than, when he had bid them abstain from capital Punishments, to add immediately, that the publick Powers were ordained by GOD to this End, to execute Punishment in GOD's Stead?

5. The fifth Place, which some alledge is, Tho' we walk in the Flesh, we do not war after the Flesh; for the Weapons of our Warfare are not carnal, but mighty, through GOD, to the pulling down of strong Haltis, &c. But this Place makes nothing to the Purpose; for both what goes before, and what follows, shews that by the Word Flesh St. Paul there meant the weak State of his Body, as to outward Appearance, upon which Account he was contemned. To this St. Paul opposes his own Weapons, that is, the Power given to him as an Apostle, to punish the Refractory, which he used to Elymas the Sorcerer, the incefuluous Corinthian, Hymenæus, and Alexander. He therefore denies this Power to be carnal, that is, weak; nay, on the contrary, he affirms it to be most strong. What is this to the Right of capital Punishments, or of War? Nay, on the contrary, because the Church at that Time was defitute of the Affirmation of the publick Powers, GOD raised up that miraculous Power for its Defence; which began to cease almost as soon as the Church had Christian Emperors; and the Manna ceased as soon as the Israélites were come into a fruitful Country.

there is a Spirit of Levity, and a Spirit of Severity. Chrysost. 3 Cor. iv. 21. See likewise St. Augustine, De Sermonibus Domini in Monte. Lib. I. and others quoted by Gratian. Cons. XXIII. Quod. VIII. Gratius. 35 The Vulgate reads defendentes in this Place; but that Word is frequently used by Christian Writers for revenging. Tertullian, in his Treatise Of Patience, Chap. X. against Marcian, B. II. Chap. XVIII. The Passage of St. Paul, here under Consideration, is well explained by St. Augustine in the following Manner: We are therefore forbidden to revet Evil, that we may not be delighted with Revenge, which feeds the Mind with the Damage inflamed by others. Ep. CLIV. Gratius.

36 See Levit. xix. 8. and Dent. xxiii. 35. where we have the Sense of the Words.

37 The present Distinction of Chapters is attributed to Hugo de Sanctis Chrys. a Cardinal, who lived in the thirteenth Century; or to others no much earlier. Before that Time there was a much more ancient Division, made towards the Clofe of the fourth Age. See Dr. Miller's Prelegemen, Num, 505, &c. Ed. Kifler. According to that, the twelfth, thirteenth, and fourteenth Chapters in our Editions make but one; as may be seen in the said Doctor's beautiful Edition.

38 St. Chrysostom is of Opinion, that by the fifth Chapter in this Place, are understood Righteous, Glory, Power, Elegance, Abstinence, Integrity, Faith, and Piety. Gratius.
6. The sixth Place produced is, Put on the whole Armour of GOD, that ye may be able to stand against the Wiles of the Devil; for we wrestle not against flesh and Blood, (add only, after the Manner of the Hebrews) but against Principalities, &c. He speaks of that Warfare which Christians have, as Christians, not of that which they may have in common with other Men upon certain Occasions.

7. The seventh Place that is brought is, From whence come Wars and Fightings among you? Come they not hence, even from your Lusts, that war in your Members? For the lusts of War, and desire of other things, do conflict in your Members, to be fulfilled. Why dost thou cast a stone against thy Brother? and why dost thou cast thy Brother out of thee House? because thy Brother is a devil.

And we find it remarked often in Strabo, that those Nations lived most innocently, whose Diet was most simple. What Lucan says is agreeable to this. O profef{s}a Luxury, that is never satisfied with small Provision! Ambitious desire of Dif{fer} every ware searche{r} for, by Sea and by Land! Vain Pomp of splendid Tables! Learn how little is fufficient for Life; how small a Portion Nature is contented with. Rich and poor Wines cannot raise the Sickness; it is not necessary for them to drink out of Gold or Porcelain Cups. It is fair Water that refores Health. A good Fountain, together with Bread, is enough for Men. Wretched Mortals! Why then do they go to War? To which we may add that of Plutarch, in The Contradictions of the Stoics, There is no War among Men, but what arises from Vice; one from the Desire of Pleasures,


Men who live on Milk, and in great Poverty, are remark'd for their Prak{hia} Justin, having told us that the Sophians made a Profession of Def{ting} Gold and Silver as much as other Men idolized them, observes, that The Innocence of their Moral and Freedom from Favour proceeds from this excellent Def{fer}; for, they believe, where the Use of Riches is known, there Contufion is found. B. II. Ch II. Num. 8. &c.

Nichephorus Gregoras fays something like this of the fame People, B. II. The Pagaffe is worth reading. Flutarch, in his Life of A. Leon{dus the Great, p. 698. Vol. I. Edit. Wielchel, introduces Taxiles, an Indian King, speaking thus to that Prince, What Necc{fis} is there of Fighting and Wars between us, if you neither come to deprive us of our Water, nor necessary Food, for which only reasonable Men are obliged to take arms? Diogen{nee} the Philosopher faid, that Barbarers and Warr{iers} were not to be found among {such} as lived on Water-ground. Porphyrey looks on a {simple and cheap} Diet, as what contributes very much towards {establishing Purity, and making it common among Men.}'Of Animals, from Animal Food, B. II. P. 144. Edit. Lugd. 1620. Cruithn.

In the Verfe quoted from Homer, at the Beginning of this Note, Our Author, following the common Explanation, takes 'Aβην̄ον for an Epi{ther}; whereas it is the proper Name of some of the ancient Sophians, as the Author of the short Scholia observes, tho' he has given Occasion to this false In{ter}pretation. Upon confiding STRABO'S Geogra-{phy, B. VII. p. 596.300. Edit. Paris. ARIAN'S Account of Alexander's Expedition. B. IV. Ch. I. Q. CURTIUS, B. VII. Chap. VI. Num. II. And STEPHANUS, De Urbi{bus, under the Word 'Aβην̄ον, it will appear, that the Poet here speaks of the Aibm, as a particular People; and it is surprizing, that MADISON DARGER is the first Translator of Homer, who hath not made a Mif{take} in this Place; for not only WETTEN's small Edition, but also Mr. BARNES's large and beau{tiful Edition, are here conformable to that which had appeared before. In the latter the Primer has omi{nated the whole Greek Scholiwm on the fifth Verfe, which the Editor has not observed, tho' he affures the Publick, he has placed it in latter Or{der} than it ever was in before. The Saying of DIOGENES, which our Author produces, without telling us where he found it, may be seen in POR-PHYRY, B. I. p. 94. I am the more willing to make this Ob{ervation, because this Saying is one of those which have escaped the Enquiries, not only of Mr. STANLEY, in his Philosophical History, written in English; but also those of the late Mr. OLEARIUS, who, when he translated that excellent Piece into Latin, undertook to make the necessary Supplements to it.

42 Pharsal. Lib. IV. v. 473. &c.
43 Page 1049. Vol. II. Edit. Wielchel. This is a very just Observation, but little regarded. It will not be improper to continue it by those other Passages, as beautiful as those already quoted. The Philo{phon} Athenaeus, in a Greek Epigram, Mor-tals, why take you so much Pains for evil Things, and...
Of the Rights of

Book I.

Pleasures, another from Contoujues, and a third from Ambition. 44 Justin commending the Manners of the Scythians, says, It were to be wished that the rest of Mankind might follow the like Moderation, and were as scrupulous of grieving at other Men's Goods and Pleasures. We should not then see so many continual Wars carried on in all Ages, and in all Countries; nor would the Sword carry off greater Numbers than it is now in many of our Days. Adverse Pleasures give Birth to Hatred, Difficulties, Discord, Seditions, and Wars. 45 Maximus Tyrius, All Places are now full of War and Injustice; for irregular Pleasures are every where let loose, and inspire all Mankind with a Desire of adding to their Pleasures. And 47 Iamblichus, For nothing but an excessive Concern for the Body, and the Pleasures which direct making an extravagant Provision for it, are the Causes of Wars, Seditions, and Quarrels, for Men engage in War, for the sake of procuring what is pleasant and advantageous to them. But what was said to St. Peter, All they that take the Sword, shall perish with the Sword; not belonging to War, in its common Acceptation, but properly to the Use of Arms between private Persons, (for CHRIST himself gives this Reason of his forbidding or neglecting his Defence, because His Kingdom was not of this World) shall be treated of in its 42 proper Place.

IX. Whencsoever there is any dispute about the Senec of what is written, the Practice afterwards established, and the Authority of the Judicious, ues to be of great Weight; which is also to be observed in Holy Scripture. For it is not probable, that the Churches, which were founded by the Apostles, should suddenly, or all at once, fall off from the Maxims which the Apostles had briefly given them in Writing, and more largely explained by Word of Mouth, or had even reduced into Practice. But they who condemn all Kind of War without Exception, use

engage in Quarrels and Wars, at the Inigation of an intangible Disire of Gain?

Fabianus Papirus, an ancient Rhetorician, writes thus, We see Armies drawn up in Battel Arrays, where often fellow Citizens and Relations are ready to engage one with another; The Hills in both Sides are covered with Cavalry, and foon after the whole Country is covered with dead Bodies, or Plunderers. Should it be allowed, What forces Man to commit this Crime on Man? Since even the wild Beasts do not make War one with another, and if they did, Would the same Conduct become Man, that peaceable Animal, and most nearly resembling the Divinity? What excessive Rage motivates you, who are one Family, and of the same Blood? Or what Perjury animates you to find one another's Blood? By what Chace, or by what Fatality, has so pernicious a Practice been introduced among Mankind? Must Parricide be committed, with a View of making splendid Entertainments, and adorning Palaces with Gold? Or doubt these Things may be great, and worthy of Commendation, which induce us to admire our sumptuous Tables, and rich Cucines, rather than retain our Innocence, and live in the open Air. Ought we not to desire to embrace the whole World, that we may have it in our Power to indulge our Appetites and Pleasures without Restraint? In fine, Why are pernicious Riches sought for with so much Eagernefs, but with a Design of leaving them to our Children? Seneca, Controv. 2. II. Controv. IX. p. 153. Edit. Elarf. Dubt the Love of Riches, of a Witman, of Glory, or any Thing else that affords Pleasure, prove the Cause of small and common Evils? Doth not this divide the nearest Relations, and convert their natural Affection into irreconcileable Hates? Is it not this that large and populous Countries are reduced to so many Distarts, by damped Seditions? It is not this that daily falls both Sea and Land with new Calamities, by Means of Fleets and Armies? The Wars of the Grecians and Barbarians, either with one another, or among themselves, which are described by the Frugis Writers, are all derived from one Source, the Desire of Riches, Glory, or Pleasures. Philo the fea, on the Caelogus, p. 765. Edit. Parisi. Pliny observes, That The Magnificence of Riches has a Tendency to promote enormous Crises, Destruction, and War. Huit. Natural. Lib. II. Cap. LXIII. The Philosopher Diogenes says, That Tyranny, the Ruin of Cities, foreign and intime Wars, are not owing to a Desire of purchasing a simple Diet of Herbs and Fruits, but to the Follies for exquisite Food and Luxury, of St. Jerome, Ad. Thir. 3. p. 77. Edit. Baff. St. Chrisyotom observes, that If mutual Love was maintained among all Mankind, no one would injure another; Murders, Quarrels, Wars, Seditions, Rapin, infatiable Disorders, and all the Vices, would be banished out of the World. In 1 Cor. xiii. 3. and in another Place, he adds, Are not they (the Rich) the Authors of Seditions, Wars, the Destruction of Cities, Slavery, Captivity, Murder, and an Infinity of other Calamities? Orat. ad Parmen Sedelem.

Claudian says, If Men would be content with the little Nature requires, we should not hear the Sound of the Trumpet, nor be expat to Sieges. In Rufin. Lib. I. v. 206, &c.

Agathias maintains, that The Minds of Men, wholly addicted to Injustice, and infatiable Disorders, fill the World with War and Confusion. Hist. Lib. I. Cap. I. I shall conclude all the fine Passages I have quoted, with a Saying of Polybius, When one knows how to be contented with the Necessaries of Life, one needs no other Philosophy or Mafter. Apul. Suidas. voc. l'Apologia.

44 Liib. II. Cap. II. Num. 2, sc.
45 De Finib. Bau. &c. Lib. I. Cap. XIII.
47 Cap. XIII. p. 142.
48 In the next Chapter, § 5.
to alledge some Passages of the primitive Christians; against which I have three Things to say.

First, That from those Passages nothing else can be gathered, than the private Sentiment of some Persons, not the common Opinion of the Churches. Besides, most of them who are cited, affected to be singular, and to teach something more sublime; such as, for Example, Origen and Tertullian, who are not always consistent with themselves. For the same Origen says, that Bees were given as a Pattern by God, of the just and regular Method that Men ought to take in making War, when there is a Necessity for it. And the very same Tertullian, who in another Place seems to disapprove of capital Punishments, said, No Body denies but it is good to punish the Guilty. And he is at a Stand about Wars; for in his Book Of Idolatry, he says, The Query is, Whether the Faithful may be allowed to take up Arms; and whether military Perjuries may be admitted into the Christian Church? And in that Place, he seems to incline to that Opinion which is against War. But in his Book Of the Soldier's Crown, after he had made some Reflections against War, he preposterously distinguishes between them who were Soldiers before their Baptism, and those who lit themselves after Baptism. Their Condition (says he) is plainly different, who were Soldiers before their Consecration to the Faith; as those whom John admitted to Baptism, or as those most pious Centurions, one of whom CHRIST approved of, and another St. Peter instructed: Provided that having embraced the Faith, and being sealed (by Baptism) they either professedly quit their Employment, as many have done; or be particularly careful that they do nothing to offend GOD. He then was sensible that they continued Soldiers after Baptism, which certainly they would not have done, if they had understood War to have been forbidden by CHRIST; no more than Soothsayers, Magicians, and other Professors of unlawful Arms, were allowed after Baptism to practice their Art. In the same Book, commending a certain Soldier, and him a Christian, he cries out, O Soldier, glorious in GOD!

The second Observation is, That Christians did often disapprove or avoid War, on account of the Circumstances of the Times, which would feare concern the bearing of Arms, without committing some Actions contrary to the Laws of Christianity. In Dolabella's Letter to the Ephesians, which is extant in toto, we find the Jews desire to be exempted from all military Expeditions, because mixt with Strangers, they could not well perform the Rites of their own Law; and because they were forced on the Sabbaths to bear Arms, and make long Marches; and the same Historian tells us, that for the same Reasons the Jews got Leave of Lentulus to

IX. (1) Ρές τι διδάσκει, καὶ τοσοῦτον πολλάκις, καὶ εἰς δείκνυσιν, γιγαντιάς ἐν ἀκόμην. Our Author quotes only their Words, without specifying the Place whence he took them. 2 Bonum efi, quam puiniitur Nocentes, non negat. Thus our Author cites the Passage, but does not tell us in what Treasle it is to be found. It is in the nineteenth Chapter of his Book De Spectaculis, where it is delivered in a more energetic Manner, Bonum efi, quam puiniitur nocentes. Qui hoc nisi Nocentes, negat? Is it good to punish the Guilty. Who, but a Criminal, will deny this? 3 The same Father says elsewhere, that, according to St. Paul, Human Justice does not bear the Sword in vain; and the Severity of Punishment is advantageous to Mankind. De Anim. Cap. XXXII. He adduces himself to the Proculid Speculum, in the following Terms. We do not attempt to terrify you, nor are we afraid of you. But I wish we could save all Men, by expostulating them not to fight against GOD. You may both exercise your Faithfulness, and be mindful of the Duties of Humanity, even in this Confederation, that thou pourestfuls are under the Power of the Sword. Cap. IV. Gro- tius.

7 TERTULLIAN says, Such Perjuries are not received into the Church, as exercise Professions not allowed of by the Laws of GOD. De Idolatria, Cap. V. The primitive Christians admitted neither Profestures, Stage-Players, nor Profesions of any other infamous Professions, to the Sacrifices of the Church, till they had renounced such criminal Engagements. As we learn from St. Augustine, De Fide & Operih. Chap. XVIII. See an Example of this Discipline, in regard to a Comedian, in St. Cyprian, Epif. L.XI. (ad Edit. Oecon.) in regard to the Gladiators, infamous Promoters of Debauchery, and such as traded in Cattle for Sacrifices; in TERTULLIAN, De Idel. Cap. XI. of a Charioteer in the publick Games, in St. August- in, Grotius.

8 De Corde militis, Cap. I. 9 Alexander, the Son of Theodore, deputed from Hyrcanus, High Priest, and Prince of the Jewish Nation, has declared to me, that his Countrymen cannot engage in the Arms; because they are not allowed to bear Arms or March on the Sabbath Day, and will not easily be able to observe the Distinction of Moats, and other Customs belonging to that People. Antiq. Jud. Lib. XIV. Cap. XVII. pag. 493. Ed. Livy.

10 This Account immediately follows the Passage quoted in the last Note.
be discharged; and in another Place he relates, when the Jews were commanded to depart from the City of Rome, some lifted themselves Soldiers, others were punished for refusing to do it in Reverence to the Laws of their Country; namely for the Reafons mentioned before; to which there was sometimes added a third, because they would be obliged to fight against their own Countrymen, but to hear Arms against their Nation was unlawful; that is, when their Countrymen were in danger for preserving the Laws of their own Country. But as often as the Jews could avoid these Inconveniences, they served in the Wars, even under foreign Kings, but yet continuing to observe the Laws of their Country, and to live according to them, which they first flipulated, as Josephus testifies. Very like to these Dangers were tho' which Tartulian objects to the Men of the Sword in his Times; as in his Book of Idolatry, the Oath of Fidelity to GOD, and that to Man, the Banner of CHRIST, and those of the Devil, are things inconsistent with one another: Because the Soldiers were obliged to swear by the Pagan Gods, Jupiter, Mars, and others. In his Book of the Crown of a Soldier, he says, Shall he (a Christian) stand Gentre before the Temples which he has renounced? and shall he join where he is forbidden by the Apostle? Shall he guard those (Demons) by Night, which he has exorcised in the Day? And afterwards, How many other Military Functions are there, which ought to be looked on as Sins? The third Observation is, that the Christians of the Primitive Times aspired with so much Ardor to the highest degree of Perfection, that they often took the divine Counsels for Precepts of an indifpenfable Obligation. Christians (says Athenagoras) do not lie at Law those that rob them. Salviian said it was commanded by CHRIST that we should rather abandon those things that are contefted than engage in a Law Suit. But this taken so generally, seems to be design'd rather as

11 Antiq. Jud. XVIII. Cap. V. 12 This is what Josephus says of Alexander the Great, who proposed their serving him on these Conditions, Antiq. Jud. Lib. XI. Cap. ult. 13 De idolol. Cap. XIX. 14 De Gerard. Milit. Cap. XI. 15 Ibid. 16 Legat. pro Christian. Cap. I. p. 10. Ed. Oxon. 1706. 17 De Gubernat. Der. Lib. III. p. 74. Edit. Paris. 1645. St. Basil. the Grand Pretender that going by Law is expressly forbidden by the Gospel. Hotmil. de Legend. Qenav. Lib. § 7. Edit. Oxon. 1694. 18 Without entering into Theological Disputes, I shall only make some Remarks, which, in my Opinion, will be sufficient for showing how little Grounds there are for what has been formerly and still is said in many Places, concerning those pretended Evangelical Counsels; and at the same Time discovering what gave Occasion to the Distinction between them and Precepts. First, then, I say, if there were any true and divine Counsels, properly so called, they must necessarily relate to such things as on one hand are always commendable, excellent, and in their own Nature agreeable to GOD: And on the other, left entirely to the Liberty of every Man; so that they can in no Cafe be obligatory. Now, upon a careful Examination of the very Examples, here alleged by our Author from the ancient Fathers, which are the most considerable of those made to regard the Evangelical Counsels, it will appear that they turn on things, which either are neither good, nor evil in their own Nature, or are really obligatory in relation to certain Perasons, and in certain Circumstances. 1. Let us begin with second Marriages and Celibacy in general, which our Author elsewhere ranks in this Cafes. B. III. Chap. IV. § 2. num. 1. It is certain that whether a Perfon marry or not, he does neither grow* or decline in that, confidering the thing in itself. As the married State does not necessarily engage to Vice, so

As neither is an unmarried Life an infallible Means for præchting Virtue. A Man may be good or bad in a married State; as he may likewise be either in Celibacy. It is but too evident from Experience that those, who have made a Vow of Celibacy, or laid themselves under the same Tie in regard to a second Marriage, have generally fallen into one of these two Inconveniences, viz. either they have not lived chastly, or have not proved just Subjects to other Nations and Cities very unworthy of a Christian, such as Anger, Covetousness, Hatred, Pride, the Spirit of Domination, Sloth, &c. even though a Man's Confinnation will easily allow him to forego Marriage, if while he lives in Celibacy, he does not for that Reason become more useful to Society, and more capable of discharging his Office, than if he had married. But if one has good Reason to believe he shall be able to employ his Time better, and do the Publicke Service in a single Life (which depends on the Condition and Circumstances of each Person, of which they must judge for themselves) he is then under an indifpenfable Obligation not to marry, supposing he believes himself entirely secure from Temptations of Imprudence; or not to marry a second Time, especially when he may thus make a better Provision for his Family. 2. In regard to forbearing Law Suits, and chusing rather to lose one's Property, than sue the Perfon, who has taken it from us or detains it unjustly; it is a general Maxim, that we are obliged to make some Abatement in our Right, whenever that can be done without great Prejudice to ourselves, or occafioning any other Inconvenience. The Laws and Practice of Prudence equally require such a Ceflion. So that Law-Suits bring commonly to so many pnercious Sources of Harmed, Animadversions, Divisions, Discontent, Perplexities, Expenses, &c. we are to avoid them as much as possible, and expose ourselves to a great many other good natural Consequences, which attend the pursuit of our own quiet Rights. This is not a Counsel, but a real Pre-
War and Peace.

Chap. II.

Ceremony, both the Gospel, and the Law of Nature, especially when certain particular Circumstances dmand such a Moderation. This was the Cafe in the Infancy of Christianity, when, to avoid giving an ill Opinion of that Religion, and its Votaries, it was highly improper for Christians to appear in the Courts of Pagan Judges. See what our Author says, Paragraph 8. of this Chapter, num. 4. But, if no such Inconvenience to ourselves or others is to be apprehended, and some considerable Interest is at Stake, it is so far from being a very commendable Act, quite contrary to the Property to be taken away, or detain'd, that it would even be a bad one; for thus ill-defining Men would be encouraged to do evil; and such a Moderation would be the more blamable, as it might add to the Inconveniences of one's self or one's Friends. So that Patience in the Cafe before us, is either useless or prejudicial; and then it cannot observe Commendation; or it is a real Duty. Almost the same may be said of declining War. Thirdly, when the primitive Christians refused the Edictship or Prenotipity, it was, according to Laws of no Virtue, because those who accepted of those Polites were obliged to exhibit publick Shows for the Entertainment of the People, in which there was some Mixture of Idolatry. But the extravagant Ideas they had of several other things, give us room to believe, that the sentiments of the Church condemn'd all in general, who fought for or accepted of Honours and Dignities. In regard to the thing itself, the Honours in question are either vain Titles and frivolous Distinctions, which fuppofe no Merit in the Persons who receive them; and have no Tendency to promote the Good of Society: Or it is requisite that they, on whom they are conferred, should be poifeld of certain commendable Talents and Qualities, for the worthy Diffcharge of the Functions annexed to them. There is no great Virtue in neglecting or rejecting the former; And as there is great Danger they will inspire us with the Sentiments of Pride, even that ought to be a Reason for avoiding them. In regard to the latter, either the Candidate is poifeld of the Qualifications requisite for acting in a publick Character, or he is not. If not, or even if there are other Candidates who are poifeld of them, in a much greater Degree, he commits a Fault in puruing, or even barely ac- cepting of the Dignities in Question, for which a Man can never be too well qualified. But if one is poifeld of a more proper Qualification, in which one may deceif himself; but also by the im- partial Judgment of understanding Persons, that one is much more capable of acquiring one's self of an honourable Employment, to which one is called, than others who aspire at it, it would be either Sloth or falle Modesty to decline it, and it cannot be reasonably done, but when the Perfon is engaged to do by some stronger Obligation, or knows he has great Reason to apprehend the Influence of Tem- tations to Vanity, which might prompt him to fre- quent the Companionships with which he would be involv'd. Fourthly, Laftancing does not allow a Citizen to trade by Sea. For why should he be to Sea, fays that Father, or what fould he be fiek for in a foreign Country, when his own furnishes him with all Necessities? Lib. V. Cap. XVII. But the Apostle St. JAMES manifestly fuppofes it lawful to go from Coft to Coft for the fakes of Traff- fick and Gain. Chap. iv. v. 13, 14. The thing therefore is in itfelf indifferent; f o that as we may Trade either innocently, or in a manner contrary to foul, whether from trading, trading, and be with a View of avoiding an infaiitable Avidity of Gain, to which a Man finds himself difposed, or some other dangerous Temptation, has nothing in it deferving Commendation. In this Cafe it is no lon- ger a pretended Counsel of extraordinary Perfection, but an indeffinable Obligation incumbent on every Christian. Fifthly, taking an Oath is sometimes in- dispensably neceffary, as when things which regard the Glory GOD, or the Good of Mankind are concerned; or where the Man of God plainly requires it. As to thefe Cafes, where our Interest only is concerned, and where the Definition of Oaths and Precepts might take Place moft, we are to judge of them by the Principles already laid down in regard to Law-Suits. Sixthly, to all these Exam- ples given by Grotius, let us add one alluded by Dr. Hammond, who, as fingularly Ecceflical Antiquity, had likewise adopted the Definition of Oaths and Precepts, as appear from his long Note on Col. ii. 23. It is taken from St. Paul's Generality, in preaching the Gospel without receiving any Salary. 1 Cor. ix. 15. 18. But on a close Examination of the Matter, we fhall find nothing in it relating to a Canfell properly so called. Though the Apostle, in the preceeding paragraphs, had shewn the right and just Tendency to promote the Christian Religion for their own Profit and Advantage: And so far he is to be commended, that we cannot see him in a better light, that he had made use of his Power of Enjoining, in prophetic exhortations, to reward by no other Means for his Conduct, it does not channell that the said Act was entirely free in regard to him, and had no relation to his Duty. He himself clearly gives us to understand the contrary, when he fays, that if he had not made use of his Power, it was that the Gospel might be without Charge. The teaching, that was a Matter of the last Importance, that the first Preachers of the Gospel should carefully avoid all that could give the least Sufpicion of their publishing the Christian Religion for their own Profit and Advantage: And it may be laid in general that all who un- dertake to instruct others in that holy Religion, can never appear too difinterested, or be too humble. Thus, though the Perons to whom the Apoftles preached, could with no fiew of Reason require them to do it without some Salary; and thus, briefly speaking, St. Paul was not obliged to do it; yet as soon as he was perfuaded his Ministry would by that Means prove more efficacious (which probably he had room to conclude from some particular Rea- fons unknown to us, and he feems elsewhere to im- plicate that he had one, 2 Cor. iii. 9, 10, 11, 12, 13;) he lay under a real Obligation to do; an Obligation founded on the general Engagement, which requires every Man to feek and employ all Means neceffary for acquiring himfelf of an impor- tant Charge, in the belt manner he can. And if therefore Cafes Perons make an Abatement of their Right in Favour of thofe with whom they have to do; and therefore a greater Stock of Virtue is requisite for refofing on such a Sacrifice, that barely refusing to take what others have in Regard to their Right, are willing to give more Re- fan to congratulate ourselves on to happy a Difpo- sition, and may expect from the Divine Goodness a more Re- fomp. Besides, the Apothel here confiders the Disinterestednefs, for which he applies himfelf, as a Duty, not as a particular Order from Heaven, or at leat not necessity join'd with the Exercife of the Evangelic Ministry, in Opposition to the Neeffity imposed on him of preaching the Gospel, v. 16. for which he had received an ex- prec Command from our Lord JESUS CHRIST, Acts xvii. 14, 15. See what Grotius himfelf has faid on this Point, in his Notes on Luke xvii. 10. And this leads us to what Occasion to this falf Definition of Precepts and Canfell, which comes now to be conlider'd. The Apotles made use of the Word Canfell when preaching to the Gentiles, to in- dicate that they ought to observe in certain Circum- stances, in regard to things either indifferent in themselves, or concerning which they had neither any particular Order from JESUS CHRIST, nor any general Rule in the Gospel, imposing an evident and
as good Counsel, 19 and tending to a more sublime Life, but not as an absolute Precept. Thus many of the Primitive Fathers condemn'd 20 all Oaths, without any Exception; whereas 21 St. Paul himself did fear in Matters of Consequence. A Christian in Tatian said, I reject the Pretorship. In Tertullian, A Christian is not ambitious of the Edile's Office. Lactantius maintains, that a just Man (such he would have a Christian to be) should not make War; 22 but at the same time says, that he should not go to Sea. How many of the Primitive Fathers diffuse Christians from second Marriages? All which, as they are commendable, excellent, and highly pleasing to GOD, so they are not required of us by the Necessity of any Law. These Remarks will suffice to answer all Objections founded on Ecclesiastical Antiquity.

X. Now to confirm our own Opinion, first we want not Writers, and even more ancient ones than those that are opposed to us, who believed that the Practice of inflicting capital Punishment, and that of making War, the Innocence of which depends on the Justice of the former, are not inconsistent with Christianity: Clemens Alexander says, that a Christian, if he be called to the Government, should be

and indefinable Obligation of acting or not acting in such or such a manner. Thus St. Paul, 1 Cor. vii. treating of Marriage, and considering the Afflictions and Persecutions, to which Christians were then exposed, says, that in Reality such as are not in a Gospel-like Manner, could not have the Glory to engage in that State, and that married Persons ought not to refuse one another the Marriage Debt, unless it be done by mutual Consent; nor separate, even though one of the Parties were not a Christian, but that he had rather those who had never been married, and those whose conjugal Tie had been dissolved by the Death of one or the other, should remain as they are. He declares, however, that he has no Commandment of the Lord, concerning that Matter; but that he gives his Judgment, or Counsel, as one who hath obtained Mercy of the Lord to be faithful, and who hath the Spirit of the Lord, v. 25. 42 that is as a good Interpreter of the Will of GOD, in determining what was to be done in regard to the Circumstances of those Times. In which, however, he could not avoid laying down some general Rules, which each Person was to apply for his own Use and Direction, according to his State and Condition, v. 17. 18 that as he was obliged to leave the Matter to each Man's Judgment and Convenience, he therefore calls his Exhortations bare Counsels, Exhortations. He does the same, when he admonishes the Corinthians to practic Liberality to the Poor, the Exercise of which Virtue ought to be voluntary and proportion'd to each Man's Abilities, 2 Cor. viii. 10. Hence some have, without sufficient Grounds, taken Occasion to imagine there are some things, which, though of an excellent Nature, and in themselves highly agreeable to GOD, are left to every one's Liberty, so that there is no evil in the neglect of them, nor any Reason to be apprehensive of Punishment for such Omisison; but if any Man forms the noble Design of affording to them, he attains to an extraordinary degree of Perfection, and performs such Acts of Virtue as merit a singular Reward. Another Reason, not unlike this, which may have given Birth to the Diffusion under Con- federation, is, that as GOD requires of Men more extensive Duties and in greater Numbers, in Proportion to their Knowledge and Affluence on the Practice of them; there are certain virtuous Acts, and even certain Virtues, not expected from great Numbers, because there are but few in Circumstances well fitted to such Practices. It has been par- 23. 24. 25. ticularly observed that GOD requires greater Sanctity from Christians, than he demanded of the ancient Jews. But it ought to be consider'd that, if any one, under the Jewish Dispensation, had by Force of Meditation and Reflection, acquired as exact and extensive a Knowledge of his Duties, as that to be found in the Gospel, which might have been done by a careful Examination of the Principles, dispersed through the Writings of Moses and the Prophets; such a Man would then have been obliged to as regular and holy a Conduct, as that of true Christians. Lastly, it is to be observed that the Difficulties of Counsels and Precepts, is so far from having any Tendency toward making Men vicious, that in certain Cases, it may divest them from the Practice of Virtue. As Men are fond of the Wonderful, and of every thing that flatters their Vanity; they are in great Danger of being dazzled with the pompous Ideas of an imaginary Perfection, which raises them above the common level; and, while in pursuit of such Chimeras, neglecting several Branches of their real Duty, the Practice of which their Passions sometimes render more difficult, than the Sacrifice they make by abstaining from Things permitted. It is even possible for Man, under Pretence of extraordinary Sanctity, to deceive himself greedily in regard to plain and common Duties, and imagine himself excused the Practice of them, to make himself Amends for the Violence committed on his In- clinations; by this Abstinence from certain Things. Expostulates prove the Truth of this Observation in such as make Vows of Celibacy and Poverty. See Mr. Le Clerc's Addition to Dr. Hammond's Note, already cited; as also his Notes on the second Epistle of Sulpicius Severus. Ed. Leipsi. 1792. 19 The fourth Council of Carthage forbids Bishops to go to Law for temporal Concerns, even though actually attacked. See St. Ambrose, de Offic. Lib. ii. Cap. XXI. and Gregory the Great, Lib. ii. Ind. XI. Epist. LVIII. Grotius. 20 See our Author's Notes on Matt. v. 34. and Tit. i. ch. xxii. Second. 21 In Rom. i. 9. 2 Cor. i. 18. 23. Gal. i. 20. Philippi. i. 8. &c. Thess. i. 5. 22 Apol. Cap. XLVI. 23 For why should it be (the just Man) go to Sea, or what should be lost for in a foreign Country, who it suflered with all he went in his own? Why should he go to War, and engage in other Men's wars? Mercury, whose Soul is always at Peace with all the World, infin. Divin. Lib. v. Cap. XVII. num. 12. Edit. Grotius. 24, 25. 26 If certain Author's Thoughts were probably on what that ancient Doctor says in his Stromata, Lib. i. Cap. XXVI. XXVII. p. 420. and of Edit. Oxon. where we meet with the Senec, but not expressed in the same Words.
(18 Mofes) a living Law to the Subjects, reward the Good, and punish the Bad. And in another Place, describing the Habit of a Christian, he says, it would become him to go barefoot, unless he should happen to be a Soldier. In the Constitutions, intitled, The Constitutions of Clemens Romanus, we read, Not that all Killing is unlawful, but only that of the Innocent; provided that this Right of putting to Death be referred to the Magistrate alone.

But letting aside private Opinion, let us come to the publick Authority of the Church, which ought to be of the greatest Weight. I say then, that Soldiers were never denied Baptism, or Excommunicated by the Church, (because they were Soldiers) which yet ought to have been done, and would have been done, if the military Profession had been repugnant to the Conditions of the new Covenant. In the aforesaid Constitutions, the same Writer treats of those who formerly used to be admitted to Baptism, and those who used to be rejected, 4 Let a Soldier that defies to be baptized, be exorted to abstain from Wrongs and Oppressions, to be content with his Pay: If he complies with these, let him be admitted. Tertullian in his Apology, speaking in the Perfon of Christians, says, 5 We go to Sea, and fight together with you. He had said a little before, We are out of a few Days standing, and yet we have filled all your Empire, Islands, Castles, Towns, Councils, and your Armies. In the same Book he had said that Rain had been obtained in favour of the Emperor Marcus Aurelius, by the Prayers of his Christian Soldiers. In his Book Of a Crown, he says, that the Soldier who had thrown away the Garland, was more brave than the rest of his Fellows; and he informs us, that he had many Christian fellow Soldiers.

We may add, that some Soldiers that had suffered Torments and Death for the Sake of CHRIST, received from the Church the fame Honour with other Martyrs; among whom are recorded three of St. Paul’s Companions: Corellus, who suffered Martyrdom under Decius; Marinus, under Valerian; fifty under Aurelian, Victor, Marcus, and Valentinus, a Lieutenant-General under Maximian: About the same Time, Marcellus the Centurion, Severian under Licinius. Opprius concerning Laurentius and Ignatius, both Africans, says, They also were once Soldiers in the Armies of this World, but were truly the Soldiers of GOD in the Spiritual Warfare, whist they vanquished the Devil by the Confession of CHRIST, and obtained by their Martyrdom, the Palms, and glorious Crowns of the LORD. Hence it is plain, what the common Opinion of the primitive Christians was concerning War, even before the Emperors were Christians.

If the Christians in those Times did not willingly appear at Trials for Life, it ought not to be thought strange, since for the most part Christians themselves were to be tried. Besides, the Roman Laws in other Things, were more severe than Christian Liberty could allow of; which sufficiently appears in the single Instance of the Silian Decree of the Senate. But yet, after that Constantine embraced, and

2 Pedag. Lib. II. Cap. XI. p. 240.
3 Lib. VII. Cap. III.
4 Lib. VIII. Cap. XXXII.
5 Apolog. Cap. XLII.
6 Ibid. Cap. XXXVII.
7 Cap. V. Father Pagi, in his Criticisms on Baronius, Tom. I. has shown that this Story has a great Mixture of Fables. But it is sufficient for our Author’s Purpose, that Marcus Aurelius had Christians in his Army; a Fact which can never be disputed, and which has given Occasion to all the Wonders invented concerning the Servanti Legion, as it is called by Eusebius, and others.
8 Cap. I.
9 Add to all these a Soldier, baptized by Corellus, mentioned by A Gordius, in his Martyrology. Grotius.
10 Epist. XXXIX. Edit. Osian. (34. Pamph.)
11 Capitulationis fapientia, Thus the Words stand in all Editions; but what follows makes it evident that the Author designed to have said Capitulationis judicis, at Trials for Life. The Question is about acting as a Judge, not as a bare Spectator of the capital Executions, as Tertullian ridiculously explains this Passage, who quotes Quintilian and Seneca. It appears from Tertullian, that the Obligation of being present at such Trials, was one of the Reasons why the primitive Christians made a Difficulty of bearing Arms; and that Father izes the very Term which I have placed here, pertinent to my Author’s Meaning. De Iud. Cap. XIX. Grotius has before quoted what follows, and immediately precedes that Sentence, to which he probably alludes.
12 By this Senate Conformity, or Decree of the Senate, it was ordered, that if a Murther happened to be affiancted in his own House, all the Slaves under the same Roof should be put to Death; even tho’ no Proof appeared of their being concerned in the Murder, or of having heard any Thing when the Blow was given. We have an Example of the Case in Tacitus, Annal. Lib. XIV. Cap. XLI, &c. The Emperor Adrian, as our Author has observed in a Note, softened the Rigour of that Decree, by ordering that only they should be racked, who were near enough to the Place, where the Murther.
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and began to promote, the Christian Religion, capital Punishments did not thereupon cease. Nay, Constantine himself, among other Laws, made also this of fowing up Parricides in a Leather Sack; tho' otherwise he was so very mild towards Criminals, that he is blamed by many Historians, for too much Indulgence. He had also a great many Christians in his Army, (as History informs us) and caufed the Name of CHRIST to be put " on his Standard: From that Time also the military Oath was changed to that Form extant in Vegetius, " By GOD, and CHRIST, and the HOLY GHOST, and the Majesty of the Emperor, which, next to GOD, ought to be loved and reverenced by Mankind. Neither at that Time, among fo many Bishops, fome of whom had fuffered very severely for Religion, do we read of fo much as one, that exhorted Constantine not to put any Criminal to Death, or to engage in any War, or that diffused the Christians from serving in Wars, out of Fear of GOD's Wrath; tho' moft of thofe Bishops were very ftrict Observers of Discipline, and far from diftembling thofe Things, which related either to the Duty of the Emperors, or other Perfons: Such was St. Ambrose, in the Time of Theodosius, who in his seventh Sermon fpakes thus, "To go to War is no Fault; but to do it purely for Plunder is a Sin. And in his Offices, Worth, which either defends our Country by Arms from Barbarians, or protects the Weak at Home, or our Companions from Robbers, is compleat Juftice. This Argument seems to me of fo great Weight, that I will seek for no other.

I am not ignorant, that Bishops, and other Christian People, have often interceded in favour of Criminals, efpecially fuch as were condemned to Death, and that Cufjom was introduced, that they who took Sanctuary in a Church, fhould not be delivered up, but upon premife to fave their Lives; and that about Eafter, those who were committed to Priafon fhould be releafed. But he that carefully considers all thofe and fuch like Things, will find that they are only the Effects of Christian Goodnefs, which eagerly embraces all Opportunities of Mercy; and not

ter was killed, to bear some Noise. SPARTAN, Vita Hadrian, Cap. XVIII. Our Author fays likewise, in the fame Note, we may add to the too rigorous Laws of the Romans, that which fends admitting the Evidence of a Slave, but when he per- fified in it on the Rack. See Cid, Lib. VI. Tit. I. De feris fugitivis, &c. Leg. IV. and Mr. Nook's Priviledges Juris, Lib. I. Cap. XIII.

13 If any one is guilty of the Death of his Pa- rent, or Son, or any other Relation, which falls un- der the Denomination of Parricide, let him be burnt up in a Sack, with a Dog, a Cock, a Viper, and an Axe — and thrown either into the neighboring Sea, or a River, Lib. IX. Tit. XVII. Or his qui parentes out liberae accendant. Leg. ult. It is well known this was the ancient Manner of pu- nishing Parricides among the Romans; but the Use of it was abfolved. Such Criminals were burnt, or obliged to engage with wild Beasts, for the Entertaininent of the Publick. See the Commentators on the Inflittutes, Lib. IV. Tit. XVIII. De publicis judiciis, § 6, and the Recitacion Sententia of Paul the Lawyer. Lib. V. Tit. XXIV. with Mr. Schu- lthue's Notes.

14 He used to fay, The diftembered and rotten Limb must be cut off, that it may not communicate the infection to thofe that are found; but not a found one, or one that began to heal. ZON. Vit. Constantin, Lib. IV. Cap. XXXXI. And this his Historian re- preffes as the Refult of his Tenderness for fuch as reformed their Lives. As the Civilians complained of that Prince's Exced of Clemency, the Dames did the fame in relation to their King Harold, as we learn from Saxon's Grammarian, Northern Hist. Lib. XI. p. 193. 194. Edit. Welchel. 1576. Gro- tius.

15 See the late Mr. Cuper's Notes on Lact- tantius, De Mortibus Persecutorum, Cap. XLIV. 16 Mr. Violet De Re Militari, Lib. II. Cap. V. Edit. Platin. Societ.

17 We find a like Saying of ST. AUGUSTIN, in- ferred in the Canon Law, Can. XXIII. Quinct. I. Can. V. as taken from his Book, De verbis Domi- nis, Tract or Sermon XIX. And our Author quotes the fame Words elsewhere, under the Name of that Father, R. II. Chap. XXV. § 9.

18 De Offic. Lib. I. Cap. XXVII. This Paflage occurs also in the Canon Law already quoted; where we have a few of the like Thoughts of other Fa- thers of the Church.

19 ST. AUGUSTIN fays, It is a Priaf's Duty to intercede for Criminals. Several Instances of fuch Acts of Goodnefs may be seen in that Father's Epi- pilles. GROTIUS.

The very Paflage, here quoted by our Author, occurs in that Father's fifty-fourth Epiftle, addreffed to Macenninus, a Judge, You fay he, why we fay it is a Duty annexed to our facerdotal Cha- racter to intercede for Criminals? &c. This is fol- lowed by his Reply to that Magiftrate's Objec- tions.

20 See ST. CHRISTOPHER, Hom. XVI. De Statu. the Council of Oflroam, Cap. III. and the Laws of the Wifcofts, Lib. VI. Tit. V. 16. Lib. IX. Tit. II. Cap. III. GROTIUS.

21 As foon as the first Day of the Paschit Feast is come, let no Man remain in Priafon; let every one of them be loofed. Cid, Lib. I. Tit. IV. De Ephip- capi adiutini, &c. Leg. III. This, however, took Place only in regard to fome certain Crimes, as appears from the reft of the Law. See Obser- vationes divini & humani juris, printed at Paris in 1564. p. 43, &c. They were written by BARNA- BAS BRION, a Diftinguifhed Name in his own Country. Learning. Besides, the Cufjom under Consideration had been before received by the Jews, as any one may perceive from what he reads in the Gospels. Our Author, in his Notes on Matt. xxviii. 15. conjectures that this Privilege was granted them by Augustus.
the Consequences of a fixed and settled Opinion, which condemns in general all capital Punishments; and therefore, those Favours were not universal, but limited to certain Times and Places; and even the Intercessions themselves were moderated

with certain Exceptions.

Here some object against us, the 12th Canon of the Council of Nice, which runs thus, "Whenever being called by Grace, have at first joined their Zeal and Faith, and quitted their military Employment; but base afterwards returned like Dogs to their Vomit; so that some shall grow Money, and make Intercess, to be taken into the Service: They shall be prostrate (in the Church) for ten Years, after having been for three Years bare Hearers (of the Word). But in regard to all these, it must be observed what Disposition they are in, and in what Manner they do Penance. For whoever, by Fear, by Tears, by Patience, and by good Works, testify the Sincerity of their Conversion, these fulfilling the appointed Time of Hearing, shall at Length afford at publick Prayers, and afterwards it shall be lawful for the Bishop to treat them somewhat more favourably. But whoever shall look on their Punishment with Indifference, and shall think the Form of their entering into the Church to be sufficient for their Conversion, these shall fulfill the whole appointed Time. The very Term of thirteen Years Penance, sufficiently declares, that the Matter in Question is not about a small or doubtful Sin, but a heinous and incontestable Crime. The Crime here meant, was undoubtedly Idolatry; for the Mention which was made of the Times of Licinius, in the 11th Canon immediately preceding, ought to be supposed tacitly repeated here, as the Sense of the following Canon often depends on the former. See for an Instance the 11th Canon of the Eulian Council. But Licinius, (as Eusebius informs us) dismissed those Soldiers from the Service, who would not sacrifice to their Gods: And the Emperor Julian afterwards did the same; for which Reason we read Victorius, and others, quitted the military Profession for the Sake of CHRIST. And formerly 1104 Soldiers had done so in Armenia, under Diokletian, of whom there is Mention made in the Martyrologies: And Mann and Hevzenus, in Egypt. In the Time then of Licinius, many left the Service; of whom was Arfacent, mentioned among the Confessors, and Auxentius, afterwards made Bishop of Moplaicfia. Wherefore those, who had resigned their military Employments from a Motive of Conscience, could not be admitted again under Licinius, but by renouncing the Christian Faith: Which Crime was by so much the greater, by how much their former Act had shewn them to have a superior Knowledge of the Divine Laws; therefore these Apostates were punished more grievously than those mentioned in the former Canon, who quitted Christianiety, without any Danger of losing Life or Goods.

But to interpret this Canon generally of all War without Restriction, is absolutely against Reason. For History plainly testifies, that they who had quitted their Posts under Licinius, and had not, during his Reign, returned to them again, because they would not violate their Christian Faith, were left to their Choice by Constantine, whether they would continue still discharged, or return to a military Life, which doubled many did.

22 Thes Exceptions may be seen in Cassiodore, Var. Lib. XI. Cap. XL. See also the Decretals, Lib. III. Tr. XLIX. De immunitate eclefiarum, &c. Cap. VI. Grotius.

23 Simeon le Mattre expresses the Sense of this Canon thus, Let faul as (having at first refisted the Violence used on them) base afterwards yielded to Iniquity, and engaged in the Army again, be excluded from Communion for ten Years. Basilian, Zonaras, and Rufinus, Lib. X. Cap. VI. give this Canon the same Sense. Grotius.


25 In the Life of Constantine, Lib. I. Cap. LIV.

26 We have likewise the Authority of Sulpicius Severus for this Fact. Licinius, being engaged in disputing the Empire with Constantine, ordered his Soldiers to offer Sacrifice, and dismissed those from the Service who refused to comply. Hist. Sacr. Lib. II. Cap. XXXIII. Num. 2. Edi. Jaff. Valentinian, who was afterwards Emperor, had for the same Reason been deprived of a military Employment, under Julian; as we learn from Rufinus, Philostorgius, Theodore, Sozomen, &c. Victor of Utica says somewhat like this, when he tells us, that under King Honeric, several quitted the Service, because they could not continue in it without declaring for Ariamus. Gro tius.

27 See Sozomen, Hist. Lib. V. Cap. XVII.

28 Eusebius, in the Life of Constantine, Lib. II. Cap. XXXIII.

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There are also some who object the Epistle of 29 Leo, which says, That it is against the Rules of Ecclesiastical Discipline, after having done Penances, to return to the Profession of Arms. But we must know, that in Penitents, no less than in Clergymen and Monks, there was required an eminent Degree of Sanctity, far above that of the Generality of Christians; that the extraordinary Purity of their Lives might serve as much to Edification, 30 as their bad Examples had before given Offence. Likewise in the most antient Customs of the Church, which, that they might be the more reverenced for their venerable Name, are generally called the Apostolical Canons: Canon the 82d it is decreed, That no Bishop, Priest, or Deacon, should follow the War, and retain at the same Time a Roman Employment, and the sacred function: For those Things that are Caesar's, should be given to Caesar, and those that are GOD's should be given to GOD. By which it appears, that those Christians who did not aspire to Ecclesiastical Offices were not forbid to follow Arms.

Moreover, they who after Baptism had served any Office, Civil or Military, could not be ordained Clergymen, as you may see in the Epistles of Sylvius and Innocentius, and by the Council of Toledo. For Clergymen were not chosen out of Christians of any Sort, but of them who had given Proof of a most strict Life. Besides, Ecclesiastics ought not to have been diverted from their Functions by 31 any other Care or Work, that required continual Application, such as the Service in War, and the Exercize of certain Civil Employments; for which Reason the first Canon provided, that no Bishop, Priest, or Deacon, should meddle in secular Affairs; and the 80th, that he should not be concerned in the administration of publick Affairs. And the sixth of the African Councils, that he should not act either as an 32 Attorney or an Advocate. So St. Cyprian holds it 33 unlawful for them to be appointed Tutors or Guardians.

But we have the express Judgment of the Church for our Opinion, in the first Council of Arles, which was held under Constantine; for the third Canon of that Council runs thus, As to those who throw away their Arms in Time of Peace, we have thought fit to exclude them from the Communion; that is, they who quit their military Employment, when there was no Persecution. For the Christians by the Word 34 Peace meant so, as appears from Cyprian and others. Let us add the Example

29 Epift. XCI. (al. XCVII.) to Rufinus, a Bishop, Cap. X. We find this Passage in the Canon Law, Cap. XXXII. Quest. III. De Pastoralibus Difj. V. Can. III. And in the Capitularies of Charle- magne, Lib. VII. Cap. CCLXIV. Edit. Paris. 1643.

30 Pope Leo, in the same Epistle to Rufinus, says, That He who obtains Pardon for doing Things unlawful, must abstain from feudal that are in their own Nature unlawful. We have almost the same Thought, in the Letter written by the Bishops to Lewis King of Germany, Every Man ought to renounce the Use of what is in itself allowable, in Proportion to the Liberty he has allowed himself in unlawful Acts. And in the Capitularies of Charles the Bold, Let every one endeavour to enrich his Soul with good Works, of greater Value, as it has been more impoverished by Crimes. GROTIUS.

31 Eusebius observes, that the Life of a Christian is of two Sorts; the one perfect, which is the other short of Perfection. He adds, that such as lead the latter, ought, among other Things, to represent their Duty to thee, who serve in a just War. Dimagn. Epist. Lib. I. Cap. VIII. GROTIUS.

32 Let not Ecclesiastics or Monks engage in temporal Affairs. Canon of the Council of Mentz, quoted in the Decretals, Lib. III. Tit. L. Cap. I. GROTIUS.

33 See St. Jerom's Epistle to Nepotian. GROTIUS. The Canon here quoted, is not the VI. but the VII. as Ziegler observes on this Place.

34 Whoever has attempted to divert the Priests and Ministers of the Church, from the Service of the Altar, deserves not even to be mentioned in the Priest's Prayers at the Altar: For which Reason, Victor, who, in Opposition to the Regulation lately made in a Council, dared apply at the Charge of a Guardian, is not to be allowed any Obligation among you, for the Repose of his Soul; (pro Dormitio ejus) nor is any Prayer to be offered in the Church in his behalf. Lib. I. Epist. IX. (Edit. Oxon. Ep. I.) Addressed to the Priests, Deacons, and Laymen at Paris. See also Justinian's Code, Lib. I. Tit. III. De Episcopis & Clericiis, &c. Leg. LII. GROTIUS.

The Passage of St. Cyprian, to which our Author barely refers, occurs in the Canon Law, Difficult. LXXVIII. Can. XVIII. and Canz. XXVI. Quest. III. Can. IV. From which it appears, that, according to that Father, the deceased deserves some Kind of Punishment even after Death, for having dared to name a Priest Guardian; because he, on that Account, forbids Oblations, or publick Prayers to be offered in his Name, on the Anniversary of his Death, according to the Canon then introduced, which afterwards paved the Way to Superstition. See Bishop Fell's Note on this Passage; and Dodwell's fifth Difertation on St. Cyprian. To which may be added, Mr. Le Clerc's Life of St. Cyprian, in his Biblioth. Universal. Tom. XII. p. 234. &c.

35 Examples of this Acceptation of the Word may be seen in Tertullian, De Idololatria, Cap. XIX. in his Treatise, De fuga Perfect. Cap. III. CYPRIAN, Epift. X. (XVI. Edit. Gruss.) XXII.
Example of the Soldiers under Julian, who had made to great Progress in Christi-
nianity, that they were ready to feel the Truth of the Gospel with their Blood; of
whom St. Ambrose speaks thus, "The Emperor Julian, tho' an Apostate, yet
had under him Christian Soldiers, to whom when he said, March (against the En-
emy) in defence of the State, they obeyed him; but when he said, March against the
Christians, then they acknowledged the Emperor of Heaven. Such was the Tebean
Legion long before, which in the Reign of Diocletian the Emperor were intrusted
in the Christian Religion, by Zabda, the thirtieth Bishop of Jerusalem, and after-
wards left a memorable Example of Christian Constancy and Patience to all Ages,
which I shall speak of hereafter.

Let it suffice, in this Place, to mention that Speech of theirs, which express 
accurately, and in few Words, the whole Duty of a Christian Soldier. "We offer
you our Service against any Enemy whatever, yet hold it a most heinous Crime to
embrace our Hands in the Blood of Innocents: They can act vigorously against the In-
fiders, and the Enemies of the State; but have no longer Force, when the Business is
to misplace the Pious, and our fellow Citizens. We remember that we took up Arms
for the Defence of our Countrymen, and not against them. We have always fought
for Justice, for Piety, for the Preservation of the Innocent; these have been bbitherto
the Remembrance of our Dangers. We have fought with Fidelity. How should we
preserve it to you, (the Speech is made to the Emperor) if we neglected it towards
GOD?" And St. Basil speaks thus of the ancient Christians. "Our Ancestors ne-
ever accounted Slaughters committed in War, as Murders, excusing them who fought
for Virtue and Piety.

II. Cap. XXXII. Num. I & 2. Edit. Voss. Cap. XXXIII. Num. 3. and at the Beginning of his
Hist. Lib. I. Cap. I. Num. 3. GROTIUS.

36. The Emperor Julian mass." This Passage does
not belong to St. Ambrose, tho' attributed to him in the Canon Law, Cauf. XI. Quaef. III. Cap.
XCVI. where it has been observed, that St. Au-
gustine has something like it, on Psalm cxix.
which is also produced in Can. XCVII. See Mr.
Pitcairn's Note. Our Author himself elsewhere
quotes a Passage not unlike this, from the Father

left named, in a Note on BII. Chap. XXVI.
§ 3.
37. This Declaration is taken from the Account
of the Martyrdom of the Tebean Legion, attri-
buted to St. Eucherius, Bishop of Lyons. But
Mr. Du Boudieu, Minister of the French
Church in the Savoy, at London, published a Dif-
fertation in 1705, shewing that Relation to be a
famous Piece, and that the Tebean Legion never
had any real Existence.
38. Our Author says nothing that can mislead us
in guessing from what Part of St. Basil's Works these
Words are taken.

C H A P. III.

The Division of War into Publick and Privaié.

An Explication of the supreme Power.

I. T H E most general and most necessary Division of War is this, that one War
is private, another publick, and another mixed; that is a publick War,
which is made on each Side by the Authority of the Civil Power. Private War is
that which is made by private Persons, without publick Authority. Mixed
War is that which is made on one Side by publick Authority, and on the other
by mere private Persons. But let us first speak of private War, which is the most
antient.

I. (1) Autere et, qui jurisdictionem habet. By
the Authority of the Civil Power. The Reason of
his expressing himself so, is, because on one hand,
by the Term War, he understands all taking of
Arms with a View of deciding a Quarrel, in oppo-
sition to the Way of terminating a Difference, by
Reconcile to a common Judge; and on the other,
includes under the Name of Publick War, even
that which is carried on by an inferior Power, with-
out the Orders of the Sovereign Power; as appears
from what he says, § 4 and 5. Thus all the Cri-
ticisms of the Commentators fall to the Ground;
who do not consider, that our Author was at full
Liberty to define his Terms as he pleased; provided
he always fixes the same Ideas to them, and reasons
on them conclusively.

P. That
Of the Rights of Book I.

That some Sort of private War may be lawfully waged, as far as respects the Law of Nature, I think has been fully proved by what I have said above, where it was shown, that it is not repugnant to the Law of Nature, for any one to repel Injuries by Force. But perhaps some will think, that it is not lawful, at least since the establishment of publick Judges; for those Courts of Justice are not from Nature, but human Appointment; yet, since it is much boneriter, and more conducive to the Peace of Mankind, that Differences should be decided by a third Person that is disinterested, than that every Man should be allowed to do himself Justice in his own Cause, wherein the Illusions of Self-Love are much to be apprehended; Equity itself, and natural Reason, advise us to submit to so laudable an Institution. Paulus the Lawyer says, \[\text{That is not to be allowed to private Person, which may be done publicly by a Magistrate; left it be the Occasion of great Troubles. The Reafon why Laws were invented, says King Theodoric, is, that none should use Violence, and do himself Justice; for whereon does War differ from Peace, if private Persons determine their Disputes by Force? \] And Laws call that Force, whenever a Man would take that which he thinks is due, without having Recourse to a Judge.

II. Undoubtedly, the Liberty allowed before is now much restrained, since the erecting of Tribunals: Yet there are some Cases wherein that Right still subsists; that is, when the Way to legal Justice is not open. For the Law which forbids a Man to pursue his Right any other Way, ought to be understood with this equitable Restriction, that one finds Judges to whom he may apply. Now the Way to legal Justice may fail, either for some Time or absolutely. It fails for some Time only, when the Judge cannot be waited for, without certain Danger or Damage. It fails absolutely, either by Right or Fact: By Right, if a Man be in Places not inhabited, as on the Seas, in a Wilderness, in desert Islands; and any other Places where there is no Civil Government. By Fact, if Subjects will not submit to the Judge, or the Judge refuse openly to take Cognizance of Matters in Dispute.

What we said before, that even since Tribunals of Justice were erected, every private War is not repugnant to the Law of Nature, may be gathered from the Law given to the Jews, where GOD thus speaks by Moses, If a Thief be found breaking up, (that is, by Night) and be smitten, that he dies, there shall no Blood be shed for him; but if the Sun be risen upon him, there shall be Blood shed for him. For this Law so accurately distinguishing the Case, seems not only to import an Impunity; but also to explain the Law of Nature; and that it is not founded on any particular Divine Command, but on common Equity; whence we fee that other Nations have followed the same Principle. That of the Twelve Tables is well known, which was undoubtedly taken from the old Attick Law; If a Thief commit a Robbery in the Night, and if a Man kill him, he is killed lawfully. So is he reputed innocent by the Laws of all known Nations, who by Arms defends himself against him that afflicts his Life; which so manifest a Content is a plain Testimony, that there is nothing in it contrary to the Law of Nature.


3 Caried. Far. Esbjt. Lib. IV. Ep. X. See also the Edit of Theodoric, Cap. X. and CX XIV. Grotius.

4 Digest. Lib. IV. Tit. 71. Quod maxis causa, et. Leg. XIII. This is what the Latin call, in the Law Stile, Injuria muniam, To lay Hands on; as is remarked by Servius, the ancient Commentator on Virgil. In Aenid. X. v. 419. Grotius.

1. II. (1) As when a Man is attacked either in the Night, or even by Day, in private Places; or when such as flee us in Danger, will not, or cannot, affill us, and bring the Aggregate to Justice. See B. II. Chap. I.


3 This was the Cause of Moses, when he saw one of his Brethren (that is, an Israelite) suffering Wrong, be defended him, and avenged him that was oppressed, and saved the Egyptian. Exod. ii. Acts viii. 24. For at that Time the Israelites had no Room to expect Justice from the Egyptian Judges.

4 Solon's Law runs thus, If any Man steals in the Day-Time, above the Value of fifty Drachms, he shall be brought before the Council of the Eleven: But whosoever steals any Thing by Night, it shall be lawful to him to wound him in the PERFECT DEFENCE. DEMOTHERNES Orat. against Timocrates, p. 476. Edit. Basf. 1572. See hereafter, B. II. Chap. I. § 12. where the Reason of the Law is more fully considered. Grotius.

5 This Law is preserved by Macrobius, who urges it as a Proof, that the Word Nex is by the Antients taken for Nos. Salut. Lib. I. Cap. IV.

III. The
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War and Peace.

III. There is more Difficulty concerning the Divine Positive Law, more perfect than the Law of Nature, I mean the Gospel. I doubt not but GOD, who has more Right over our Lives than we ourselves, might have required Patience of us to such a Degree, that being brought privately into Danger, we ought rather to suffer ourselves to be killed, than to kill. But our Question is, Whether he has thought fit to rye us up so far? Two Places (of Scripture) are wont to be brought for the affirmative Opinion, which we have already explained, when we examined whether War in general was lawful. But I say unto you, refi a not him that doth Thee an Injury. Dearly beloved, avenge not yourselves; the Latin Version has it, Defend not yourselves. There is also a third Place, in the Words of CHRIST to St. Peter, Put up thy Sword into the Sheath; for they that take the Sword shall perift by the Sword. Some also add the Example of CHRIST himself, who died for his Enemies.

Amongst the primitive Christians there are some, who indeed did not disallow of publick Wars, but believed Self-defence between private Persons to be unlawful. I have already cited some Passages of St. Ambrose, in favour of the Innocence of War: We find in St. Austin many more on that Subject, and more clear, which every Body knows. Yet the same St. Ambrose said, 1 Perhaps CHRIST therefore said to Peter, upon his showing him two Swords, It is enough; as if it had been lawful to (the Time of) the Gospel, to make Use of the Sword; that the Doctrine of Equity might be in the Law, and the Perfection of Godness in the Gospel. And in another Place, 2 A Christian, tho' be be attacked by a Highwayman, is not to strike him again, left in defending himself he offend against Piety. And St. Austin, 3 I do not dislike that Law, which allows those (Robbers, and other violent Aggrefors) to be killed; but how I shall defend them who kill them, I know not. And again, 4 I do not approve of the Maxim of killing him, by whom one is apprehensive of being killed one's self; unless it happen to be a Soldier, or publick Officer, so that he does not do it for himself, but for others, by Vertue of a lawful Authority. And it plainly appears, that St. Basili was of the same Mind, from his 5 second Epiftle to Ambrofius.

But the contrary Opinion, as it is more common, so it seems to me more reasonable, that we are not obliged to such a Patience; for we are commanded in the Gospel to love our Neighbours as ourselves, not before ourselves; nay, when an equal Danger threatens us, we are not forbid to take Care of ourselves before others; as we have already shewn from the Authority of St. Paul, explaining the Rule of Beneficence. Perhaps some one may object, and say, tho' I may prefer my own Good before that of my Neighbour, yet this holds not in Things unequal; wherefore I ought rather to part with my own Life, than suffer the Aggressor to fall into eternal Damnation. But it may be answer'd, that the Person assaulted may also stand in Need of Time to repent, or may reasonably think so; and that the Aggressor may likewise before his Death have some Time left him to repent. 7 Besides in moral Judgment, that Danger ought not to be regarded into rather than expose him to the Hazard of eternal Damnation, by defending ourselves, is by that Means secured from the Danger. It may even happen, that he will only become more wicked, and more hurtful to Society. Besides, a Man has not Time to examine every Thing, when in the Terror occasioned by an approaching Death, with which he is threatened by an unjust Aggressor. And after all, we only make use of our natural Right to endeavour our own Preservation; rather, in my Opinion, we are under a Sort of Obligation so to do in this Case, as I have observed on Pufendorf, B. II. Chap. V. § 2. Note 5. Second Edition. Let us add, with the late Mr. La Placey. 6 If Charity forbids us to kill Persons whom we a know to be in a State of Sin and Perdition, it a would follow, that the Magistrates have no Pow- a er to order the Execution of Criminals, whole Words and Actions make it appear, that they are a not in a Disposition of making a good End.

6 Cassiodorus says, We are not obliged by any a Pragmat, or by any Reason, to procure the Salvation of our Neighbours Soul by the Lif of our own, or pre- fer the Security of his Body to that of our own, ex- cpt when we have Room to hope such an Action will put him in Effign of eternal Salvation. De Am- cia, Grotius. The Tretise here cited, is judged by the Criticks to be the Work of Peter of Blois.

7 To this may be added, that we have no Aflu- nce, that the Person whom we permit to kill us,
Of the Rights of

Book I.

into which a Man throws himself, and from which he may deliver himself.

It is probable at least, that some of the Apostles wore Swords in Travelling, in the Sight, and with the Knowledge of our Saviour, during the whole Time they accompanied him, which \( \text{Iosephus} \) informs us, other Galileans also did in their Journey from their own Country to Jerusalem, (the Roads being much infected with Highwaysmen) and who also tells us the fame of the Ephesians, the most quiet and peaceable of all Men. Hence it came to pass, that when CHRIST told his Disciples, such a Time was at hand, that they should sell even their Garments to buy Swords, the Apostles presently anfwered, that there were two Swords in their Company, and in that Company there were none but the Apostles. Besides, what CHRIST himfelf then faid, tho' indeed it was not a Precept, but a proverbial Speech, declaring that moft grievous Dangers were at hand; (as the Oppofition of the firft Time, which was safe and prosperous, plainly fhews, \( \text{Ver.} 35 \)) feems however to allude to a common Practice, a Practice which the Apostles looked on as innocent.

Now, as \( \text{Cicero} \) very rightly fays, \( \text{Why should it be permitted to wear a Sword, if it were not permitted to ufe it?} \) But as to that Paffage, \( \text{Reftit not him that injures you, it is not more universal than that which follows, Give to every one that asketh; which yet admits of an Exception, provided we do not too much incommode ourselves, Nay, there is nothing added to that Precept concerning giving, which intimates the Reftriftion; which is deduced only from the Rules of Equity; whereas the Prohibition of Reftitution has its Explication adjoined, by the Inftance of a Box on the Ear; which fhews that we are only obliged to suffer without reftiting, when the Injury offered us is as flight as a Box on the Ear, or fomething like it; for otherwise it would have been more natural to have faid, \( \text{Reftit not him that injures thee, but Sacrifice thy Life rather than defend thyfelf by Force.} \)

In the Words to the Romans, \( \text{Avengue not yourselves, the Word κακάω does not signify to defend but to revenge; as \text{Judith} i. 12. ii. 1. \text{Luke} xviii. 7. 8. xxii. 2. \text{Thoff.} i. 8. 1 \text{Pet. ii. 14. \text{Rom.} xiii. 4. 1 \text{Thoff.} iv. 6. And this the very Con-} \) 


\( \text{Vex. 11.} \)

nation of the Words plainly fhews, for the Words going before are \( \text{Render to no Man Evil for Evil;} \) but this is the Definition of Revenge, not of Defence. \( \text{St. Paul} \) also supports his Exhortation from that Place of Deuteronomy, \( \text{Vengeance is mine, I will repay it;} \) Where 'tis in the Hebrew צון, which in its proper and natural Sense signifies Vengeance; and it is evident, \( \text{Self-Defence cannot be meant in that Place.} \)

Now what was faid to St. Peter, does indeed contain a Prohibition to ufe the Sword, but not in the Cafe of Defence; for he had no Need to defend himfelf: \( \text{CHRI} \) had already faid concerning his Disciples, \( \text{Suffer thief to go away;} \) and this, \( \text{That the Saying might be fulfilled which is spoken of thee in the} \) 


\( \text{John xviii. 8.9} \)

\( \text{Cap which my Father hath given me, shall I not drink it?} \) And he fays in \( \text{St. Matthew, How then should the Scriptures be fulfilled, that thus it must be?} \) St. Peter being then of a fiery Temper, thought of Revenge, and not of Defence. Beside, he would have taken up Arms againft them who came with publick Authority, which whether it be lawful in any Cafe to refift, is a particular Qufition, that shall be handled in its proper Place. But what \( \text{CHRIST} \) also adds, \( \text{All they that take the Sword, shall be perfified by the Sword;} \) is either a proverbial Saying, which signifies, that Blood caueth Blood; and therefore, that the Ufe of Arms is never free from Danger: Or, according to the Opinion of \( \text{Origens, Theophyld, Titus, and Euthy-} \)

\( \text{Thefe Wretches need only utter Blufhings and Impieties, to shelter themselves from the Punishment they have deferved; which is abroad and inapporitable. It would also follow, that no War is allowable; for as it is morally impoffi-} \) 

\( \text{ble, that the leaft bloody War should not sweep away} \) 

\( \text{every great Number of Wretches, who will die in bad Dispositions, no War could be car-} \) 

\( \text{ried on without exfoing ourselves to that Dan-} \) 

\( \text{ger, and confquently, without violating the Laws of Charity.}; \) \( \text{Treatise on the Right which every Man has to defend himself, Ch. V. To con-} \) 

\( \text{clude, If an unjust Aggressor lofs his Life, he who killed him, in defence of his own, is the innocent Minifter of the Divine Providence and Ven-} \) 

\( \text{geance.} \)

\( \text{He fays, that when any of that Sort travell'd, they took neither Baggage nor Provisions with them; but were provided with Arms on the Account of Highwaysmen. De Bell. Jud. Lib. II. Cap. XII.} \)

\( \text{9 Orat. pro Athenes, Cap. VI.} \)
Wak, ofe, tho, fufh, but to Moreover, meant is thfe De Thief the What fifmg here faid regard That Oppofition an if a one, What his i^^a/ ly Tit. 0iew, not and from faid. well nor i. if wWch

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nins, it shews, that we should not inroach upon GOD's Right, by anticipating the Vengeance which He, in his own due Time, will fully requite. In which Senfe precisely, it is faid, He that killeth with the Sword, shall be killed by the Sword: Here is the Patience and Faith of the Saints. With which agrees that of Tertullian, 10 GOD is a fit Depofitory of thy Patience; if thou lefft thy Injuries in his Hand, he is thy Avenger; if thy Lajies, he is thy Scurty; if thy Grief, he is thy Physician; if thy Death, be is thy Rescor: What ought not Patience to do, that has GOD for its Doctor? Moreover, in thefe Words of CHRIST there seems to be included, a Prophecy of tho Punishments which the Sword of the Romans would take of the Blood-thirfty Jews.

As to the Example of CHRIST, who is faid to have died for his Enemies, it may be anfwered; that all CHRIST's Actions were indeed full of Virtue, that we may laudably imitate them, as far as 'tis poifible; and that Imitation will certainly be rewarded; but yet they are not all fach, as either refult from an Obdience to an inapoftible Law, or confitute a Law to us. For that CHRIST died for his Enemies, and the Ungodly, he did it not by any Law, but as it were by a fpecial Covenant and Agreement with the Father; who, upon his doing it, did not only promife him the moft exalted Glory, but alfo a People that should endure forever. Befides, this Fact of CHRIST was, as it were, singular, of which we can hardly find any Example; as St. Paul fhevs: And CHRIST himfelf com-
mands us to expofe our Life to Danger, not for every one, but for our Brethren, 14 who profeft the Christian Religion.

In fine, the Paffages quoted from Christian Doctors, either fee to give an Ad-
vice of extraordinary Perfecution, or rather to eftablifie an expref Command; or contain only the Opinion of fome private Perfons. For in tho moft antient Canons called Apofholic, he only was to have been 15 excommunicated, who with the firft Blow killed his Adverfary in a Quarrel, through an 16 Excefs of Paffion. And St. Auffin himfelf, whom we quoted before on the other Side, fesms yet to ap-
prove 17 of this Opinion.

IV. Publifh Wars are either 1 Solemn, according to the Law of Nations, or not folem: What I here term Solemn is generally called Lawful, in 2 Opposition to a Codicil; or a Mar-
rriage

10 De Patiendia. Cap. XV. 11 Who profeft the Christian Religion. This is the Signification of the Word Brother, here ued by the Apostle. He at the fame time fuppofes, without Doubt, that the Perfons, in whose Favour we haz-
nard our Lives, defire to great a Sacrifice at our Hands, and that we have good Grounds to believe fuch an Action will procure them some coniderable Advantage; which cannot be faid in regard to a Highwayman, or any other unjust Aggreffor.

12 If an Echaffleiftch strikes a Man in a Quar-
rel, and kill him with a Blow, let him be depofed for his Rafhnefs. If a Layman is guile of the fame Fault, let him be deprifed of the Communiff. Can. LXIV. Our Author, in his Margin, quotes two Canons from the Decretals; one, which orders that if a Layman wounds an Echaffleiftch, in his own Defence, or on finding him in Bad with his Wife, Mother, Sifter, or Daughter, he fhall not incur the Sentence of Excommunication. Lib. V. Tit. XXXIX. De Sent. Eevm. Cap. III. Another, which makes feveral Diftinctions, in Caifes where a Man kills an Aggreffor, and fuppofes, as the former does, that he may be killed, Conm modernae inculp-
atae tutele. With the Moderation of an innocent Difance. Lib. V. Tit. XII. De Homicidio volun-
tario, vel culpatis. Cap. XVI. In both of them it is laid down, as a Fact, that all Lives allow of re-
pefling Forc3 by Force.

13 St. Ambrose, on the Advice of our Saviour, to fett our Cont and buy a Sword, has hefe Words: Lord, why do you forbid me to arih, fince you com-
mand me to purchase a Sword? Why am I order'd to carry a Weapon, which I am not allowed to draw! Unless perhaps that I may be provided for my own De-

14 Our Author finds this in St. Ambrose, in the Book of Exodus. But St. Augustine in that Place only gives the Reafon, why the Law of Moses, allow'd of killing a Thief in the Night, but not in the Day. Because, says he, after Sani rifting a Man might dijlignouf, whether the Thief came to kill or barely to fca; and in the latter Cafe, he was not to be kill'd. That Father makes no other Diftinction; nor does he feck of what the Evange-
lical Law permits or requires in this Cafe.

IV. (1) See B. III. Cap. III. 2. The Ephemr Leuful is taken in this Senfe in the very Definition of a Will or Testament, given by the Civil Law. A Testament is there called, A Declaration of our (left) Will, made in Form; which is exprifed by Yfve, the very Word ued by our Author. Digest. Lib. XXVIII. Tit. I. 29 Testamentum iure fpiiritu. Lib. Leg. I. See also the Fragments of UPDIN, Tit. XX. § 1. I do not know that the Terms fpiirituum Testamentum occur in the Body of the Civil Law, precipitely in Opposition to Codices. For in the Law quoted from Digest, Lib. X. Tit. II. De aquire vel amitt. Hereditate. Leg. XXII. 39 Testamentum is oppofed to Non fpiiritum Testamentum, that is, to a Will not made in Form; and this only is meant in the Title, Infidiae, rapina, inan facuto Testamentis. Lib. XXVII. Tit. III. It is well known, that certain Formalities are required even

Q
riage Lawful, in Opposition to the 1 Cohabitation of Slaves: Not because it is not allowed a Man, if he pleafes, to make a Codicil, and a Slave to cohabit with a Woman; but becaufe a Will, and a Marriage in Form, have some peculiar Effects, by the Civil Law; which it is convenient to observe; for many, misunder
standing the Word Lawful, think all Wars are condemned as unjust and unwarrantable, to which that Epithet does not agree. Two Things then are requisite to make a War folemne by the Law of Nations. First, that it be made on both Sides, by the Authority of those that have the Sovereign Power in the State: And then, that it be accompanied with some Formalities; of which we shall treat in its proper Place. Thole Conditions are equally necessary, so that if the one be wanting, the other is needles.<n>But a publick War not Solemne, may be made both without any Formality, and against mere private Person, and by the Authority of any Magiftrate whatever. And indeed it we consider the thing without refept to the Civil Law, every Ma-
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Chapter III

Grievant seems to have as much right, in case of Refusance, to take up Arms in order to execute his Jurisdiction, as to defend the People committed to his Protection. But since by War the whole State is endangered, therefore it is provided, by the Laws of almost all Nations, that it be undertaken only by the Order or with the Approbation of the Sovereign. There is such a Law in 7 Plato's last Book de Legibus. And by the Roman Law he was reckoned 8 guilty of High Treason, who without Commission from the Prince prefixed to make War, lift Soldiers, or raise an Army. And the Cornelian Law, 9 enacted by L. Cornelius Sulla, says, without Commission from the People. In the Code of Justinian, there is a Constitution extant, made by Valentinian and Valens, thus, 10 Let no Man use any Sort of Arms without our Knowledge and Permission. According to St. Austin, 11 natural Order and the Peace of Mankind require, that the Matter should be so regulated in every State. This Law however ought to be understood with some Restriction, according to the Rules of Equity, as every Maxim is, however general the Terms may be in which it is expressed.

First then, It cannot be doubted, but that it is lawful 12 for him who has any Jurisdiction, to reduce to their Duty, by his Officers, a Few who are disobedient; and indeed, it requires not great Force to do it, nor endangers the State. Again, If the Danger be so prelating, that Time will not allow to consult the Sovereign, here also Necessity grants an Exception. 13 L. Pinarius, Governor of Emona, Sicilian Garrison, prefiguring on this Right, upon certain Information that the Townsmen design'd to Revolt to the Carthaginians, put them all to the Sword, and so preferred the Place. Franciscus de Victoria has pretended to transfer the

6 Puffendorf criticises this Opinion. B.VIII. Chap. VI. § 10. But it is easy to reconcile our two Authors. Grotius fixes a more general Idea to the Term War, as appears by his Definition of it, Chap. 1. § 2. See my first Note on that Chapter. According to him also, when an inferior Magistrate takes Arms for the Maintenance of his Authority, and to reduce those to their Duty, who refuse to submit; he is suppos'd to act with the Approbation of the Sovereign, who by entrusting him with a Share in the Government of the State, invests him at the same Time with the Power necessary for the Execution of his Charge. The Question therefore is only, whether every Magistrate, as such, stands in need of an express Order from the Sovereign in this Case, so that the Frame of civil Societies in general require it, independently of the Civil Law of each particular State. If such a Magistrate has a Right to employ Arms for the Reduction of one Person, of two, three, ten or twenty, who refuse him Obedience, or attempt to hinder the Execution of his Jurisdiction, why may he not make use of the same Means against fifty, a hundred, a thousand, two thousand, &c. ? The larger the Number is, the more he will stand in need of Force for conquering the Refusance. Now this is what our Author includes under the Term War. If it be objected, that it would be dangerous to allow an inferior Magistrate so much Power, the only proves that Legislators do well in setting Bounds to what would otherwise be a Consequence of the very Design of placing the Magistrate in his Post, in order to proceed in a Manner attended with fewer Inconveniences, so that the Commentators on our Author have no good Reason for failing on him in this Place, as if he were weak'd and defray'd the first Principles of publick Law.

7 If any Man makes Peace or War, by his own private Authority, without the Order of the State, let Duties, his Punishment 8. But if an inferior of the State makes Peace or War of their own Heads, let the Officers of the Army convene the Authors of such an Attempt before a Council of War; and let the Criminals, on Conviction, suffer Death. De Legi. Lib. XII. p. 955. Vol. II. Edit. H. Steph.
Right of taking up Arms to the Inhabitants of a Town, even without such a Cafe of Necessity, in order to have Satisfaction for those Injuries, which the Prince neglects to revenge; but his Opinion is justly rejected by others.

V. But Lawyers do not agree, whether in those Cafes wherein it is allowed that inferior Magistrates have a Right to take up Arms, such a War ought to be called Publick; some affirm, and others deny it. Indeed, if by Publick we mean only that which is done by Vertue of a Magistrate's Power, no doubt but such Wars are publick; and therefore, they that in such a Cafe reft the Magistrate, are liable to the Punishments due to those that rebel against their Superiors. But if Publick be taken in a higher Sense, for that which is Solemn, as without Difpute it is often taken, they are not publick Wars; because, to render the Idea compleat in that Sense, there must be an express Resolution of the Sovereign, and several other Circumstances. It would be in vain to object, that in such Kind of Quarrels, the Goods of the Rebels are taken, and given to the Soldiers. For that is not so peculiar to a solemn War, as that it may not also be done in any other.

But it may happen, that in a very large State, the inferior Powers may have Authority granted them to begin a War; which, if so, then the War may be reputed as made by the Authority of the Sovereign Power: For be that gives to another the Right of doing a Thing, is deemed the Author of it.

But it is more difficult to decide, whether, if such an Authority be not granted, the bare Conjecture of the Sovereign's Will be sufficient? For my Part I cannot think it is: For it is not enough to force which the Will of the Sovereign would be, if he were consulted in this Cafe; but it must rather be considered, what a Prince would have done without being advised with, where the Matter will allow Time, and when the Affair is doubtful, if a Law were thereupon to be made: For tho' the Reafon which determines a Sovereign to require that his Orders should be waited for, may in such or such a Cafe be seen, when particularly considered; yet the same Reafon, when taken generally, always subsists; which is, to prevent the Dangers to which the State would inevitably be exposed, if every Magistrate should pretend to judge of the Uefefulness or Necessity of War.

Cœnis Manlius was not therefore injuriously accused by his Lieutenants, because he had made War upon the Galatians, without the Order of the People of Rome; for tho' the Galatians had supplied Antiochus with some Troops; yet, as Peace had been made with that Prince, it did not belong to Manlius, but to the People of Rome, to determine whether that Injury was to be revenged on the Galatians. Catil would have had C. Cæfar delivered up to the Germans, for making War on them:

8. V. (3) To the Lawyers quoted in the Margin, and FRAN. ARTY, Conf. XVI. num. 7. GAULIUS, De Pace publico, Cap. II. num. 20. Cardinal TUSCHYS, Pratii, Quod. LV. lit. B. verbo Bellium, num. 20. GOEDDEUS, Conf. Marpsg. XXVIII. num. 292. &c. GROTIUS.

2. See the Law of FRIDERIC I. in CONRAD, Abbot of Uffberg, GROTIUS.

This Law relates to the Members of the German Empire. See a Difterratiou, it written by the late Mr. HERTIUS, intituled, De superiortate Territorialis, § 31, where he also observes, after FA. MALBILLON, Disciplin Diplomatica, Lib. IV. Cap. XX. § 5, that formerly in France, every Gentleman might make War on his Neighbours by his own private Authority. Herefore usfor Satisfaction on that Subject, to MR. DU CANO's Remarks on the History of St. Lewis, by JONVILLE, and to the Extract of a Book of FA. MAINBOURG, in the Journal des Savans, for the Year 1676.

3. That is, though no Damage has actually ensued from a Governor's undertaking a War, without waiting for the Sovereign's Order. See B. II. Cap. XVI. § 25. num. 1.

4. Suetonius, in one Place, that Cato had frequently declared on Oaths, that he would imitate him (Cæsar) as soon as he was disposed of the Command of the Army. Cap. XXX. And in another Place, he speaks in general of some Persons who were for giving him into the Hands of the Enemy, Cap. XXIV. But PlUTARCH relates the Fact, with its several Circumstances: He tells us, that after the Victory gained by Cæsar in the Billicg Gaul, over the Ulpets, and the Tauchetians, who had paused the Rhine, in Order to settle themselves, the Senate decreed publick Rejudging and Sacrifices, to expresse their Gratitude to the Gods, and do honour to the General. Whereupon Cato delivered it as his Opinion, that Cæsar should be delivered up to the Barbarians, (that is, the Germans) to expiate his Perfidy, and divert the Curses from the State, which that Action might draw on it. Vit. Cæf. p. 718. Tom. II. Edit. Wechel. Where Plutarch produces the Authority of TANUSIUS GENNIBUS, loco 4. ad 314: for that is the true Reading and justified by a MS, not vaticina. See also what he says in his Parallel of the Lives of Cælius and Nicia. p. 567. So that Cato proposed giving Cæsar into the Hands of the Enemy, not because he had made War on the Germans without the express Orders of the Commonwealth, but because that General had attacked the Germans, against the Promise and
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them: I believe not so much in respect to Justice, as to free the City from the Fear of a Man that wanted to render himself absolute. For the Germans had affixed the Galls, declared Enemies to the People of Rome, and therefore could have no Reason to complain of any Wrong done them, if the Romans had just Caufe to make War against the Galls. But Cæsar ought to have been contented with beating the Germans out of Gaul, the Province appointed to him, and not to have pulld the War on the Germans in their own Country, especially when there was no Danger to be feared from thence, without first confulting the People of Rome. The Germans therefore had no Right to demand Cæsar to be delivered up to them, but the People of Rome had to punifh him; as the Carthaginians plainly anfwered the Romans, 5 The Quefion is not whether Hannibal has defièd Saguntum by publick Authority, or by his own private Authority? But whether in that he has done you an Injury, or not? For it is our Bufinefs to see whether our Subjeft has acted by Virtue of our Orders, or of his own Head. The only Point to be decided between us and is, whether the Thing could be done without Prejudice to our Treaties?

6 Cicero defends what Ovíarius and Decimus Brutus did, who made War upon Antony of their own Heads. But tho' it were plain that Antony had deferved it, and Affurance given them, and feized feveral of their Deputies; as appears from what he himself fays in his Commentaries. Bell. Gall. Lib. IV. Cap. XI. &c.

He does indeed endeavour to put a Glift on his Conduct; but there is good Reason for believing that he here, as on other Occasions, difguifts Things, in order to turn them to his own Advantage. See his Commentators on this Place, in Mr. Davies's Edition; and Farinianus's Supple- ment to Livy, Lib. CV. Cap. II. &c. See Gronovius. The Manner in which Cato gives his Opinion is fufficient for forming a Conjecture, that they were perfuaded at Rome that Cæfar had not dealt fairly and honestly in the Matter under Confideration. But, whatever becomes of this Quefion, it is evident from the Authority alleged, that our Author has not given the true Reafon for Cato's voting for delivering Cæfar into the Hands of the Germans. He likewise confinuates the Defeat of the Oppofites and the Tramissions, which happened before Cæfar and the fifth Bridge over the Rhine, with the Victory he gained over those of Treves about two Years after; for Cæfar did not till that Time carry the War into the Country of the Germans, in order to take his Revenge on them. For it is certain from our Author's Commentaries, that those of Treves, Bell. Gall. Lib. VI. Cap. IX. And this Expedition took up but little Time, and was far from being considerable. At Cæfar's Approach the Enemy retired into their Forests; and the Roman General being apprehensive he should fall short of Provisions for his Army, repulfed the Rhine a few Days after. Ibid. Cap. XXIX. Tho' Deion Cassius attributes this Motion to his Fear of the Enemy. Lib. XL p. 151. Edit. H. Stephi. In several of their Author's Expositions he confounded Matters still more, by understanding what he here fays of Cæfar's War with Ariovifis, when that Prince had pollefted himfelf of Part of the Country of the Sequani, related. Bel. Gall. Lib. I. The learned Obrecht is one who gives into this Mistake, as appears not only from his Notes on this Work, published by one of his Scholars without his Knowledge; but also from a Corollarie placed at the End of his Differtation De Conju Jugifl, which is the ninth of the Collection printed in 1754. For he there makes PLUTARCH BY CA EFAR'S War with Ariovifis being ended, Cato gave his Opinion, &c. And he maintains, that the Ro- man People had as at that Time as Right to punifh Cæsar, but that the Germans had a Right to de-
they should have aaid for the Decision of the Senate and Roman People; Whether it was for the Benefit of the State to have dissembled the Matter, or to have re-

given it; to have come to Terms of Peace, or to have recourse to Arms? For no Body is obliged to pursue his own Right, which is often attended with the Haz-

of Damage.

But then further, tho' Antony hast been declared an Enemy; the Senate and People of Rome should have been allowed to consider, whom to employ as Generals to command in that War: Thus the Rhodians 2 answered Cassius, when he de-

fied their Affisitance by Virtue of a Treaty, that they would give it if the Se-

nate ordered it. This Example, (of Cicero's Apology) and many more that one may meet with, ought to teach us, not to approve of every Thing that is said by the most famous Authors: For they often reason according to the Circumstances of the Times, and often according to their own Partitions; filling, the Line to the Stone; or the Rule of Equity to Things, and not Things to the Rule of Equity. Whereof we must endeave in the Examination of such Matters, to use an unbiased Judgment, and not rashly draw those Things into Example, which may be rather excused than commended, in which respect we often fatally err.

Since then, as we have said, a publick War ought not to be made, but by the Authority of the Sovereign; for the understanding both this Affair, and the Question concerning a solemn War, and several other Things that depend upon it, it will be necessary to be thoroughly informed, what this Sovereignty is, and in which it resides; and so much the more, because learned Men in our Age, each of them handling this Argument rather according to the present Interest of the Affairs of his Country, than according to Truth, have made that which was of itself not very clear, much more perplexed.

VI. The Moral Power then of governing a State, which u's to be called the Civil Power, Thucydides describles by three Things, where he calls a State that is really so, A Body that has its own Laws, Magistrates, 3 and Tribunals. Aristotele divides the Administration of the Government into three Parts, 1. Consultation about publick Affairs. 2. The Establishment of Magistrates. 3. Judgments. To the first he refers the Power of making War or Peace, of concluding or breaking Treaties and Alliances, of enacting or repealing Laws; to which he adds, the in-

flicting of Death, Banishment, Confinication of Goods, and the Punishment of Peculation and Extortion: That is, in my Opinion, the Judgments that relate to publick Crimes; whereas, in the third Class, by judgments he means those that concern Crimes committed directly against private Perils. Diogenes Hecatom-

phon fist chiefly takes Notice of these 4 three Things, 1/3, The Right to create Mag-

istrates. 2/3, The Right to make Laws and repeal them. 3/3, The Right of making Peace or War. In another Place he adds, the Right of Judging as a 5

1 This Example is not exactly to the Purpose, for the Rhodians were not subject to the Romans, but an inferior Sort of Allies, as our Author himself terms them, § 21. Num. 9. Tho' in Reality, they were dependent on the Romans, in spite of the Liberty they in one Sense enjoyed. See my 25th Note on that Paragraph. Besides, Cassius, in his Reply to the Rhodian Deputies, told them, they lamented and trifled with him, when they talked of the Consent of the Senate, that Body being then disordered by the Oppression of the Tyrants. Appian. De Bell. Guttik. Lib. IV. p. 627. Edit. H. Steph. This helps to confirm the Reflections made in the preceding Note, and I am surprized the learned Gronovius hast taken No Notice of this Pas-

sage.

2 One may also translate the original Word αυ-

τονων, which has its own Taxes, or Impofts; that is, pays Tribute to no foreign Power. And this is the Sense which the Greek Scholastick gives that am-

biguous Word. Grotius.


4 The Greek Writer is there speaking of the Re-

oma People, Who, he says, were from the very be-


ginning possessed of three great and most necessary Branches of Power, viz. that of creating civil Ma-


gistrates, and Officers for the Army; that of enacts-

ing and abrogating Laws; and that of regulating whatever belonged to Peace and War. Antiq. Rom. Lib. IV. Cap. XX. p. 26. Edi. Oxon. See also ib-

i L. II. Cap. XIV.

5 The Grammarians Servius describes the Pow-

er of the Romans in the same Manner, Omni Di-

nions. Omni in this Place, says he, is better than omnis, to express their enjoying all Power, in regard to Peace, War, and Laws. Grotius.

6 In a Speech made by Marcus Valerius, where he requires, that the People should be allowed a Share in the Administration of Justice, especially in Cases which nearly concern the Good of the Community; as when a Person is accused of raping Sedu-

tion, endeavouring to crush any Country by the Ex-

erture of despotic Power, or betraying it to the En-


Oxon.
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Fourth; and again, elsewhere, 'the Right of Regulating the Affairs of Religion, and of calling Assemblies.

But if any one would divide it right, he may easily find all Things relating to it; so as that nothing may be wanting or superfluous. For he that governs a State, does it either by himself or by another. What he does himself respects either general Affairs or particular; what concerns general Affairs relates to the making or repealing of Laws; which extends as well to sacred Things (as far as he has a Right to meddle in them) as to profane. Aristotle calls this 'συνένων, the first Art of Government. The Particular Affairs are either directly publick or private, but considered as they relate to the publick Good. Those which are directly publick, concern either certain Actions, as the making of Peace, War, Treaties, Alliances; or certain Things, as Taxes, and such like, in which is comprehended that eminent Dominion which a State has over its Subjects, and their Goods, for the publick Use. Aristotle calls this Art by the general 10 Name πολιτικόν, Political, and by another ( διοικημένον) that signifies the Art of Deliberating. Private Affairs are here the Differences of private Persons, so far as the Repose of the Society requires the Decision of them by publick Authority: And this Art Aristotle calls " διοικημένον, Judicial. Those Things which are dispatched by another, are either done by Magistrates, or other Ministers, among whom we may put Embassadors. In these then confits the Civil Power.

VII. That is called Supreme, whose Acts are not subject to another's Power, so that they cannot be made void by any other human Will. When I say, by any other, I exclude the Sovereign himself, who may change his own Will, as also his Successer, who enjoys the same Right, and consequently, has the same Power, and no other. Let us then see what this Sovereign Power may have for its Subject. The Subject then is either common or proper: As the Body is the common Subject of Sight, the Eye the proper; so the common Subject of Supreme Power is the State; which I have before called a perfect Society of Men.

We then exclude the Nations, who are brought under the Power of another People, as were the Roman Provinces; 9 for those Nations are no longer a State, as we now use the Word, but the les considerable Members of a great State, as Slaves are the Members of a Family. Again it happens sometimes, that divers People have one and the same Head, and yet each of those People make a compleat Society; for it is not in the moral Body, as 'tis in the natural, where one Head cannot belong to several Bodies; for there the same Person may be head, under a different Consideration, to several distinct Bodies; of which this is a certain Proof, 2 that upon the Extinction of the reigning Family, the Sovereign Power reveres to each People. So it may also happen, that several States may be linked together in a most strict Alliance, and make a 3 Compound, as Strobo more 4 than once calls it; and yet each of them continue to be a perfect State, which is observed both by others, and by 5 Aristotle in several Places.

The State then is, in the Senec I have just mentioned, the common Subject of Sovereignty. The proper Subject is one or more Persons, according to the Laws

7 Our Author has his Eye on the Place where the Grecian Writer speaks of the Power given by Romans to the Kings, which was reduced to the following Heads, 1. The Direction of what related to the Sacrifices, and other Parts of Religious Worship. 2. The Maintenance of both the Natural and Civil Laws, with the Cognizance of the most considerable Violations of both. 3. The Convening of the Senate, Assembling of the People, giving their Votes first, and putting in Execution whatsoever was carried by a Plurality of Votes. 4. The Command of the Armies, Lib. II. Cap. XIV. 7. Ethic. Nicom. Lib. VI. Cap. VIII. 9. See Chap. I. § 6. 10. Ethic. Nicom. Lib. VI. Cap. VIII. 11. Ibid.

VII. (1) What Puffendorf says, B. VII. Chap. V. may serve as a Comment on all this. As to our Author's Definition of the Sovereign Power, see Tresise De Jure Imperii, written by RABOB HERMAN SCHELIUS, p. 132. &c. 2 See B. II. Chap. IX. § 8. 3 Puffendorf treats of this at large, B. VII. Chap. V. § 16, &c. It is worth while to consult him on the Subject.


5 He calls those Bodies Συμμαχίαι, Alliances, Polit. Lib. II. Cap. II. p. 313; Ed. Paruf. Tom. II. and Lib. III. Cap. IX. p. 343, because such Sort of Conferences are commonly formed chiefly with a View of mutual Defence against the common Enemy.
and Customs of each Nation, in which the first Power of the State, in Ga-
then, Lib. 6. de placitis, Hypsoc. & Plat.

VIII. And here we must first reject their Opinion, that the Supreme Power to be always, and without Exception, in the People; so that they may refrain or punish their Kings, as often as they abuse their Power. What Mif-chiefs this Opinion has occasioned, and may yet occasion, if once the Minds of People are fully possifled with it, every wise Man fears. I shall refute it with these Arguments. It is lawful for any Man to engage himself as a Slave to whom he pleases; as appears both by the Hebrew and Roman Laws. Why should it not therefore be as lawful for a People that are at their own Disposal, to deliver up themselves to any one or more Persons, and transfer the Right of governing them upon him or them, without reverting any Share of that Right to themselves? Nei-
ther should you say this is not to be preemined: For the Question here is not, what may be preemined in a Doubt, but what may be lawfully done? In vain do some allege the Inconveniences which arise from hence, or may arise; for you can frame no Form of Government in your Mind, which will be without Inconve-
niences and Dangers. 3 Either you must take the one with the other, or else refuse both, says the Comician.

But as there are several Ways of Living, some better than others, and every one may choose which he pleases of all those Sorts; so a People may choose what Form of Government they please: Neither is the Right which the Sovereign has over his Subjects to be measured by this or that Form, of which divers Men have divers Opinions, but by the Extent of the Will of those who conferred it upon him.

There

VIII. (1) See my Remarks on Puffendorf, B. VII. Chap. VI. § 5. Note 2. The late Mr. Her-

Xtus has left us a whole Difertation on this Que-
fion, which is the eighth in his first Volume of Commen-
tations & Opufcles, &c. Where we have a particular and exact Account of the Books pub-
lished on both Sides of this Question. It must be
owned, there has been much Mifunderstanding in
regard to the whole Subject of the respective
Rights of the Sovereign and People. The first
who wrote on it with any Extent, having only con-
fined Ideas of the Law of Nature, were not suffi-
ciently acquainted with the Topick of such Que-

tions. Add to this the particular Interests and

Paffions, which in this, as in other Affairs, have
carried the Difputants on both Sides into violent
Extremes. But if we examine Things without Pre-
judice, I believe we shall find it not so difficult
to establish certain Principles, which neither favour
Tyranny, nor the Spirit of Independence and Re-

bellion. It is certain, that as soon as a People in
any Manner subnits to a King, really fuch, they
are no longer possess'd of the Sovereign Power;
for it implies a Contradiction, to say we confer a
Power on any one, and keep it fball in our own
Hands. But it does not thence follow, that we
have conferred it fo as not to referve a Right to
refumme it in any Cafe. This Referfe is sometimes
express'd; and there is always a tacit one, the Ef-
fecd of which appears, when the Perfons on whom
the Power has been conferred abuses it in a Man-
ner directly, and remarkably, contrary to the End
for which it was conferred. See our Author, in
the following Chapter, § 11. For I do not know
any Man has ventured to maintain, that a Prince
entirely forfeits his Right for the leaft Abufe of the
Sovereign Authority. Princes being Men, as well
as the meanest private Perfons, and consequently,
subject to Faults, that Consideration is fupppofed to
be taken in, when they are inверfed with their
Power. And it is certain, that the People pardon
them a great Number of crying Injuries, before
they think of recovering their natural Liberty.

2 In the Margin of the Original, we have here
a Quotation from A. Gellius, which is not only
faulty in all the Editions before mine, but also mis-
applying, as has been observed by Gronovius, in
a Note on that antient Writer, tho' he is entirely
silent in this Place. The Paffage in Quotation is as
follows,

Diogenes the Cynick was a Slave; but he was
fold into Slavery, and fo left his Liberty. Noch.
Attic. Lib. II. Cap. XVIII.

Our Author by this design to let us know, that
among the antient Greeks every Man had a Right
to fell his own Liberty directly; as appears from
his Florum Spartanum ed Jux Tituflaniismum. Tit.
he makes use of this Paffage for proving the pre-
tended Difference between the Grecian and Roman
Laws in this Particular; and the Latin Compiler
of Mijcellanea Observationum only means, that Di-
genes from a Freeman became a Slave, for he was
taken by Pirates, who fold him; as appears from
the Paffages of Diogenes Laertius, alluded by
Gronovius on that Place. A Paffage from
Diion of Pride, quoted by our Author, B. II. Chap.
V. § 27, Num. 1. would have been more to his
Purpose.

3 Terence, Heautontim. Act II. Scene II.

Ver. 54.

4 Cicero speaking of the Power of the Tri-

tum of the Roman People says, You see plainly,
Quintus, that the Triumvirs is exalted to many A-
buses. But it is unjust, in the Proclamation of any
Acclamation, to enumerate Inconveniences, and place
such a View on it, without taking any Notice of the
Advantages resulting from the Things under Con-
dideration — But we should not enjoy the Advantage
fought for, without that Mixture of Inconveniences.
De Legibus, Lib. III. Cap. X. Grotius.

5 The City of Auxerre petitioned Charles V., that
the Reformation of their Senate might be al-
lowed, under the Affect of the Affairs of the Tribes of the People. The Norimbergers
defire the direct contrary. Grotius.
There may be many Causes why a People should renounce all Sovereignty in themselves, and yield it to another: As when they are upon the Brink of Ruin, and they can find no other Means to save themselves; or being in great Want, they cannot otherwise be supported. For if the Campari formerly, obliged by Necessity, submitted themselves to the Romans in this Form, * We yield up, O ye Senators, the People of Campania, and the City of Capua, our Fields, Temples, and all that we have, both Divine and Human, into your Power. And some People, when they offered to submit themselves to the Power of the Romans, were refused, as Appian relates: What hinders, but that any People may, after the same Manner, yield up themselves to one powerful Prince. We read in Virgil,

Nec cum fe, &c.

It may also happen, that a Master of a Family having large Possessions, will suffer no Body to dwell in them upon any other Condition; or one may have a great many Slaves, and make them free, upon Condition of acknowledging him for their Sovereign, and paying some Taxes: Of which we have many Instances. Tacitus speaks thus of the German Slaves, * Every one has his Declining, and governs his own House. The Master demands of him, as of a Farmer, a certain Proportion of Corn, Cattle, or Stuff; after which the Slave is under no Obligation.

Besides, as Aristotle said, * some Men are naturally Slaves, that is, turned for Slavery. And some Nations also are of such a Temper, that they know better how to obey than to command; which the Cappadocians seem to have been capable of, when being offered their Freedom by the Romans, they preferred living under a King, declaring that they could not live without one. Thus Philostratus, in the Life of Apollonius, * It is a Folly to pretend to set the Thracians, Moijians, and Gete at Liberty, since they don't like it.

Moreover, the Examples of other Nations, who for many Ages lived happily under an arbitrary Government, may have influenced some. * The Critics under

Our Author is mistaken here, in attributing to Charles the Fifth, what the Historians say of Sigismund; as has been observed by Wagenesell, De Norimberg. rebus notabilibus. Cap. XXIIII. p. 179, for which he quotes Melanchthon,.Greven. Gatt. Lib. II. p. 206. I am beholden to Mr. Hertius for this Remark. See his Differencia De Jucabitur, Rom. Germ. Imperii Rebus publicis, &c., § 23, in Tom. II. of his Commentationes & Opuscula, &c., p. 6. Lib. VII. Cap. XXXI. Num. 4. 7 The Pelopids and the Samians did the same. See Libv. V. Cap. XXVIII. and Lib. IX. Cap.XLII. Thus likewise the Epidamnites, being abandoned by those of Corcyra, surrendered themselves to the Corinthians, so as to engage that People in their Defence against the Thasians, the Illyrians, and the Eleans, who had joined them. Thucydides Lib. I. § 24, 25. Edit. Owen. Grotius.


9 This Passage of Virgil is nothing to the present Purpose, as has been observed by the Commentators of the Work before us. It is taken from the fourth Book of the Ennius, v. 618, 619, where Didius, among the Impressions with which he loads Eneas, wishes that, after having made a disadvantageous Peace, he may enjoy neither Kingdom nor Life.

—Nec cum se, &c.

Our Author, by changing the Punctuation, and the Scope, makes the unfortunate Lover say,

—Nec cum se, &c.

A remarkable Example how far the Memory imparts on such as depend on it too much. 10 De waribus Germanorum, lib. XXV. See a Differentia de Mr. Thomass, De bominibus propria Germanorum, § 66, &c. Where he explains how Historian's Account of the several Sorts of Slaves among the ancient Germans. The Liti or Lidi, in the middle Age, were also brought as an Example on this Occasion. See the late Mr. Hertius, De bominibus, propriis, sect. I. § 4, in his Comment. & Opuscula, &c., Tom. II.

11 See Puffendorf, B. III. Chap. II. § 81. Where he examines this Opinion of the old Philosopher.


13 Seneca, speaking of Marcus Brutus, says, That he was a great Man in other Respects, I think he was extremely mistaken, and destitute from the Maxims of the Stoicks, in dredging the Name of King, since there is no better Government than that of a good King: In flattering himself with the Hopes of Liberty, at a Time when both those who aspired at Power, and those who should submit to it, had so large a Reward in view: Or in imagining the State could be re-established in its first Form, when the ancient Morals were corrupted, and that it was possible to settle the Equality of a Commonwealth, and put the Laws duly in Execution, in a State where he had seen thousands in Arms, not to offer their Liberty, but to decide who should be their Master. De Benef. Lib. II. Cap. XX. See Petr. Biar, Hist. Graecorum, Lib. XIV. p. 329. Grotius.

14 Lib. XLII. Cap. V. Num. 23, 31, 34.
Bunæmæ, says Lucæv, would not have changed their Condition with any free State whatever. And sometimes the Situation of publick Affairs is such, that the State seems to be undone without Remedy, unless the People submit to the absolute Government of a single Perfon; which many wise Men thought to be the Cafe of the Roman Republick, in the Time of Augustus Cæsar. For these and such like Reasons, it not only may happen, but often does, that Men submit themselves to the Government and Power of another, as Cicero observes in his second Book of Offices.

But now as Property, or Right to the Goods of an Enemy, may be acquired by a lawful War, the Word Lawful being taken in the Sense I before mentioned, so may also Civil Dominion, or an absolute Right to command and govern the Enemy. What I have said, does not tend solely to maintain the Sovereign Authority of a Monarch, in Places where it is establishes; for there is the same Right, and the same Reason, for that of the Nobles, who govern a State exclusive of the People. Not even a Commonwealth was ever found so populous, but that those who were very poor, or Strangers, the Women and young Folks, were excluded from publick Councils. There are also some People that have other People right impertinent, if it had been included in the Words of our Author, who was not capable of such an Extravagance. We are therefore place to it the Account of his Epitaph, who is in other Respect a very great Critick, but here on this and other Subjects, has often made strange Mistakes, in explaining an Author whose Principles he did not thoroughly understand; as I have long since observed in my Notes on Grotius, and as appears from what I have said in my Latin Edition of the Work of Grotius.

18 Thus ISOCRATES tells us, that several Citizens of the free States of Greece left their own Country, and settled at Salamis in Cyprus, because Evagoras reigned there. Orat. Laudat Evag. p. 199. Ed. H. Steph. GROTIUS.

19 PHE pseudratus makes Dion say, I fear the Romans, who have been long accustomed to Monarchy, will bear no Change in their Form of Government. Vita Apol. Tyan. Lib. V. Cap. XXXIV. Ed. Lipsi. Oler. GROTIUS.

20 Thus Tacitus says it was the Opinion of wise and discerning Perfons, after the Death of Augustus, that there was then as Way of avoiding the Discontentions of the State, but that of submitting to the Government of one Annual. Lib. I. Cap. IX. Num. 4. See also Hist. Lib. I. Cap. I. Num. 2. Florus, Lib. IV. Cap. III. Num. 6. Lucan's Pharsalia, Lib. I. v. 670. IX. 262. And Dion Cassius, Hist. Lib. LIII. p. 575. Ed. H. Steph.

21 There are several Reasons which induce Men to submit to the Command and Power of another: They are engaged either by Convenience, by the Greatness of Fortunes received, the Dignity of the Person, the Hope of future Advantages, or an Apprehension of being forced to obey: They are captivated by the Hope of a valuable Consideration, and large Promises: Or finally, They are hired to make their Submissions, as we see frequently the Case in our Commonwealth, Do Office. Lib. II. Cap. VI.

22 This Reflection (which our Author has inquired in his short Remarks on Campaellus's Poet. Ec. p. 97. of the Collection printed at Amsterdam, in 162.) is designed to shew that it is not contrary to the End of Civil Society in general, that People should be subject to an independent Power; because in the most populous Common-wealths, there is always a considerable Number of Perfons of both Sexes, who have no Share in the Administration, and depend on the Affembly of the People, in whose Hands the Sovereign Power is lodged, as much as the Subjects of a Monarchial Government depend on their Prince, or thole of an Ariftocracy on the Council of the Chiefs of the State. I make this Observation because the learned GRONOVUS makes our Author reason thus: There are some Perfons who are ordinarilv excluded from publick Debates; therefore the whole People, or the greater and better Part of them, is not permitted to reft a Tyrant, even in extreme Necessity. Whereupon the Commentator concludes with an Air of Contempt, Sit oppræ Argumenti Pontius. In Reality, the Argument would be down-right imperempt, if it had been included in the Words of our Author, who was not capable of such an Extravagance. We are therefore place to it the Account of his Epitaph, who is in other Respect a very great Critick, but here on this and other Subjects, has often made strange Mistakes, in explaining an Author whose Principles he did not thoroughly understand; as I have long since observed in my Notes on Grotius, and as appears from what I have said in my Latin Edition of the Work of Grotius.
people, or them, who are no less subject to them than if they were under Kings. Whence arise that Question, **35 Are the Collative People in their own Power?** And when the Caipus had delivered themselves up to the Romans, they **36 are said to have passed under a foreign Dominion. As Aetolia and Amphipolonia are said to have been under the Power of the Aetoliad, Poree and Caunus under that of the Rhodians. Psydus was given by Philip to the Olybrians. And those Towns which had been under the Spartans, when they were delivered from their Government, were called Eleutherolocanes, **37 freed Locricians.** The City Catara is said to have belonged to the People of Smyrna, in Xemophoria, Nice in Italy was adjudged to the People of Marsilile in Strabo; And the Island of Pithecus to the Neapolitans.

So we read in Frontinus, that the Town Colatia was adjudged to the Colony of Cypresa, Cauditium to the Colony of Beneventum, with their Territories. Others gave the Cities of the Moors to, **38 the Province of Bactria, with its Territories.** All which were absolutely void, if we allow, that the Right of Government is always at the Discretion and Will of the Perfons governed.

But both sacred and profane History do testify, that there are some Kings who do not depend on the People, considered even as a Body, **39 If thou shalt say, (said GOD to the Israelites) I will set a King over me, And to Samuel, Shew them the Manner of the **40 King that is to reign over them.** Hence the King is said to be anointed over the People; and over the Inheritance of the LORD, and over Israel. Solomon is called King over all Israel. So David thanks GOD, that he had subdued the People under him. And CHRIST says, *The Kings of the Gentiles exercise Lordship over them, That Paffage of Homer is well known, 35 Regum timendorum, &c.*

*For my part,* Kings have Dominions over their own People; but Kings themselves are subject to the Dominions of Jupiter.*

Seneca thus describes the three Forms of Government, **46 Sometimes we have Reason to fear the People; sometimes the Person of Credit in a Council; when the greatest Part of publick Affairs are in the Hands of that Council; and sometimes one single Person, who is invested with the Power of the People, and over the People.** Such are the who **47 Plutarch says, Not only command according to the Laws, but even command the Laws themselves.** And in Herodotus, Othamus thus describes Monarchy, A Power to command as one pleases, without being accountable to any Person. And Dion Phusistratus describes Royalty: *So to govern, as not to give Account to another. Panfanius to the Messenians, opposes regal Government to that which may give Account of its Actions.*

Aristotle says, there are some Kings who have the same Power as the whole Nation has in another Place over their Perfons and Goods. So after the Chief Men of Rome began to aume to themselves the Regal Power, the **38 People are said to have founded Salamis with Egina, for Xiphillion says, Augustus disputed the Athenians, and took Egina from them, p. 75. Ed. H. Steep. Secondly, Neither did Adrian take the Island of Cephalenia from the Athenians. On the contrary, they received it from that Emperor, as we learn from the Author here quoted, p. 264. Thirdly, there is no such Island as Lindus, which is the Name of a City in Rhodes, as PLINT afires us, Lib. V. Cap. XXXI.

21 Livy, Lib. I. Cap. XXXVIII. Num. 2.
22 Iden Lib. VII. Cap. XXXI. Num. 6.
23 This Example is nothing to the Purpose; for it speaks of a Province of the Roman Empire, which of Course could not have a Sovereign Power over those Cities, without the Emperor's Will and Pleasure.
24 See what is said on the following Chapter, § 3.
25 Hor. Lib. III. Ode I.
26 Ed. XLIV.
27 This Paffage of PLUTARCH is not very well applied. The Historian speaks there of Philopomenes, General, not Sovereign of the Achaeans, and observes, that he was so great a Master of the Art of War, that he understood not only how to command according to the Laws, but even how to command the Laws themselves, when the Chief of the State required it; that he did not flag till the Command was given him, but took it when Opportunity offered; being perfuaded, that the Person who had better Skill and Judgment then those at the Helm, was their General, rather than he whom they chose. Comar. Vit. Philopomen. & Flamin. p. 382. Tom. I. Edit. Web.
28 The Prince's Pleasure has the Force of a Law, for by the Lex Regia, made by his Authoritie, the People conferred him all the Authority and Power. Diz. Lib. I. Tit. IV. De Cognit. Principian, Leg. I. See the learned Gronovius's Oration De Lex Regia, which I have translated into French, and illustrated with Notes. That Piece was published in 1741, in the Second Edition of Mr. Noord's Discourse on The Power of Sovereignty, Princes, and Liberty of Conscience.
hefted all their Dominion upon them, and Power over other themselves; as
Theophilus expounds it. Hence is that Saying of Marcus Antoninus the Philosopher, 
No one but GOD only can be the Judge of a Prince: and Dion, B. 53.
of such a Prince, He is free, Master of himself, and of the Laws, so that he does
what be pleases, and what be dath not please be need not do. Such a Kingdom was
that of the Incubides antiently in Greece at Argos; for in the Argives Tragedy of
Suppliants, the People thus address the King in Efchylus. Sir, you are the City
and the Publick; you are an independent Judge. Seated on your Throne, as upon an
Altar, you Alone govern all by your absolute Commands.

Quite otherwise than King Thebes himself speaks of the State of Athens in
Euripides, This City is not governed by a single Peron, but it is a free City,
where the People reign, by establishing new Magistrates every Year, as they think
fit. For Thebes, as Phalarb explains it, was only their General in Time of War, and
the Guardian of their Laws; in other Things upon a Level with the Citizens.
Hence it comes to pass, that Kings who are accountable to their People,
are fad to be called Kings improperly. So after Lycurgus, and especially
after the Ephori were constituted, the Macedonian Kings are fad by Poly-

29 The Lex Regina gave the King all Manner of Power over the People. Ad Inftiht. Lib. I. Tit. II.

Mr. De Tillemont, in his History of the Emperors, Vol. IV. p. 644. Edit. Bruxelles, join and explains that Prince's Words, as if he meant to say, He feared not the Masters of the Soldiers, because GOD alone is the Master of Empires. Grono-

31 This is fad in Judg. vii. 11. 21. and 1 Macc. x. 15. The Names of the GoddesSES Oeea, and Sophocles, to whom Cadmus built a Temple at Thbes, and whom the Grecians called Polias. Eschylus says, The Priachus were Polias, that is, Exiles, for the Greek Word λατεύς. The first In-

32 Thes are the Anakim משלים, mentioned Deut. ii. 10. Hence the Name of the GoddesSES Oeea משלים, to whom Cadmus built a Temple at Thbes, and whom the Grecians called Polias. Eschylus says, The Priachus were Polias, that is, Exiles, for the Greek Word λατεύς. The first In-

33 But, as Milton observes, in his Deuf. pro Pop. Angic. Cap. I. p. 174. The Poet puts those Words into the Mouth of some foreign Women, who defying the King of Argos's Protection and Affiliation against the Egyptian Fleet in Pursuit of them, flatter him with an absolute Power, which did not belong to him; as is evident from that Prince's own Words, I have already told you, I will not do it, without the Consent of the People, even tho' it was in my Power. Conformably to this Declaration, he fumes the People, and having ob-

34 Suppl. v. 404, &c. 

36 Demophon the Son of Theof, speaks thus in one of Eeuripides's Tragedies, I am not taught by Words, nor do I fear the Words of Priest,

37 That Hiforim speaks only of the Manner how the Kings of Macedon were limited. Lib. VI. Cap. VIII. which is the Place our Author had in View.
It is where he speaks of Clemens, who, as he observes, had only the Name of King, but the whole Power was lodged in the Hands of the Euphor. Vit. Agig. & Clemem. p. 305. Edit. Web.

Plutarch says (of the Argives) to the Corinthians, The Argives, of old great Lovers of Equality and Liberty, have limited the Royal Power as much as possible; "se that they have left to the Sons and Posterity of Cits, nothing but the bare Name of King." So also Plutarch observes, That the Senate had Power to judge Kings among the Carthag. 44 Aristotle denies that such Kingdoms constitute any proper Form of Government, because they do but make Part of an Aristocratical or Democratical State.

Nay, even among Nations, which are not always under Kings, we meet with some Instances of a Sort of temporary Monarchy, which is not subject to the People. Such was the Power of the 45 Amymones among the Chaldeans, and of the Dictators 44 in the first Ages at Rome, from whom there was no Appeal to the People, whence a Dictator's Edict was held as sacred, says 45 Livy. Neither was there any 44 Security but in a careful Obedience. And 44 Cicero, that the Dictators had possessed itself of the whole Force of the Royal Authority.

The Arguments which are brought for the other Opinion are easily answered. For first, Whereas it is alleged, that the Person constituting, must be fuperior to the Person constituted; it is only true in regard to those Powers whose Effect depends always upon the Will of their Author; but not in regard to a Power which, tho' at first one was at Liberty to confer it or not, cannot afterwards be revoked by him that has once conferred it. As when a Woman chooses herself a Husband, whom she must from that Time always obey. Valentinian told his Soldiers, who had made him Emperor, when they desired something which he did not like, 48 It was indeed in your Power to chose me your Emperor, O ye Soldiers!

But

32 It is where he speaks of Clemens, who, as he observes, had only the Name of King, but the whole Power was lodged in the Hands of the Euphor. Vit. Agig. & Clemem. p. 305. Edit. Web.

39 His Words are these, For it has long been a flandering Calumny among the Lacedemonians, to have two Kings, who are such more in Name than Authority, chosen out of the two Families of Proclus and Euclidines, &c. Vit. Agigil. Cap. II. Num. 2. Edit. Cudor. & Cap. XXI. De Regibus, Num. 2. But Amerianus says, that other Spartans, was King of the Lacedemonians, in Name, not in Power. 40 Carth. Cap. XIX. p. 61. Edit. Web. Grac.

42 The Officer who had the Care of the Perjton, used to bring the Kings before the Senate by Night, and not give them their Liberty till they were cleared by that Body. Plutarch, Quoed. Grac. p. 291, 292, Tom. II. Edit. Web.

43 The Philosopher does not say such Kings made Part of an Aristocratical or Democratical State; but that there may be, even in Democracy and Aristocracy, Generals invested with as large a Share of Authority in Military Affairs, as the Perfons who bear the Title of King. Polit. Lib. III. Cap. XV. p. 319. Edit. Paris.

44 Amymones. Our Author, and some others, miscon this People, as GRONOVius observes; for Amymones is the true Reading, which he shews from Plutarch, Quoed. Grac. 292. But I am surprized that no one has taken Notice of the Misapplication of this Example. For the firty, chosen Men, there mentioned, who governed in the most important Affairs with absolute Authority, held their Office during Life, (ā vivō). So that this cannot be allowed as an Instance of temporary Sovereignty. But our Author, trussing his Memory on this Occasion, thought Plutarch wrote 44 twenty, which were chosen annually. Or perhaps, having read Bodin, who makes the fame Mistake in his Treatise Of the Commonwealth, Lib. I. Cap. VIII. p. 126. Edit. Lat. Franc. 1622. he took it from that Writer, without consulting the Original. I am inclined to believe this was the Case, because they agree in giving the Magistrates of Corinth the Application of Amymones. But whatever led him into this Error, our Author might have produced a more suitable Example nearer Home, which is that of the Government of Frisland, where the Senators, who compose the supreme Council of State, and are elected every Year, have, during that Time, to absolute Authority ever since the Year 1639, that they do what they please, without consulting any one, or being obliged to answer for their Conduct when out of Office; nor can any Act of theirs be abrogated. This I learnt from a Lawyer of that Country, who has been successively Professor and Member of that Council; from whence he was called into the Academy of Frankfort. See ULRIC HUBER, De Jurc Civitatiis, Lib. I. Sect. VIII. Cap. II. Num. 3, &c.

44 See § 1. where the Author treats professedly of the Dictators. I have transposed a Note of the Author to that Place, because it contains an Example taken from the Roman History, relating to what he says of the Power of those extraordinary Magistrates...

45 Lib. VIII. Cap. XXXIV. Num. 2.

46 Idem. Lib. II. Cap. XVIII. Num. 8.

47 The Roman Orators speak of the proper and ordinary Power of the Dictators, but of the Manner in which Julius Caesar, had employed it, when he found Means to make that Office perpetual, so is evident from the whole Series of the Disputes. The Words are these. He (M. Anthony) entirely abolished the Dictatorship from the Commonwealth, which had possessed itself of the whole Force of the Royal Authority. — The perpetual Dictatorship being new, in every one's Mottom. Philoponen. J. Cap. I. 48 SOLYOMON, Hist. Accl. Lib. VI. Cap. VI. THEDOROT makes the Emperor speak thus to his Army, During the Vacancy of the Thrones, it was your Business to deliver me the Reign of the Government;
But after you have chosen me, what you request depends on me, and not on you. It is your Duty, as Subject, to obey, and mine to consider what is proper to be done. Neither is that true which is supposed, that all Kings are constituted by the People. The contrary sufficiently appears from the Examples I have already alluded, of a Mafter of a Family that receives Strangers into his Lands, upon Condition of Subjection; and of Nations reduced under one’s Dominion by the Right of War.

2. Another Argument they fetch from a Saying of the Philosophers, that all Government was ordained for the Sake of the Governed, not of the Governours, whence it follows, as they pretend, that the Governed are superior to the Governours, since the End is more noble than the Means. But neither is that universally true, that all Government was designed for the Sake of the Governed; for some Powers are of themselves established for the Sake of the Governour, 49 as that of a Mafter over his Slave: For there the Benefit of the Slave is extrinftical and accidental: As the Gain of the Physician has no Connection with the Art of Phyfick.

There are other Powers that tend to the mutual Advantage of him who commands, and of him that obeys, as the Authority of a Husband over his Wife. So that there may be some Civil Governments established for the Benefit of the Sovereign, as the Kingdoms which a Prince acquires by the Right of Conquell; but are not therefore to be reputed Tyrranical; for Tyranny, as the Word is 50 now taken, implies Injustice. Some Governments may also respect the Benefit as well of the Governour as of the Governed; as when a People, unable to defend themselves, submit to the Dominion of a powerful Prince, I do not deny but that the Good of the Subject is the direct End proposed in the Etablifhment of moft Civil Governments; and that it is true, which 51 Cicero said from 52 Herodotus, and 53 Herodotus from 53 Hefiod, That Kings were constituted to administer Justice to the People. But it does not therefore follow, as they infer, that the People are superior to the King: For Guardianfhip was undoubtedly designed for the Benefit of the Pupil; and yet it gives to the Guardian 54 a Power over the Pupil. Neither does it avail, that a Guardian may be removed if he does not manage his Charge well; and therefore there ought to be the fame Power over a King. For as to a Guardian, it is to be considered, that he has a Power superior to him: But in Civil Governments, because there must be some denier Rejort, it must be fixed either in one Perfôn, or in an Affembly; whose Faults, because they have no Superiour Judge, GOD declares, that he takes Cognizance of; who either punifhes them, if there be a Nefceffity for it; or tolerates them, for the Chriftinfement or Trial of a People.

It is admiredly said of 55 Tacitus, You must hear with the Luxury or Covetousnefs of Princes, as you do Barrements, Storms, and the other Inconveniences of Nature: There will be Faults, as long as there are Men; but the Evil is not perpetual,
is compensated by the Good which happens from Time to Time. And M. Aurelius said, the Magistrates are to judge of private Persons, Princes of Magistrates, and GOD of Princes. There is a remarkable Place in Gregory of Tours, where that Biliop thus addresses the King of France, If any one of us (O King!) should transgress the Bounds of Justice, be he may be punished by you: But if you yourself should offend, Who shall call you to Account? When we make Representations to you, if you please, you bear us; but if you will not, who shall condemn you? There is none, but be he who has declared himself to be justly itself.

Among the Maxims of the Eusebius, Porphyry mentions this, That it is not without a particular Providence of GOD, that the Power of Commanding falls to the Lot of some Persons. And Trenexus says excellently, By whose Orders 62 Men are born; by his Command also are Kings ordained, proper for them who are governed by them. We have the same Thought in the Constitutions of Clement, Thou shah fear the King, knowing that he is chosen of GOD.

Neither is it an Objection to what I have said, that we read of some People punished for the Offences of their Kings; for this does not happen, because they do not punish or restrain their King, but because they seem to give, at least a tacit Consent to his Vices; or perhaps, without respect to this, GOD may make use of that Sovereign Power which he has over the Life and Death of every Man, to chastise their King, in regard to whom it is a great Punishment to lose his Subjects.

IX. There are others, who fancy to themselves a reciprocal Dependence between the King and the People; so that, according to them, the People ought to obey the King whilst he makes a good Use of his Power; but likewise, when he abuses it, he becomes in his Turn dependent on the People. Now if by what they say, they mean only, that our Duty to our Sovereign does not oblige us to do any Thing manifestly unjust, they say but the Truth; but this implies no Right to compel the King, or to command him. But suppose they had a Defign to divide the Government with the King, (of which we shall say something hereafter) there ought to be Bounds assigned to the Power of each Party, according to the Difference of Places, Persons, or Affairs, that the Extent of their respective Jurisdictions might be easily discerned.

The Author has the Passages of Xiphilin in View, which I have quoted Note 50 of this Paragraph. He sets it down in a Note on this Place; where he also quotes two Expressions of two other Princes, to the same Purpofe. King Virgo, (in Cassiodorus) says, that what regards the Royal Power (he should have said Dignity) is to be judged by the Powers above; since it is derived from Heaven, and is accountable to Heaven alone. In the same Author a King says, We cannot be subject to another, because we have no Judges. This last Passage is in the Formula Prefettrii Urbanae, Var. XI. 6. The first Words of the former are taken from Lib. X. 31. But I do not know where our Author found, Sinc. &c.

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XI. Mutual Subjection refuted.

See what I have said in the foregoing Note.

This Reason may sometimes take Place. See Mr. Le Clerc's Reflections on the Famine with which GOD punished the Israelites, on the Account of Saul's exterminating the Defendants of the ancient Gibeonites, a SAM. XXI.

(1) That is, while he remains really a King, and has not for a while abused his Power, as to give just Occasion to consider him no longer in that Character. For this Reflection is always to be under-
But the Goodness or Badness of an Action, especially in Civil Concerns, which are liable to frequent and intricate Discquisitions, are not fit to distinguisht hose Limits; from whence would necessarily follow the utmost Confusion; because, under Pretence that an Action appeared Good or Bad, the King and People would each, by Virtue of their Power, affume to themselves the Cognition of one and the same Thing; which Disorder, no Nation (as I know of) ever yet thought to introduce.

X. Having confuted these Errors; it remains that we give some Cautions, in order to direct us how to judge rightly, to whom the Sovereign Power in every Nation belongs. Let this then be the First, That we be not deceived by the Ambiguity of Words, or the Shew of outward Things. For Example, 'Thou' among the Latins, a Kingdom and a Principality are generally Opponites; as when Cesar said, 'the Father of Veriuginetor had obtained the Principality of Gaul, but was flain for aspiring to the Royalty: And when Pifs, in Tacitus, said, * that Germanicus was the Son of a Prince of the Romans, not of a Parthian King: And Suetonius, that Caligula wanted but little of changing the Ornaments of a Prince into those of a King: And Marobodius is said in * Pelleius not to have been contented with the Principality, which he poifled with the Confeit of those that depended on him, but ambitiously to have affected the Regal Power.

Yet we fee these two Words often confounded together; for the Spartan Chiefs defended from Hercules, after they were subjected to the Ephori, were yet called Kings (as we have 6 feen above). And in antient Germany, there were some Kings, who, as Tacitus says, 7 governed by the Deference paid to their Counfels, rather than by any Power they had of commanding. Livy relates, 8 that Euanperor Gege reigned more by the Efeem People had for him, than by his own Authoritv, Ariilatho, and Polybius 10, and Diodorus 11, gave the Title of Kings to the Saffites, or Judges of the Cartaginians: And Hanno is fo called by Solinus 12, Strabo 13 speaks of Seffuls in Traut, that having incorporated the Milifians into the State, it formed itself into a Democracy, leaving the Name of King to the Defendants of their antient Kings, and something of the Dignity.

1 That is, if the People had a Right to confider themselves as independent of the King, and proceed againft him authoritatively, as often as the King should do any Thing that seems unjust, or prejudicial to the publick Good, a perpetual Source of Quarrels and Diforders would be opened; because it might easily happen, that the People, at certain Times would judge France Things unjust or prejudicial, which are not really fo. So that the King, on such Occasions, being perfuaded he had not abused his Power; and the People thinking the contrary; and no Judge being to be found for deciding the Difference; they must necessarily come to an open War. It is better therefore, that the Sovereign should sometimes do Things really Evil, with Impunity; and the Inconvenience on this Side is les than that on the other. But then it does not follow, that the People can never judge of the Kings Actions; and that they are obliged to submit to, and suffer every Thing. This it is contrary to the natural End of all Society, and to the Obligation under which whole Nations, as well as each Man, lye of preferring themselves. X. (1) De Bell. Gall. Lib. VII. Cap. IV. 1717.

2 Anall. Lib. II. Cap. LVII. 
3 Vita Calig. Cap. XXII. 
5 The Kings of Lacedemon, as the learned Gronovius observes on this Place, were not subject to the Ephori; but the Ephori were established to oppose the Kingly Power, when it degenerated into Tyranny: As the Tribunes of the People, among the Romans, were fet up to check the Confular Power. This we learn from Valerius Maximus, Lib. IV. Cap. I.

6 See the 39th Note on Paragraph 8.

7 De Morib. German. Cap. XI. Num. 6. 
8 Lib. I. Cap. VII. Num. 8. 
9 Polit. Lib. II. Cap. IX. p. 334. 
10 The Cartaginians, says that Histarian, had Kings, and a Senate invifed with Artificiatical Power. Lib. VI. Cap. XLIX. 

The same Title is given him twice or thrice in the fame Place. 
12 Xenophon, of Lampacius, relates that Hanno, King (he Cartaginians travelled into those Islands, Cap. LXI. The Author here adda, in a Note, a Fafilage from the Writer of Hannibal's Life. He means Cornelius Nepos, whose Lives of Illuftrious Generals, at that Time pulled under the Name of Amilius Probus; but the Learned very much doubted their being the Work of that Grammarion of the middle Age: For two Kings were chosen yearly at Carthage, as the Confuls were at Rome. Cap. VII. Num. 4. Edit. Callcr. He likewise observes, that we may rank among those Kings, improperly so called, the Princes on whom their Fathers, who were real Kings, bestowed the Title of King, without devifing themselves of the Sovereign Power. Such was Darius, whom Artaxerxes condemned to die for Conpiracy against him; as we learn from Plutarch, Vit. diut. p. 1026. Tom. II. Ed. Web. 

13 It had before been formed into an Ariftocracy; as appears from the Words immediately preceding those quoted by our Author. But afterwards they (the Scythians) were changed into an Oligarchy, &c. See Geo. Lib. XIII. p. 924. Edit. Angl. (607. Paris).
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The Roman Emperors, on the contrary, after they exercised openly, and without any Divisum, a most absolute monarchical Power, were nevertheless called Princes. There are also some Republicks, where the chief Magistrates are honored with the Ensigns of Royalty.

On the other Side, the States of a Kingdom, that is, the Assembly of those who represent the People, divided into three Orders, according to Guizot 15, Praetates,procures, nostrique potentibus Urbes. Praetates, Nobiles, and Deputies of Towns. Those States, I say, in some Places, are only, as it were, the King's Great Council, by whose Means the Complaints of the People, which the Members of his Privy-Council often conceal from him, come to his Ear; and the King has nevertheless a Power afterwards to ordain whatever he thinks fit, in regard to the Matters in Question. But in other Countries they have a Right to take Cognizance of the Actions of the Prince, and also to prescribe Laws, which shall oblige the Prince himself.

Many think, that in Order to know whether a Prince be Sovereign or not, we need only consider whether he mounts the Throne by Right of Succession, or by Means of Election; for according to them, successive Kingdoms only are Sovereign. But it is certain, that Maxim is not generally, and without Restriction, true. For Succession is not a Title that determines the Form of the Government, and the Extent of the Power of him that governs: It imports only a Continuation of the Rights of him, to whom one succeeds. When a Family is chosen to reign, the Right conferred upon it passes from Successor to Successor, with the same Power that the first Election had given, and no more. Among the Laecodemians the Kingdom was Hereditary, even after the confuting of the Ephoroi. And of such a Kingdom, that is, of the chief Dignity of the State, Aristotles speaks, τότε τον βασιλέα αι μη κακά γίνοι, αι δ' αδιερή. Of those Kingdoms, some are Hereditary, others Elective. The same Author 16, and Thucydides 19, and Dionysius 20 of Halicarnassius, observe, that in the Times of the Heroes, most of the Kingdoms of Greece were so. On the contrary, the Roman Empire, even after all Power was taken from the Senate and People, 21 was conferred by Election.

XI. Another Caution may be this, We must distinguish between the Thing itself, and the Manner of enjoying it; which takes Place not only in Things corporeal, but also in incorporeal: For a Right of Passage, or Carriage through a Ground, is no less a Thing than the Ground itself. But these have for a full Right of Property, some by an usurious Right, and others by a temporary Right. Thus, amongst the Romans, the Dictator was Sovereign for a Time 23. The Generality of Kings, as well those who are first elected, as those who succeed to them in the Order established by the Laws, enjoy the Sovereign Power by an usurious Right. But there are some, Kings, who possess the Crown by a full Right of Property, as those who have acquired the Sovereign Right by Right of Conquest.

14 As the Doge of Venice, who is crowned, and has the Title of Serene; tho' not a Sovereign Prince.
15 In Ligurin. 16 See Pufendorf, B. VII. Chap. VI. § 12.
17 He there speaks of such as had only the perpetual Command of the Armies. Polit. Lib. III. Cap. XIV. p. 356. Ed. Paris.
18 Ibid. p. 357.
19 Lib. I. § 53.
20 See the Passage quoted at Length, on Pufendorf, B. VII. Chap. I. § 7. Not. 1.
21 This Point of History is treated at large, B. II. Chap. IX. § 11.
23 We have an Instance of a King chosen for a Time in Nic. Phos. Gregor. Lib. IV. Grotius.
24 Reges denique. Thus it is flood in all the Editions before mine: But I chose to read Reges ple- riorum, The Generality of Kings. The Sequel of the Discourse necessarily requires this Correction; and the Author himself uses the same Expression, § 14. Pleraque Impera famus non pleno bantaret. Besides, the Midlate was so gross, that Mr. De Courton has, I perceive, corrected it in his Translation, without mentioning it.
25 Our Author's Distinction of Patrimonial and Usurious Kingdoms, has been adopted by Pufendorf, B. VII. Chap. VI. § 16, 17, and by the Generality of Commentators and other Writers. But the late Mr. Cocceius, Professor in the University of Franckfort, on the Oder, rejects it, in a Difficult De Tamenato Principis, Cap. II. § 16. And, since him, Mr. Thomasius has renounced it very judiciously, in his Notes on Huber. De Ture Civitatis, Lib. I. Sect. III. Cap. II. § 19. p. 69, 70. The Substance of what he says is this: It is acknowledged that the Sovereign Power may be disposed of in Transfert. This supposes nothing contradictory to the Nature of the Thing; and if the Compact between the Prince and the People, expressly allows the Prince a full Right of alienating the Crown, this may be called a Patrimonial Kingdom, in Opposition to which

others
Of the Rights of

Conquest, or those to whom a People, in order to prevent greater Mischief, have submitted without Conditions. Neither can I agree with those, 5 who say the Roman Dicator had not the Sovereign Power, because it was not perpetual: For the Nature of moral Things is known by their Operations, wherefore those Powers, which have the same Effects, should be called by the same Name. 6 Now the Dicator,

others may be termed Vifedatory. But in Que-

tions relating to this Matter, the Enquiry is com-

monly concerning Kingdoms founded without such a formal Compact; the Examples of such Com-
pacts being very few; for we shall hardly find any but that made between the Egyptians and their King, mentioned in the sacred History, GENESIS, XXVII. 18, &c. and the Diuiples of the Doctors about the Power of alienating the Crown, relate to Caesars in which there has been no Compact be-

 tween the Prince and People on that Point. In

order to extricate themselves from the false

force have invented the Distinction under Consi-

deration, which only confounds the Matter, and is

 reduced to a Vith Circle. For when it is asked, what

Princes have a Power of alienating the Crown;

the Doctors reply, such as are in Petition of a Perplexity,

and when we desire to know, what is meant by a Patrimonial Kingdom, we are
told it is a Kingdom of which the Prince has a

Power of alienating the Crown. Some indeed pre-
tend that iu€ciffio Kingdoms are Patrimonial; oth-

ers give it Appellation to despotic Kingdoms; while others, confer it on such as have been con-
guared, or established in some other Manner by a

forward Conquest of the People. But all this lays no

solid Foundation of a Right of Property, strictly

speaking, and attended with a Power of alienating

the Crown, according to the Gratius himself, only

continues the Right of the first King. The

Turkish Empire is the most despotic in the World; and yet the Grand Signor has no Power either to alienate the Crown, nor change the Or-

der of Succession at Pleasure. Nor does it follow

from a People's submitting by Force or Necessity,

that they have by that Action invested the Prince

with a Power of transferring his Right to whom he pleases. It is in vain to object that if, in that Case, the Prince had demanded such a Power, the Peo-
ples would have given it. For Silence, on the con-

trary, leaves Room for presuming that there was no

fach tacit Concession; because had the King pre-
tended to acquire a Right of alienating the Crown,

it was his business to explain himself, and make

the People explain themselves on that Article; and

the People not having gokon of it, as is here grant-
ed, is and ought to be supposed to have had no

Thoughts of giving the King a Power, which en-

ables him to change their Matter as often as he

thinks fit. A Door is open to Chicanery, if Con-

tracts are to be explained beyond their express

Terms, under Pretext that the Prince would prob-

ably have extended their Engagements farther, if

they had been prefixed. Such Conjectures have no

Place, but when the Qestion turns on the Mean-

ing of an ambiguous Clause. In a Word, the So-

vereign Power, however conferred, does not in it-

self imply a Right of Property: There are two

very different Ideas, which have no necessary Con-

nection. As therefore a Prince, by transferring the

Property of an Estate to a Subject, does not there-

by give him a Right of Sovereignty over that E-

state. So, when a whole People submits to the

Dominion of any one, such a Grant does not of it-

self imply a Concession of a full Right of Pro-

perty. So that the Conveyance of Property does of

itself and in its own Nature include a Power of

alienating, unless such a Power is taken away by a

Claue in the Contract; but, on the contrary, the

Conveyance of Sovereignty does not of itself in-

clude a Power of alienating, unless it is specified

by a formal Clause. Nothing therefore remains to

be considered in the numerous Examples of Alie-
nations made by Sovereigns. But either those Alie-
nations took no Effect; or they were made or

approved by an express or tacit Convent of the Peo-

ple; or have been supported by Force only. See

my 20 Nov. on §. 12. Whatever becomes of this

Query for a Time on only, it will be asad

down as a Principle, that where any Doubt arises,

every Kingdom ought to be reckoned Non-patri-

monial. See Mr. Boiher's Introductio adjust

Public, Univer. p. 238.

5 The author means Bodin, who explains him-

self with more certainty in his Tractate of the Com-

monwealth, B. I. Chap. VIII., and who has been

followed by several Authors, and among the rest by

Pufendorf, B. VII. Chap. VI. §. 15.

6 If therefore the People confer all the Right of

carrying all the Parts of Sovereignty on any

one for a Time, without confining any one, or be-

ing accountable for his Conduct, it may be said he

is a Sovereign during that Time. I do not under-

stand why several Authors obligably maintain

that there can be no Sovereign for a Time. Ei-

ther this is not so different, nor the Reasons alledged are no better than so many different

Ways of begging the Question. The Power of commanding, even absolutely, is of such a Na-

ture that it may be conferred for a Time, without

cearing to be such. If a private Person tells his Li-

box an Act of Conveyance for a Time only, he will be

effectually a Slave during that Time, as if he had

taken a Matter for Life. It is true, in that Case the

Matter has no Right to fell him; but the Power of

Alienation is not, according to the Law of Nature

nor the Law of Reason, any more than the Right of

Sovereignty, much less of Sovereignty in general. It is granted, however, that the Limitation of Time destroys the Nature of

Sovereignty; but then it is falsely supposed that all

Sovereignty ought to be perpetual. It is said that a

sovereign Power conferred for a Time, is of Course

dependent, which I deny. It is indeed conferred

by the People, and they designed to confer it only

for a Time; but the Moment the Person, on whom it is conferred, is actually invested in it, he

is above the People, and is no more dependent on

them, during the Time fixed, than a Prince eli-

tablished for Life; all the Difference is, that when

the Time is expired, his Superiority and Independ-

ence are at an End. It is farther objected, that

such a Limitation confines the Sovereignty to cer-

tain Acts of Sovereignty. But it is sufficient that

the Person established Sovereign for a Time, is

thereby possessed of a Power of exercising all the

Acts and Parts of the Sovereignty, as he shall judge

proper, and according to the Exigency of Circum-

stances, it is not necessary that he should actually

have Occasion to exercise them all. If this is not the

case, a King, who exercises Religion to the People a

ccording to the Course of Nature, can reign but a

very short Time, would not be a Sovereign. Thence,

who maintain that Perpetuity of Duration has a

necessary Connection with the Nature of Sove-

reign,
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Dictator, during the whole Time of his Office, 7 exercised all the Acts of civil Government, with as much Authority as the most absolute King; and nothing he had done could be annulled by any other Power. And the Continuance of a Thing alters not the Nature of it, though if the Question be concerning Dignity, which is generally called Majesty, doublets he that has a perpetual Right, has a greater Majesty, than he that enjoys it but for a Time, because the Manner of holding adds to the Dignity. The same Thing may likewise be said of such, as during the Minority, Lunacy, or Captivity of their Kings, are appointed Regents of the King-
Of the Rights of

Book I.

...so that they depend not on the People, and cannot be deprived of their Authority before the Time fixed by Law.

But it is otherwise with those who are invested with a precarious Power, and which may be at any Time recalled, as were the Kings of the ancient Vandals in Africa, and of the Goths in Spain, whom the People might depose, upon any Dislike. Whatever such a Prince does, may be abrogated by those who voted him with a Power so liable to Revocation; and consequently as the Exercise of his Authority has not the same Effects as the Acts of a true Sovereign, so neither is the Authority the same.

XII. Against what I have said before, that some Governments are held in full Right of Propriety, that is, by way of Patrimony, some learned Men make this Objection, that Free-men are not to be barred away. But as there is a Difference between the regal Power, and that of a Master over his Slave; so likewise there is a Difference between civil Liberty, and that which is personal: The Liberty of a private Person is one Thing, and that of the whole Body of the People another. For even the Sticks acknowledge there is a kind of Servitude in Subjection; and in Holy Writ the Subjects of Kings are called their Servants. As then personal Liberty excludes the Dominion of a Master, so does civil Liberty exclude Royalty, and all manner of Sovereignty properly so called. Liberty thus opposes them, Before Men had talked the Sweetness of Liberty, they defined a King. Again, It seemed a shameful Thing, that the People of Rome, when they were under Kings, were never attacked in War, nor besieged by an Enemy, but being a free People should be besieged by the Hetrurians; and in another Place, The People of Rome are not new under a King but at Liberty. And again in another Place, he opposes those Nations that were free, to them that lived under Kings; and Cicero said Either the Kings should not have been expelled, or the People should have had their Liberty in Deed, and not in Words. And after them Tacitus, The City of Rome was at first under Kings; but L. Brutus brought in Liberty, and the consular Government. And elsewhere, The Liberty of the Germans is more secure than the regal Power of Arfaces. And Artaxerxes made of the two Cities, (those that live after their own Laws.) And Carthage in Sicily, The regal

It is to be observed that the Author fiscals only of such as are appointed Regents in the Cafes here specified, which happen but seldom; for those who have criticized him on this Occasion, seem to suppose he fiscals of all Regents in general. In the second Note on this Paragraph he refers us to an Instance of the extraordinary Cafe in Quinquer, which is given at large in Puffendorf, B. VII. Cap. VI. Note 4. The late Mr. Hertius, in a Diftribution De Tota Regia, which is published in the fifth Volume of his Commentaries & Opuscula, adds some others. John de Brevens, Viceroy of Jerusalem, was made Guardian of Baldwin II, and crowned as Emperor, on Condition that when his Ward, who was to marry his Daughter, came to Age, he should faithfully refign the Empire to him. See Charles Du Fresne's Goths Byzantine Historians, B. III. Odd, or Eudo, Duke of Burgundy, being named Guardian to Charles the Simple, King of France, was crowned as King, that he might govern with more Authority. See Mr. Du Cange's Glossary, under the Word Heredity, Alberic's Chrstianiti, An. 994, and Boisserée's History of France, B. II. p. 407. In the German Empire, Philip governed with the Title of King, during the Minority of his Nephew Frederic II. See Mr. D'Urberfo's Chronicle, p. 319, and that of Godfrey the Monk, An. 1196.

The fame is related of the ancient. Heredity by Porphry, Guthrie, Lib. II. Cap. XIV. XV. Of the Lombards, by Paul Warnefrid, Lib. IV. Of the Burgundians, by Amman Marcellinus, Lib. XXVIII. Cap. V. Edit. Falsiy. Of the Magdoviani, by Launcel Chalcondyl. Of the King of Agades in Africa, by Joan Leo, Lib. VII. In Normandy, whoever killed a King, succeeded to the Throne, as we learn from Guillelm. Neubrig. We have Instances of the same Kind among the Quadi, and Razaer in the Fragments of Dio.


De Legibus. Lib. III. Cap. X.


Natur. Lynig. Lib. II. Cap. XIX. We have an Instance of this Prefage in the History of Greece, by Peter Bizzarr. B. XIX. The Author, in a Note on this Place, produces the following additional Passages to prove that the ancient Greek and Latin Writers opposed Liberty to Monarchical Government. This Teres, the Father of Statelle, was the first who enlarged the Kingdom of the Odrysian so much, that he exceeded the other Kings of Thrace: for great Part of Thrace is free. Thucyd. Lib. II. Cap. XXXIX. Edit. Oxon. Are not to be feck their Miscellaneous i the same Manner in a free State, as under Kings, Seneca Pater Sophor 1. p. 4, 5. Edit. Italic. 1672. Josephus distinguishes between Kings and free States, Antiq. Lib. XIII. Cap. 31. Where he has preserved the Affinities of free States, and confederate Kings. Ad Famil. Lib. XV. Epif. IV. And Platf speaking of some Nations as free, adds, that they were not subject to King. Hist. Nat. Lib. VI. Cap. XX.
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Thunderbolts are those whole Force affect, either the Assembly of the States, or the chief Places of a free City: The Meaning whereof is that the State is threatened with a regal Power. So those Ciliciae who were not under Kings were called E-leutherus Cities, 7 free Ciliciae. And 8 Strabo says of Amfius, (a City of Pentus) that it was sometimes free, and sometimes under Kings. And every where in the Roman Laws, that treat of War, and Judgments of 9 Recovery, Foreigners are distinguished into 10 Kings and free People. It is said even of these, who do not enjoy this public Liberty, as well as of those who are deprived of personal Liberty, that they are not their own Masters; but that they belong to those on whom they depend. Hence that in 11 Livy, subieéthus Cities, subieéthus Lands, subieéthus Men were once under the Power of the Etolians. And again, 12 Are the People of Collattia their own Master? The Argument then which is here used, is not to the Purpose, since 13 the Question does not relate to personal but civil Liberty. But properly, when a People is alienated, it is not the Men themselves, but the perpetual Right of governing them, as they are a People. Thus when a Freed-Man is affigned to one of his Patron's 14 Children, the Freeman is not alienated, but the Right which one had over that Person is transferred.

And that is as weak, which alleges, that because a King conquers other Nations by the Blood and Sweat of his Subjects, therefore what he so conquers, should rather belong to them than to the Prince. 15 For it is possible, that the King may maintain 16 his Army out of his private Estate, or out of 17 the Revenues of the Crown Lands. For, though a King has but an unconditional Right to thole Lands,
as he has to the Sovereignty over the People who have chosen him, yet are thofe Revenues properly his own: Just as, by the civil Law, when one is obliged to re- 
store an Inheritance, the Incomes are not restored, because they are accounted to 
arife from the thing itself, and not to make Part of the Inheritance. Therefore it may happen that a King may fo enjoy a Government over some People in his own proper Right, that it may be in his Power even to alienate it; and we 
find in History many Instances of Sovereignty accompanied by that Right. 
Strabo says, That the Island Cythera over-againſt Tenerus did belong to Eu- 
ricles a Lacedemonian Prince, &c made Hebrews, in his own proper Right. So 
King Solomon gave to Hiram, (for fo Phiſo Byſbius, who translated the History of 
Sanctamantus, calls him in Greek) King of the Phoenicians, twenty Cities, not of 
thofe that were inhabited by the Hebrews. For Cabul (which Name is given to 
thofe Cities) was feated without the Bounds of the Hebrews; but of thofe Cities, 
which fome conquered Nations, Enemies to the Hebrews, had held to that Time, 
and were partly fubdued by Solomon's Father-in-Law, the King of Egypt, and given 
to him in Dowry with his Daughter, and partly conquered by Solomon himself. 
For it is plain, that thofe Cities were not at that Time inhabited by the Israelites, 
becaufe when Hiram had restored them, Solomon planted Hebrew Colonies in them. 

Thus we read, that Hercules having conquered the City of Sparta, gave the 
Sovereignty of it to Tyndares, on Condition, that if Hercules left any Children of 
his own, he fhould restore it to them. So Amphipolis was given in Marriage 
Dowry to Acamas Son of Thefæus; and Agamemnon promises in Homer to give 
Achilles feven Cities. King Amasgos gave two Parts of his Kingdom to Melan- 
pus. And fufis tells us of Daris, that he bequeathed by Will his Kingdom 
to Artaxerxes, and to Cyrus the Cities, of which he was Governor. Thus, the

19 That is from fuch Things as compose the Substantial Evidence of the Inheritance, and which were fully acknowledged by the Poet, for Reftitu- 
tution. This is our Author's Meaning, and the true Sense of the Law, which he has in View; fo that Lingler's Criticisms on both are mere Chi-

19 Thofe who accompanied Baldwin in his Eastern Expedition, allowed him half of the Cities, Provinces, Impofts, and Flanders, they had taken. 

Grotius.

In Regard to thofe Inftances it fhould be ob-
served, that We are not sufficiently acquaint- 
ted with the Terms on which the Princes or States here mentioned acquired the Sovereignty over the repective People. There might have been fome formall Chain, by which thofe People gave their 
Sovereign a Power of alienating the Sovereignty. Secondly, Thofe Aliensments were frequently supported 
by Force alone, as has been observed, Note 4, 

on § XI. and became lawful only by Vertue of a 

Subsequent Covenant, given when the People, thus 
alienated, submitted without Opposition to their new Sovereign. Thirdly, There might have been a 
tacit Covenant, entirely free, at the very Time of 
the Alienation; either when the People, to be alien-
ated, expreffed no Opposition to that Action, though not under the Contrain of superior Forces, or becaufe, a Cuthon being introduced into the 

Left, and other Countries, of annexing such a Full 

Power of Property to the Right of absolute Sove-

reignty, as authorized the Prince to alienate his 

Dominions at Pleafure, whofe Alienation was ef
tially declared the contrary. So that all thoe Ex-

amples do not amount to a Proof that the Power of 

Alienation is necelfarily attached to the moft a-

olute Sovereignty, considered in itself, and how-

ever acquired.
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Succeffors of Alexander the Great 27 are to be considered as having suceeded him, every one in his allotted Part, in the full Right of Property, by Vertue whereof he governed those Nations, which had been formerly under the Persians, or else as having acquired that Sovereignty themselves, by Right of Conqueft; therefore it is not to be wondered at, that they claimed to themselves the Right of Alienation.

When King Attalus, 28 the Son of Eumenes, had made, by his Will, the People of Rome Heir to his Goods, they, under the Name of Goods, poifefled themselves of his Kingdom. Of which Pharus 29 thus speaks. Therefore the Romans entering upon it as Heirs, reduced it into the Form of a Province, not by Force of Arms, but in a fairer Way, by Right of Inheritance. And afterwards, when Nicomedes, King of Bithynia, had made the People of Rome his Heir, they immediately reduced the Kingdom into the Form of a Province. And 30 Ciceron, in his second Oration against Rullus, says thus, We have got a good Inheritance, the Kingdom of Bithynia. So that Part of Libya, called Cyrenaica, was left by King Apion, by Will, to the Romans. Tacitus, in his fourteenth Annaal, mentions some Lands 31 which formerly belonging to King Apion, were, together with his King-

27 Ammian. MARCELLINUS. speaking of Per- 

son, says, th'o' not conformably to the Truth of His- 

tory, and according to the Great Plot, as that whole Kingdom to one of his Succelors. Lib. 


GROTIUS. See Henry DE VALOIS Note on this 

Paragraph. 28 Valerius MAXIMUS tells us, that Attalus did 

this out of a Principle of Gratitude, Lib. V. Cap. 

II. Num. 3: Sertorius affirmed, that on that 

Account, the Roman People had a very good Title to 


I. Edt. Wicl. GROTIUS. 29 Lib. II. Cap. XX. Num. 3. 


XV. p. 413. Edt. Grav. 31 Appian of Alexandria tells us, that Apion, a 

Dioecesis of the Ruffe of the Lagides, left the Country of 

Cyrene, (to the Roman People) by his Will. De 

Bell. Mithridat. Ammian. MARCELLINUS. speaks 

of this Legacy, Lib. XXII. Cap. XVI. We became 

possiflible of the drier Libya, by the Disjofal of King 

Apion; we received Cyrene, and the other Cities of 

Libiya from the Liberty of Pontus. For that King of 

Cyrene was called both Apion and Protow. See Breviar. Liv. Lib. IXX. That 

Prince himself came to the Throne by his Father's 

Will, as we learn from Justin, Lib. XXXIX. 

Cap. V. Num. 2. Eusebius in his Chronicle at 

the Year 1992, speaks of another Apion, mentioned 

by Ammian. MARCELLINUS. who had made the Ro-

man People Heirs of the Dry Libya. [But see 

HENRY DE VALOIS Notes on that Place]. To 

these may be added the following Examples. King 

Arsaces, by his Will, divided Armenia in such a 

Manner, that the greater Part of it fell to his Son 

Arsaces; and the smaller to Tigranes. Procop. 

De Adiaphor. Lib. III. Cap. I. We learn from 

Josephus, that the Emperor Augustus having allowed 

Herod to leave the Kingdom of Judæa to which of his Sons he preferred, that Prince altered his Will fe-

veral Times, Antiq. jud. Lib. XV. XVI. Among 

the Gburs and Vandals the Kings difpofed of their 

Conquestes by Will. Giacini, King of the Vandals, 

followed this Custom in regard to his Spanish 


Theodoric, King of the Ostrogoths, gave his Siter 

Amalasfrida the Country of Libybusam, in Sicily, 

for her Portion. Ibid. Cap. VIII. We find the 

same Practice established in other Nations. Pepin 

having conquered Italy, divided it among his 

Children: FREDEGAR, Obren. We have Tablet-
Of the Rights of

Book I.

dom, bequeathed to the Romans. And in 33 Cicero, Every Body knows that the Romans are become Masters of the Kingdom of Egypt, by Virtue of the Will of the King of Alexandria. Mithridates, in Jos. Jnfrin, speaking of Paphagonia, says, 33 Which fell to his Father, not by Force, and the Superiority of his Arms, but by a testamentary Adoption. The famous Author also relates, that Orodos King of Parthia, was a long while debating, to whom of his Sons he should leave his Kingdom. And

Polone, Prince of the Tiberianians, (a People of Cappadozia) and of the Country adjoining, left his Wife Heirefs of his Dominion; which also Manouel had formerly done in Caria, tho' he had several Brothers alive.

XIII. Some are told not to be true.


XIII. (1) Poppianus, a Roman Senator, declared that the Empire ought not to be left by Will, like Lands and Slaves. Tacit. Cap. VI. Salvian, speaking of Nebuchadnezzar, King of Babylon, makes the following Observation, For he (the Prophet) spoke to the King; in the King not of one single City, but, as was then suppos'd, of the whole World; who therefore could not bequeath the Nations which he governed, to the Poor, before the severall barbarous People under his Jurisdiction, on the Needy, it might seem, to confirm his extensive Kingdom into a Patriarchy for the Insolent. Break off thine Iniquities, saith he, by the breaking Mercy, that is, give the Poor Money, because you cannot bequeath your Kingdom upon them: Distribute your Substance among them, because you cannot dispose of your Crown. Ad Eccle. Carthol. Lib. I. p. 356. Editor. 1645. Grotius.

I have set down the left Paffage at Length, which our Author has quoted in such a Manner, that if I had not found it by Chance, after a long Enquiry, it would not have appeared whether Sal- vian was speaking of Kings in general, or of some one in particular. But that Author's Argument, thus considered intact, and the Paffage of Daniel, c. iv. which gave Occasion to it, will shew us that it is possible he thought of the Subject in Question; it is very probable he only means, that a Prince is not obliged to let fall his Subjects, in order to raise Money for the Relief of the Poor; and that it would not be proper or possible for him to leave them his Dominions; that therefore the King of Babylon ought to give Alms, not as a King, but as a very rich Man: Whence the good Priest con- cludes, in a Manner worthy of the Age in which he lived, that since Daniel exhorts the King, in general Terms, to redeem his Sons by Alms, without excepting any Thing in his Possession, that could be given to the Poor, he by those Words di- rected the King to employ his whole Treasure in Alms. When he only does not command him to give what he could not bequeath, but he forms to have command- ed him to give his All. So that no Confuence can be drawn from those Words for deciding whether Kings in general, and those of Babylon in particular, had, according to Salvian, a Power of alienating their Dominions at Pleasure.

The Author here has HOTMAN in View, who, in his Queristines libri, Cap. I. criticizes on the German Historian's Observation.

3 See the Capitularies of Charles the Bald, Cap. II. Conventus ad Carolum. To this Pur- pose is the Will of Porphius, by which he left Spain (or the Kingdoms of Leon, Asturias, and Galicia) to Alphonso and Ormifonfua; as also some Particulars in SAXO GRAMMAT. relating to Denmark. We are not therefore to be surprized that the Will of some Princes have been set aside, because not ratified by the People; as that of Alphonso, King of Aragon. Mariana, Hist. Hist. Lib. X. p. 499. and that of Alphonso, King of Leon, by which he had appointed his Daughters his Heirs, exclusive of his Sons. Ibid, Lib. XII. p. 577. Grotius.

4 ZIEGLER, on this Place, quotes the very Words of Charlemagne's Will, which we find after his Life, written by an anonymous Monk of Augstins, and published by P. FITHOU, p. 202. &c. As likewise in the large Collection of Mel- chior Goldast, Ann. 806. In which that Prince evidently supposes the Approbation of the People absolutely necessary. But if either of their Three Brothers shall have a Son, whom the People shall deit to succeed his Father, &c. The Historians say also that Charlemagne, toward the Close of his Life, assembled the Grandees of all his Dominions, and that with their Approbation he appointed Lewis King of Aquitaine, afterwards called the Pious, the Debonnaire, and declared him his Successor. EINGHART, in Vita Caroli Magni, Cap. XXX. See also ANSELM, Annales, Francon. Ann. 813, and THEOHANUS, De Geoffrey Lusac. Imper. Cap. VI.

5 He made them confirm his Will by an Oath, as EINGHART affirms us in another Work, or in his Annales. The learned BOECLER, who quotes the Paffage in his Short History of the ninth and tenth Ages, Tom. III. Diuert. p. 20. is of Opinion that
The like is reported of Philip King of Macedon, that when he designed to disinherit his son Periuss, and lette the Crown upon Antigonus, his Brother's Son, he went over all the Cities of Macedon to recommend Antigonus to the Princes, as Loy informs us. In regard to what is said of Lewis the Pious, that he restored the City of Rome to Pope Paschal, it is nothing to the Purpose, since the French having received the Sovereignty over the City from the People of Rome, might well restore it to the same People, in the Person of him who represented them, as being Chief of the first Order of the State.

that the Succession was free and constantly observed at that Time, in which it is joined by several other Authors. But it is not easy to reconcile this with all the Precautions taken by Charlemagne, and his Successors, for securing the Difpofals they made. The Matter was carried so far, that Religion, or rather Superition was called in to their Assistance. This Project (of Charlemagne) was received with great Satisfaction by all the Princes, for they thought him divinely inspired in this Occasion, for the Good of the Kingdom: as Eginhart, De Vit. Cor. Magn. Cap. XXX. See the other Authors. Otherwise, the Life of M. Schimmeld, in his last Edition of this Work.

6 We have something like this in Cassiodore, Lib. VIII. Epist. III. &c. Thus the Agreement made between Sanchis and Tanes, concerning the mutual Succession to the Crown of Aragon, were confirmed by the Nobility; as we learn from Mariana, Hist. Hist. Lib. X. p. 112. That Historian says the name of the Will of Henry King of Navarre, by which he made John his Heir, Lib. XIII. p. 597. And of that of Fradera Queen of Castile, Lib. VIII. (or Append. Hist. p. 243). Grotius.

7 Lib. XI. Cap. I. V. Num. 7.

8 Several Objections may be made in this Place. First, The Fact itself is false. We find no Account of this pretended Dominion, either in Armoria, in Eginhart's Annals, in Anastasius, or in Theganus, De Gestis Ludov. Imp. nor in the uncertain Author of that Emperor's Life. The Whole is founded on a spurious Act, of which two Copies are produced; one, which Raphael, Volant. III. (Geogr. Lib. III.) tells us, he took from the Vaticane Library; the other appears in the Canons Low, Diflinct. LXXIII. Livel. etiam Principis magnos, Episcopos non dignos, Cap. XXX. See Mr. de Plessis Morin's History of Italy, pg. 311. Parts of the Church. See Mr. Le Clerc's Biblioth., Chap. Tom. XXXII. Art. II. But whatever becomes of this Question, or whatever Appellation is given to the Right of the Emperors over the City of Rome, it is evident from History, that they exercised it till the Reign of Henry IV. and the Pontificate of Gregory VII. that is, during the Space of almost three Ages. Thirdly, The Answer here made by our Author, seems neither exact nor to the Purpose. He undertakes to refute Hotoman, who had alleged the pretended Donation of Lewis the Debonnaire, as an Infallible of the Power of alienating the Crown, which, according to him, belonged to the Kings of the antient Germans. Now, supporting the Truth of that Fact, which our Author admits, the Question is not, How the Sovereignty of the City of Rome was formerly translated to the Kings of France, nor in whose Favour they divested themselves of it? But should it only be enquired whether Lewis the Debonnaire made that Resignation by his own Authority, or with the Approbation of the Pope.
XIV. But now, the Distinction we make between Sovereignty, and the Man
ner of holding it is so well founded, that not only the Generality of Sovereigns
are not Masters of their States with a full Right of Property; but also there are
several Powers not Sovereign, who have a full Right of Property over the Countries
within their Jurisdiction; whence it happens, that Marquisates and Earldoms are
more easily fold, and bequeathed by Will, than Kingdoms.

XV. Another Thing that proves the Reality of our Distinction, is the Manner
in which the Regency of a Kingdom is regulated, during the Minority of the Heir
to the Crown, or when the King is disabled by any Diátemer from exercising
the Functions of Government. For in Kingdoms not Patrimonial, the Regency
belongs to those, to whom the publick Laws, or upon their Deficiency, the Con-
sent of the People shall confign it. But in Kingdoms Patrimonial, 4 it belongs to

XV. (1) See MARIANA, speaking of Alphonso V. King of Leon. But the Will of King John,
which names Regents of the Kingdom, was disapproved of by the Grandees; as we learn from the
learned Hifiory, Hist. Hist. Lib. XVIII. GRO-
TIUS.

2 Prolomy King of Egypt made the Roman
People Guardian to his Son. VALER. MAXIM.
Lib. VI. Cap. VI. Num. 1. GROTIUS.

But these Examples may be eluded by other In-
stances, in the contrary manner. The late Mr.
CoCCELIUS, in a Differtation De Tutela illegitimum,
published in 1693. Sec. II. § 4, makes it appear,
that in the same Kingdoms which our Author con-
fiders as patrimonial, the People sometimes dispossessed of the Regency, during the Minority of the Heir
to the Crown; And, on the other Hand, that in thofe which are owned not to have been Patrimon-
ial, the Regency has been named, either by the left
King, or by his Relations after his Demife.
For Infinces of the latter Caf, see a Differtation
by the late Mr. HARTUS, De Tutela Regis (in
Tom. I. of his Comment. & Opifi. &c.) § 19, 
&c. and Note 6, on this Paragraph. For which
Reafon Mr. THOMASIUS, in his Notes on Hu-
BER, De Jure Gent. p. 287, 288. seems to be of
Opinion, that no certain Principle, or Law is laid down
in that Matter as in Cafes of difputed Succeeded. I agree with him, that the Lawyers will always find
wherever there shall be both Sides of such Que-
questions, as the Interief of the Party they efpouse shall require. But, if we consider Things in thofe cafes, with the Student's greatest caution, it is hardly to be feared,
that the Right be not established, tho there may be no small Difficulty in applying it to the
Fault, in the Dispute before us. If there is in Re-
sity any Patrimonial Kingdom, that is, fuch as a
Prince hath Power to alienate, and dispose of the Succeeded as he pleafes, whether that Right was
formally granted to the firt King, or acquired by his Successor by a tact but plain Conception of the People; it is certain that fuch a Prince has a Right to name thofe whom he would entrufh with the Regency during his Successor's Minority; and when he has done it, no Difficulty remains. But, upon the default of a particular Declaration of his Will, or any general Regulation of the Matter, I am of
Opinion, that as the People are moft nearly con-
cerned in the right Government of the Kingdoms,
during the Minority of the Perfons, who is to be their Master, fo is it their Bufinefs to regulate the
Regency as they think proper, or at leat in con-
junction with thofe of the Royal Family. Tho' in
that Cafe the People do not become free, the
Right of governing being full lodged in some Prince, yet the Prince being in the Condition of exercifing the faid Right, there is a Sort of Interregnum, during which the People may provide
for their own Security and Advantage, as they might have done, if their King, who is old enough to go-
vcrn, was abfent, and it was imposfible for him to give any Orders; as for Example, if he was a Pri-
foulds, and was in the ftrongest, or even the Weakened Means of defignifying to whom he would have the Care
of the Government committed. The People may and
ought to be fuppofed to have referred to themselves
this temporary and provisional Right; and if the
King refuses them the Exercise of it, he has no
more to do than to take prefent Measure upon thofe
time, for fettling the Regency as he pleafes. Ne-
ither thofe of the Royal Family, nor even the Mo-
ther of the King under Age, have any Privilege in
this Cafe, exclusive of the People. The Mother
may indeed act as Guardian, or Son, in what
concerns his Education, and the Administration of
his private Patrimon; but the Administration of
the Government is of a very different Nature; and
as even thohe Princes, who have a Power of
alienating their Dominions, can never do it in a
Manner illellaventageous to their Subjects, fo ne-
ther can they deprive the People of the Right of
providing for their own Prevarification and Intered,
during a Minority, when the deceased King has
made no Provision of that Kind. As to the other
Relations of the Royal Minor, who is to have the
Right to the Succeeded, according to their respective
Ranks, that Right cannot yet operate, because it is
only in Expectation; and even the Intered of the
actual King requires that the Administration of the
Government should not be regulated absolutely by
the Right of the Relative, but that the People, who
give them an Opportunity, to anticipate the Time of
their Succession. What I have here laid down
ought with more Reafon to take Place in King-
doms eftablifh'd by an entirely free Convent of the
People, and without any Conception of a Power of
Alienation; For even in Kingdoms, the Peo-
ple may allow the King a Right to regulate the Re-
gency, where there is no fundamental Law relating
to the Affair. See Note 6. on this Paragraph. And
thus the different Manner, of eftablifhing a Regency, is of Indif of No Service toward proving the
Definition of Regiments, and upon the Kingdoms; as our Author pretends. But, to do him
Justice, it should be obferved that he speaks only
of the Regency of a Kingdom (Tutela Regni) not
of the Guardianhip of a King under Age, or of the
Power to direct the Affairs, and take Care of his
private Patrimon. These two Rights are ind-
edually united; but they may be separated, and
lodged in different Hands. So that, the Ob-
jection of some Commentators on this Place doth
not affect our Author, viz. That, according to his
Point of View, the Right of Governor, is given Primary and Autonomous Power to him, as to a King, in Relation to the Guardianship of his Children. 6 It is neither new, nor singular

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Chap. III. WAR and PEACE.

those whom the Father, or nearest Kindred shall chuse. Thus we see in the Kingdom of Ephesus, which had been founded by the Consent of the People, Guardians were nominated by the People to their young King Arihas; and by the Nobles of Macedon to the poulhumous Son of Alexander the Great: But in Aphi the Leks, that was won by the Sword, Eumenes appointed his Brother Guardian to his Son Attalus: So did Hiero in Sicily nominate such as he thought fit to be Guardians to his Son Hieronymus.

But whether the King is Proprietor of every particular Spot of Ground in his Kingdom, as the Kings of Egypt, after the Times of Joseph, or as the Kings of India, according to Diodorus and Strabo, or whether he is not, this is extrinlick to Sovereignty, and has no Relation to the Nature of it: Thus there neither refults from it another Form of Sovereignty, nor another Manner of holding it.

XVI. The third Observation is this, That Sovereignty is not left Sovereignty, tho' the Sovereign at his Inauguration solemnly promises some Things to GOD, or to his Subjects, even such Things as respect the Government of the State. I do not here speak of the Observation of the natural and divine Law, or even of the Law of Nations, to which all Kings stand oblige, tho' they have promised no

62 (fadd a Gentleman, some Years ago, in the Parliament of Paris) to fee, in private Families, the Education of Minors, separated from the Regulation and Administration of their Fathers; and History is full of Instances, where the Agency of a Kingdom, and the Guardianship of the Royal Minors have been entrusted in different Hands.


3 JUSTIN. Lib. XVII. Cap. III. Num. 10.


5 The learned GRONOVius finds Fault with our Author, for having ranked the Lefter Aphi, where Eumenes reigned among the patrimonial Kingdoms, acquired by Right of Conquest; but, for, says he, that Prince did not conquer Aphi, but received it as an Inheritance from his Father Attalus, and his Dominions were enlarged by the Romans, in return for his Affiliation, in the War with Antiochus. But our Author does not pretend that Eumenes himself conquered the Lefter Aphi; he only means to say that Country was originally a Conquest. In Afr. Minor, belo parti, Rex Eumenes Attalo, filio suo, fratrem suum tutorem dedit. That is, In the Lefter Aphi, which had been gained by Conquest, King Eumenes, &c. Now it is certain, that Alexander the Great, having conquered Aphi, and after his Death, it descended to his Successors with the same Right, and consequentially, was a patrimonial Kingdom, according to our Author's Principles. See STRABO, Geograph. Lib. XIII. p. 925, 926. Edit. Angl. (623, 624. Edit. Paris), 50 to which it should be added, that what the Romans gave Eumenes, they had acquired by Force of Arms; and in making that Donation, they transferred their Right to him. The Commentator's Criticism therefore is ill grounded; but he might have made one more just, by observing, that, according to Plutarch, quoted by our Author in his Margin, Eumenes not only appointed his Brother Attalus Guardian to the Hair of the Crown, and Regent of the Kingdom during the minority, but really and absolutly left him the Kingship: nay, and obliged him to carry his Widow. For which Reasion the Philosopher gives it, as an excellent Instance of fraternal Friendship, that Attalus, the Brother here mentioned, would not prefer any of the Children which he had by his Sister in Law, to his own, but took Care of his Ne- phew's Education, and, as soon as he came to Age, placed him on the Throne, Tom. II. p. 439, 450. This Want of Examen in our Author is therefore the more remarkable, because the Fact thus related, conformably to the Sense of the Greek Writer, was still more to his Purpose, as it shews what Liberty the Kings, who looked on their own Patrimony, took in disposing of it. STRABO indeed relates the Matter in a different Way; he speaks of Attalus as having been named Guardian only of the King's Son, and Regent of the Kingdom; but he tells us that Attalus dying, after a Reign of twenty one Years, left the Crown to his Nephew. Geogr. Lib. XIII. p. 926. Edit. Angl. (624, Edit. Paris.)

6 The Author takes this Fact from Livy, Lib. XXIV. Cap. IV. The learned GRONOVius takes Notice of two Mistakes on this Occasion. First, That this Hieronymus was Grandson to Hiero; as appears from the very Words of the Roman Historian; for Gol, the Father of Hieronymus, was dead. Secondly, That the Kingdom in Question was not patrimonial, since this Hiero, the second of that Name who had reigned in Sicily, was made King by the formal and express Consent of the People, as we learn from JUSTIN, Lib. XXIII. Cap. IV. Num. 1. 2. So that Inheritance is so far from confirming our Author's Principles, that it actually destroys them.

XVI. (1) See PHEN. B.VII. Chap. VI. § 10, 11.

22 The Emperor Trajan, when he was chosen Consul by the free Votes of the People, took an Oath that he would discharge that Office faithfully, submitting himself and his whole Family to the Divine Vengeance, if he knowingly and wilfully violated the Law. PLINY, Pont. Cap. LXIV. Num. 3. Edit. Cellar. Adrian feared he would never punish a Senator, till he had been condemned by the Senate. SPARTIAN. Vit. Hadrian. Cap. VII.

The Emperor Augustus took an Oath to observe, and put in Execution, the Decrees of the Council of Chalecedon, as we learn from ZONARAS, CER- PENNAS, and other Writers. The later Greek Emperors took an Oath to the Church. See ZONARAS, in the Life of Michael Rangabas, and elsewhere. We have an Example of the Promises made by the Gothic Kings in CASSIODORUS, Var. Lib. X. 16, 17. GROTIUS.

All the Inheritance here alleged by the Author, are not to his Purpose. For the Question is into what Engagement Princes enter before they are actually invested with the Sovereign Authority, or when they ascend the Throne; not what Promises they make after that Time, which may be of no binding.
thing; but of the Observation of certain Rules, to which they would not be ob-
ligated but by their Promise. The Truth of what I say appears by the Example of
a Master of a Family, who has promised his Family something that regards the Direc-
tion of it: For tho' he is bound to perform his Promise, yet he does not therefore cease to be the Head, and in some Manner, the Sovereign of his Family,
as far as the End and Constitution of that little Society permits. A Husband like-
wise loses nothing of his Authority over his Wife, for having promised her some-
what, which he stands obliged to fulfill.

Yet I must confess, where such Promises are made, Sovereignty is thereby
somewhat confined, whether the Obligation only concerns the Exercise of the Power,
or falls directly on the Power itself. In the former Case, whatever is
done contrary to Promise, is unjust; because, as we shall shew elsewhere, every
ture Promise gives a Right to him to whom it is made. * In the latter, the Act
is unjust, and void at the same Time, through the Defect of Power. It does not
however follow from thence, that the Prince who makes such Promises, de-
deps on a Superior; for the Act is not made void in this Case, by a supe-
rior Authority, but by Right itself. Among the Persians their Monarch
was, 'αυτοκρατωρ και αυτονομος, absolute, and accountable to none, as Plu-
tarch declares, and adored as an Image of the Divinity; nor, as it is in jest,
was he changed but by Death. He was a King that spoke thus to the
Persian Nobility, I have called you together, that none might think I have fol-
lowed only my own Counsel, but remember it is your Duty to obey, rather than
advise. And yet upon his Accession to the Crown he took an Oath, as Xen-

3 Our Author's Meaning, and the Grounds of his Discounten, are these: Sometimes the People require, for Example, that the King shall raise Taxes on certain Things, as on Lands or Com-
modities. In which Case the King has a Power of raising Taxes, which is a Branch of the Sovereign Authority; he is not obliged to confute the People, or
enquire whether they think it necessary to im-
pose extraordinary Taxes, or raise them in this or
that Quantity; but then he can lawfully lay them
only on such Things as are specified by the funda-
mental Laws. So that then the Limitation falls on the Exercice of the Power, not on the Power itself.
The same is to be said, when the People have stipu-
lated, that the King shall, in all civil and criminal
Cafes, caufe the Laws of the Country to be ob-
erved, without depriving him of a Power to make
others, which shall not be contrary to them: That
he shall chuse his Magistrates only out of a certain Rank of Men; Or that he shall go into no Of-
ferent War, but on certain Conditions, and in cer-
tain Cafes. But sometimes the People stipulate,
that the King shall levy no Taxes, make no Laws,
chuse no Magistrates, or engage in no War, with-
out the Consent of the People; and then the Li-
mitation of the Royal Authority affects the Power
itself. For, that the Prince is notified of all the
Parts of the Sovereignty, there are some which he
cannot exercise without the People's Consent. This
defers particular Notice; because the Commen-
tators understand our Author's Words as if he sup-
pomed a Division of the Sovereignty, Such a Di-
vision is mentioned in the following Paragraph; and
the Difference is, that when the Sovereignty is re-
ally divided, the People exercise that Part of it
which they have referred to themselves, indepen-
dently of, and without any Obligation to consult
the King; whereas, in the Case under Considera-
tion, the People cannot, for Example, make War
of their own Heads; but have only a Right to re-
quie that the King shall not enter into one without
their Consent; and when such a Consent is given,
the King, as a Lawgiver, makes the War himself.

4 I see no Ground for this Distinction. All
that the King doth in both Cæs, contrary to his
Engagements, seems to me equally unjust, and
void in itself. The King, for Example, hath no
more Right to impose Taxes on Commodities, or
other Things excepted by the fundamental Laws,
than to raise any without the Consent of the Peo-
ples, when he hath entered into a solemn Obligation to observe that Condition, which limits one Part
of the Sovereignty. The Engagement is as real,
and as strong, in the former as in the latter Case; and
consequently, the King has no more Right to
violate one than the other: So that, if what he
hath done is not annulled, it is either for want of
sufficient Strength in the People, or the Effect of
their tacit Toleration and Ratification, who may
wave their Right for Peace fake, or on other Con-
federations.


6 PLUTARCH makes Artabannus a General un-
der King Ariasor, speak thus, Thol. we have
get of the Laws, the most excellent of all ti
honour the King, and adore him, as the
Image of GOD, who preservs all Things. Tho.

7 Lib. X. Cap. I. Not. 2.

8 VALERIUS MAXIMUS, from whom our Au-
Author takes this Fact, gives it as an Example of a great
Infolence, Lib. IX. Cap. V. extern. Notum 2. See
Syburg.

9 The Palliaze here meant, by our Author occurs
in the Cyruspidea, where the Historian tells us that
Cambyses, having declared Cyrus his Successor in
the Precedence of the Nobility, whom he had convened
for that Purpuse, made that Prince promise on Oath
to defend the Persians against their Enemies and
maintain their Laws, in the stead of his Power;
and engaged the Perpts, in the same solemn Man-
ner, to support and defend the Crown and Domin-
ions of Cyrus against all Attempts. To which he
says, that the Persians and their Kings entered into
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Chap. III.  

War and Peace.

\[\text{Phan and Diodorus Siculus observe; and it was not allowable for him to change the Laws that had been made in a certain Manner, as both Daniel's History and Phutarch in his Life of Themistocles inform us.} \]

Diodorus Siculus too, B. xvii. and a Long Time after, Procopius in his first Book of the Persian War, where there is a remarkable Story to this purpose. Diodorus Siculus says the same Thing of the Kings of Athiopia. The same Author tells us, that the Kings of Egypt, who doubtless exercised a Sovereign Authority no less than the other Eastern Kings, were obliged to observe many Things, which if they did not perform, they could not during their Lives be called to an Account; yet after their Deaths, their Memories might be arraigned, and being found guilty were refused solemn Burial; as the Bodies of wicked Princes amongst the ancient Hebrews, were not interred in the Royal Sepulchres, but in this wonderful Temptation, the Sacredness of Sovereign Majesty was preferred, and yet their Kins were refrained from breaking their Engagements for fear of a future Condemnation. Phutarch also tells...
tells us in the Life of Pyrrhus, that the Kings of Epirus were accustomed to take an Oath, that they would govern according to the Laws.

But what shall we say of Promises, accompanied by this Clause, that if the King breaks his Faith, he shall forfeit the Crown? Even in that Case, the Power does not cease to be supreme, but the Manner of holding it will be limited by such a Condition, and the Sovereignty will not be unlike a temporary one. Agatharcides said, a King of the Sebaeans, was *demonstratus*, the most absolute Prince in the World, and yet if he were found without his own Palace, he might be floned to Death; which Strabo also observes out of Artemidorus.

Thus, Lands held as Fidements of Trufh are no lefs our own, than if we poifioned them with full Property; but yet they are capable of being lost. Such a commiffory Clause may be added not only in Compactz between the People and the King, on whom they confer the sovereign Authority, but also in other Contracts. We fee some Treaties of Alliance made on that Condition with neighbouring Nations: or even by thofe Treaties it is stipulated, that the Subjects shall not aff irrit their King, nor obey him, if he violates his Engagements.

XVII. The fourth Observation is this, That the sovereign Power be but one, and of itself undivided, confifting of those Parts above mentioned, with the Addition of Supremacy, that is, *z
demonstratus*, accountable to none, (1) yet it sometimes happens, that it is divided, either into Subjèrce Parts, as they are called, or potential; (that is, either amongst several Princes, who poifefs it jointly; or into feferal Parts, whereof one is in the Hands of one Prince, and another in the Hands of another). Thus though there was but one Roman Empire, yet it often happened, that one ruled in the Eastern Part, and another in the Western; may, and sometimes the Empire was divided among three. So also it may happen, that the People in chusing a King, may retain certain Acts of Sovereignty to themselves, and confer others on the King absolutely and without Reftriction. This however does not take place, (as I have fiewed already) as often as the King is obliged by some Promife; but only then, when either the Partition is expressly made, (of which alfo we have treated above) or when the People being (as yet) free, shall require certain Things of the King, whom they are chusing, by way of a perftant Ordinance; or if any Thing be added, whereby it is implied, that the King may be compelled or punished. For every Ordinance flows from a Superior, at leaff in Regard to what is ordered. And Compulfion is not always indeed an Act of a Superior, for naturally every Man has Power to compel his Debtor; but it is repugnant to the State of an Inferior; therefore from Compulion there at leaff follows an Equality, and consequently a Division of the sovereign Power.

Kings to sacrifice to Jupiter *Agas", and take an Oath to the People of Epirus, to govern according to the Laws; and for the People to maintain their Power, according to the same Laws. In Phr. p. 385.


21 Efti quidem Fundus, non minus quidam, &c. Thus the Pallage stands in all the Editions of the Original before mine; where I have inserted the Word after fundus; which the Senec evidently requires; and then it runs thus: Lands held as Fidements of Trufh are no lefs our own, than if we poifioned them with full Property, &c. I am very much miifaken, or our Author had that Law of the Digest in his Mind: *Non idem minus rei? quid Nos trium effe vindicabimus, quid abire a nobis Dominium speratur, &c Conditio Legati aut Libertatis extitoris, Lib. VI. Th. I. De rei vindicat. Leg. LXVI.

22 Our Author himself elsewhere affirms that this commiffory Clause is tacitly included in all Treaties of Alliance. B. II. Chap. XV. § 15.

23 See Martini Cromer. Polonic. Lib. XIX. & XXI. We have likewise an Instance of this Sort of Stipulation in the Chronicle of Lambert de Schafnabeu, on the Year 1774, in the Reign of Henry IV. Emperor of Germany. Grotius.


2 This Example is not well applied. See Pu- fend. B. VII. Chap. V. § 15. who has given some more exact.

3 In the Reign of the Emperor Probus, the Senate confirmed the Laws made by the Prince: took Cognizance of Appeals; created Proconsuls; and affigned the Consuls their Deputies. Vopis- tus, in Probo. Cap. XIII. See also Gailius, Lib. II. Obfcr. LVII. Num. 7. and Cardinal Mantica, De tactis & ambiguïs conventionibus, Lib. XXVII. Tit. V. Num. 4. Grotius.

The last Words of the original Pallage are *Leg- gatus Confidibus daret*. But as the learned Sal- masius has shown in a Note on that Place, the true Reading is *Legates ex Confidibus daret*; that is, *named the Consular Lieutenants*, for Governing even those Provinces which were referred to the Emperor.

4 See on this Subject Pu- fend. B. VII. Chap. IV. § 14.
Chap. III. War and Peace.

Many allege here a great Number of Inconveniences, to which the State is exposed by this Partition of Sovereignty, which makes of it as it were a Body with two Heads; but in the Matter of civil Government, it is impossible to provide against all Inconveniences; and we must judge of a Right, not by the Ideas that such or such a Person may form of what is best, but by the Will of him, that conferred that Right; as we have already observed. A very ancient Example of this Divison is brought by Plato in his third Book of Laws. For the 2 Heraclea (the Politerie of Hercules) being settled at Argos, Messenia and Lacedemon, their Kings were obliged to govern according to Laws prescribed to them; and whilst they did so, the People were bound to continue the Kingdom to them and their Politerie, and not to suffer any one to take it from them. Moreover, besides the reciprocal Engagement of each People and their King, the three Kings of this ancient Confederacy, to the other, the three Nations one to the other, and each King to the two neighbouring Nations, as also each Nation to the two neighbouring Kings; all of them together promising mutual Affiance.

XVIII. But they are much mistaken, who suppose, because Kings will not allow some of their Acts to be of Force, till they are ratified by the Senate, or some other Assembly, that there is a Partition of Sovereignty. For whatever Acts are thus annulled, ought to be reputed as annulled by the King's Authority, who by that Means (1) would take Care, that nothing deceitfully obtained of him, shall pass for his Will. Thus, Antiochus the third (2) wrote to the Magistrates, that they should not obey him, if he commanded any Thing contrary to Law; and there is a Law of Conftitution, which enacts that Orphans and Widows should not be forced to come to the Emperor's Court for Force, 3 of which, even though the Emperor's Order were produced. Wherefore this is like those Wills, which have this Clause added to them, that no Will hereafter made shall be of Force. For such a Clause implies, that a posterior Will would not proceed from the real Intent of the Testator. But as this Clause may be made void by 4 an express Revocation, so may the Act of a Prince by his express Command, or any special Declaration of his posterior Will.

XIX. Neither will I here (in order to establish the Truth of what I have now said concerning the Partition of Sovereignty) make use of the Authority of Polybius, (1) who reckons the Roman Republick among all those States, whose Government was mixt. For at the Time in which he wrote, the Government was merely 3 popular, if we consider the Right and not the Manner of acting; since not only the Authority of the Senate, which he refers to Arifocracy, but also that of the

5 Dr. Legib. Lib. III. p. 683, 684. Tom. II. Edid. See the Commentators, who pretend that this Example is not well applied, because as they tell us, it turns only on an Alliance. But on a careful Examination of it, we shall find that, pursuant to the Alliance, the Subjects had a Power of exercising some Acts of Sovereignty, independently of their Prince.

6 We have several Examples of this Sort in the History of the Northern Nations. See Joannes Magnus, Hist. Suec. Lib. XV. & XXIX. Crantzius, Suec. Lib. V. Fontanus, Hist. Suec. Lib. VII. & Grotius.

XVIII. (1) It is very probable, however, that in those Kingdoms, where a certain Assembly must approve of the Edicts and Ordinances of the Prince, this Approbation had originally more Force, and was a Kind of Limitation of the legislative Power, widely established for preventing Abuse. But in Process of Time, the Kings found Means to reduce it to a Fortification, that is, to a bare Formality, none of the Members of the Assembly daring to give his Opinion on each Edict; of which sometimes the Titles are read, and to which no one pretends to make Objections, for Fear of incurrying the Prince's Displeasure, who requires a blind Obedience.

Of the Rights of Book I.

Consuls, which he compares to Monarchy, were both dependent on the People. What I have said of Polybius, I say likewise of other Authors, who, in writing on Politicks, may think it more agreeable to their Purpore, to regard the external Form of Government, and the Manner in which Affairs are commonly administered, than the Nature itself of Sovereignty.

XX. More to the Purpore is that of Aristotle who says (1) there are some Sorts of Royalty of a mixt Kind between an absolute Monarchy (2), which he calls θραυματική, (the name is from θραινω to move; and θραμμα κυριος, Kυριος θραμματικος), and a Monarchy, and in Plutarch: ις εποχες ατελες, in Strabo) and a Kingdom like that of Macedonem, which is only the first Dignity of the State; of such a Mixture we have an example (I think) in the Sphyraeth Kingdom, for without Doubt in most Things they ruled with an absolute Power. For the People declared a King, such a one as the neighbouring Nations had; but the Power of the Eastern Kings was very absolute. Thus Achylus brings in Alcman speaking to the Persians of their King, in teutvteis pulta, not accountable to the State for his Actions. And that of Virgil is well known, The Egyptians, Lydians, Parthians and Medians, have not a more profound Respect for their King. And in Livy: The Syrians, and People of Aisa are Men born to Slavery 6, to which

XX. (5) Politic. Lib. III. Cap. XV. where he speaks of such mixt Kingdoms, where the Kings have less Power than absolute Monarchs, but more than the Kings of Sparta, who were but little better than a Kind of Generals for Life; for before this perennial and absolute Command in War, which was not always Hereditary, they had no Power, but in what related to Religion. See ibid. Cap. XIV. He speaks of three Sorts of Governments between these two. The first are such as are established among some of the Barbarians, where the Kings are hereditary and invested with a Power, almost as extensive as that of Tyrants, (or absolute Monarchs) Thos Kingdoms are however, established by Law, and the free Consent of the People. The second is that of the Adjuncts, of which I have already spoken in Note 7. of § XI. The third is a Kingdom like that of the Heroic Time; where the Crown was bestowed by the Consent of the People, and made hereditary, in Return for the Obligations they had to those first Kings. Thos Princes commanded the Armies, were entrusted with the Affairs of Religion, and all Judical Matters, &c.

From this Account it is clear, at first Sight, to determine what Difference Aristotle makes between his Kingdom on the Plan of the Barbarians, θραυματική, and his absolute Monarchy, Κυριος θραμματικος; for if, in the latter, the King has a Power of doing whatever he pleases: Cap. XVI. the former, according to our Philosopher, is despotic, and differs from Tyranny also, as that is a Power usurped, against the Will of the People. Giphanius, in his imperfect Commentary on Aristotle's Politics, printed at Frankfort in 1628, with a new Version, is of Opinion that the Author either treated this Subject obliquely, to avoid giving Offence to his Pupil Alexander. This Conjecture is plausible enough; though the Philosopher expresses himself obliquely in several other Places, where he had not the same Reasion. I imagine that the Idea by him fixed to what he calls θραυματική and absolute Monarchy, of which he gives no Example, is the same that my Author entertain of a patrimonial Kingdom; this appears from a Passidge before quoted, on § 8, where he compares the Authority of an absolute Prince to that of a Father, who may dispose of his Estate, as he pleases. He also observes, in the following Chapter, that such a King regulates the Succession to the Crown by his own Will. For, treating of the Inconveniences attending such a Royalty, he says it is very dangerous for a Prince to leave the Crown to his Children, even though virtuous. But says the Philosopher, will he not make his Children his Successors, when it is in his Power? This indeed is a difficult Question of himself, and such as requires a Degree of Virtue above the common Force of human Nature. Cap. XV. p. 659. On this Foot then the Kingdom formed on the Plan of the Barbarians, how despotic soever, must have been hereditary, only as far as the People allowed them to be. But, whatever becomes of that Question, it appears from the Passidges already quoted that the Kingdoms, mentioned by Aristotle, as being of a middle Sort between the Spartan Kingdoms and absolute Monarchy, did not admit of a real Division of the Sovereignty, like those Governments, which our Author distinguishes by the Appellation of Mis'd.

2 Διαβολίας βασιλείας. Dionys. of Halicarn. speaking of the Macedonians, says they were not αυτοκρατορίας, absolute, and independent. Lib. II. Cap. XIV. p. 85. Μεν. (87 Syll.) Γροτή.

3 The People, to use the Words of Josephus, thought it not absurd or unreasonable to submit to the same Form of Government, as was established among the neighbouring Nations. Antq. Lib. VI. Cap. IV. p. 174. Edit. Lips. Grotius.

4 This is spoken of the Bees. Geo. Lib. IV. v. 2100. Φρατρίων.

5 Lib. XXXVI. Cap. XVII. Num. 5. 6 Cicerone speaks of the Jews and Syrians as People born to Slavery. De Prov. Confusis. Cap. V. Euphræsius says that among the Barbarians, all are Slaves except one Man. Helena, 2, 283. In which he imitates a Thought of Echylus, who declares no one is free but Jupiter alone. Prometh. vinct, which Lucan applies to Caius. Lib. II. v. 280. Sertuvs & Philoegorvs, on Virgil, Georg. IV. v. 210. quote a Passidge from Salust, which that Historian observes, that the Eastern Nations have naturally a profound Veneration for the Name of a King. The Emperor Julian speaks of the servile Temper of the Syrians, Persians, Parthians, Medes, and all the Barbarians, the East and the South, who were governed by despotic Princes, in Opposition to the Love which the ancients
which agrees that of Apollonius in 7 Philostratus, Ἀρσενικές, § 21, that the vicissitudes 

we redress, The Antirriffs, and Medes adore arbitrary Government; and that of 

and mere 89 has is Clerc's a reduced An-

not Christ, nor Luke 306. but the 51. am

against, and his 3. King.

gainst. Erafm. he

Manner 91, 583, 

revised,

and added. whose, and Neighbour, who adored arbitrary Government, entertained no no-

entitled to the name of Liberty, in St. Cyril, p. 158. 38. C. Claudian tells the Em-

him, that he commands a free People, and not such as the Arabians, Armenians and Sy-

ius. De IV. Confuflatus Honorii. v. 506. Gror-

7 He makes, Apollonius of Tyana says, that Demis 

king, or a Neighbour in the Medes, who adored arbitrary Government, entertained no no-


8 But see the following Chapter, § 3.

St. John, in this Place, observes, that as David was King, or a Neighbour in Man, to which he elsewhere adds; he had no Superior. Epist ad Ruflicam, de Pænitent. Tom. i. p. 251. Edit. Erof. Bajf. St. Ambrose reasons in the same manner on this Passage: For he was a king, and obtained power over his countrymen (is 

against Man) and being secure under their own Power, can be punished by no Laws. He did not therefore 

against Man, to whom he was not subject; but the his Pst secured him, he was subject to God by the Law of Faith and Religion. Apol. David. Cap. X. See also Ambrosius the younger on the same 

is, and Isidore of Pelusium, Lib. V. Epist. 383, in the late Edition of his Works. Fitzies, King of the Galatians, held, The Actins of Kings are to be judged at the Tribunal of God, for as their Power is derived from Heaven, so they are obliged to 


I am surprised that our Author, both here and in his Treatise De imperio svecoraro Psalteriam circa ieram, Cap. IX. § 40. could adopt so unrea-

fable an Explanation of David's Words, as that given by the Fathers of the Church, and the loose Conclusions, they draw from them. To speak with 

in his De synth. et Pæt. Ang. Cap. II. p. 545. I shall mention this and 80. See in his polemical Treatise De iure Imperii, p. 555, is there any Probability that David, when he spoke these Words, penetrated with Sentiments of Humiliation and Repentance, thought of the 

Prerogative of Kings; and that he intended to boast 

of a pretended Power, which authorized the Com-

mission of Rapin, Murder, and Adultery, and left 

his Subjects no Room for Complaint? I cannot 

think the most zealous Defenders of arbitrary Power, how extravagantly forever they may compliment Kings with Impunity, and however strong an Ob-

ligation they may impose on Subjects of Non-Re-

fidence, would venture to maintain, that a Prince, 

who takes away the Life of an innocent Man, 

takes away a Subject's Wife, sins against GOD 

alone; and that he is not guilty of a real Injustice 

Regard to the Person killed, or the Husband. 

Now it appears evidently from the whole Sequel 

of the Discourse that David here speaks of the 

Morality of Action, not of the Punishment or Con-

sequences of it. It is certain therefore that he means 

no more than that he had not only injured his 

Neighbour, but also offended GOD in his heart 

by that, though the Sin was not committed directly 

against the Divine Majesty, it principally regards 

GOD, as being a Violation of his most indissoluble 

Laws. Hence it is that the prodigal Son deprecates 

to his Father, I have sinned against GOD and a-

gainst Thee. Luke xv. 18, 21. This would be 

sufficient to prove that the Words against Thou 

are not to be taken literally. But the Critics have 

alleged some other Texts of Scripture, where this 

Manner of speaking has not an exclusive Signification, 

but is reduced to against thee wholly, or you 

principally. See Glass. Philog. Sacr. Lib. III. 

Tract. V. Can. XXVI. Note 2. Gronovius 

produces several Examples of the same Kind, taken 

from Latin Authors, who probably imitated the 

Grecian Writers in that Particular. See that learn-

ed Gentleman's Note on Semerca's Hippolytus, 

v. 874. He might have added the Expression, unice 

unare aliquem, which occurs in good Authors, and 

signifies not in you one Person alone, but to be 

a Person very much, or preferably to others. 

To this is a mere Fable, as has been most evi-

dently proved by several Authors. See Selzen. 

De Synedriis. Lib. III. Cap. IX. Salmasius, in 

his De synth. et Pæt. Ang. Cap. II. and Cap. V. Mr. Le 

A 2 Clerc's
of Exeileation (the pulling off the Shoe) because it had something of Dishonour in it, did not affect them. The Sentence of the Hebrew Barnachman is still extant in the Sayings of the Rabbins, under the Title of Judges, No Creature judges the King, God only has that Power.

Yet notwithstanding all this, there were some Caesars which, I suppose, the Kings had no Right to judge, and were referred to the "Sanhedrim (the Council) of 70 Elders, which being instituted by Moses at God's Command, continued without any Interruption to the Days of Herod. Wherefore both Moses and David called the Judges, God, and their Judgments God's judgments. And the Judges are said to judge by the Authority of God, and not by the Authority of Men; and there is a plain Distinction made between the Things of God, and the Things of the King. Whereby the Things of God, (as the most learned among the Jews interpret it) are meant, the Judgments, that were to be rendered according to the Law of God. I do not deny, but that the Kings of Judah did of themselves take Cognizance of some Criminal Affairs, in which Maimonides prefers them to the Kings of the ten Tribes of Israel; and that plainly appears from many Examples, as well in Holy Writ, as in Hebrew Authors; but it seems that the Cognizance of some Caesars was not allowed to them, as concerning Crimes committed by a Tribe, or by the High Priest, or by a Prophet; and this is plain from the Story of the Prophet Jeremy, whom when the Princes demanded to put to Death, the King anfwered them, Be bold he is in your Power, and the King can do nothing againft you, that is, in such fort of Affairs. Moreover, when any one had been accused before the Sanhedrim, upon any other Account whatsoever, it was not in the King's Power to screen him from the Judgment of that Tribunal; and therefore Hyrcanus, finding there was no Way to hinder Herod from being tried, fought out Expedients to clude the Sentence.


31 The Continuation of this grand Council, which had been disputed by several able Writers, is entirely destroyed by Mr. Le Clerc, in his Sentimens pour l'Histoire Critique du P. Simen. Lett. X. and in a Difertation on that Subject, published at the End of his Commentary on the historical Books of the Old Testament, made by our Author, that is entire, to the Ground. See an occasional Prooof, in Note 30. on this Paragraph.

32 This is a figurative Exprefion, from which we can conclude no more than that the Judges were invested with some Authority.

33 Those Magistrates were obliged to judge according to the Law of GOD, delivered by Messiah. And this is the whole Foundation of such Exprefions, which no Means imply that they had an Authority independent of the King.

14 In Religious Affairs and private Causes, as well civil as criminal, which could be decided by the Law of Messiah, the Kings were not allowed to make any Alteration by their own Authority, but were obliged to judge according to that Law, which was the fundamental Law of the State; so that all Affairs, which depended on it, might in that Sense, be called Causes relating to GOD. But in all other Causes, their Power was unlimited; and here the Term of Royal Causes took place. They appointed proper Persons to take Cognizance of both those Causes of Caesars, Caesars, which are evidently even from the Place in the Book of Chronicles, quoted in the Margin; which likewise serves to refute the Fable of the Perpetuity of the grand Council among the Jews; for we there find Judges appointed by Messiah, in all the Cities of Judah, without excepting Jerusalem. From all which let us conclude, that there was no Division of Sovereignty in the Monarchy of the Hebrews, but only a Limitation of the legislative Power, and of the Power

in Matters of Religion; notwithstanding which, their Kings were in other Respects as absolute, as any other Eastern Power. So that our Author's Application of this Example is not just. We shall see in Note 29, that what gave Occasion to the Mishle into which he has fallen after several other Writers.

15 And this was carried so far, that he ordered the Execution of the Criminals, without any Formality of Justice. Dovid exerted the same Semplicity on the Men, who boasted of having killed Saul, 2 Sam. 1. 15, and on the Affairs of Ishbosheth, ibid. iv. 15.

See Selden, de Synedriis. Lib. II. Cap. XIV. § 8. &c.

17 But do we not read that Solomon deposed Abiothar, the High Priest, 1 Kings ii. 27. Our Author, and those whom he has followed, confound the Government of the Hebrews before the Babylonish Captivity, with the State of the Commonwealth of Spain under the Roman Emperors, who, though they wore the Crown, and had assumed the Title of King, were obliged, for confirming their Authority, to share it with the Sanhedrin, which had been established since the Jews, having shook off the Syrian Yoke, began to be governed by the High Priests, in Conjunction with the Heads of their own People; according to the judicious Consideration of Mr. Le Clerc in his Difertation, § 7. In regard to Crimes committed by a whole Tribe, or by the High Priest, or by a false Prophet. See Selden, de Synedriis. Lib. III. Cap. IV. &c.

18 The Question there is not concerning the Rights of the Royal Power, as has been observed by Commentators. Zedebah only declares that, in that Conjunction, he is obliged to yield to the important Demands of the Heads of the People, who looked on Jerushalim as a Triaror, and one, who held a Correspondence with their Enemies the Chaldeans.
In Macedonia, those that descended from Caramus, as Callisthenes says in Arrianus: 20 ή μία ἅλκη τίτονας Μακεδόνας ἀρχοντις δηλίνας, reigned according to the Laws, and not by Force; and Curtius 21, in his fourth Book, though the Macedonians were used to regal Government, yet they lived in a greater Appearance of Liberty than other Nations: For the King himself could not judge of capital Crimes: And the same Author in the 6th Book 22, By an ancient Cusom amongst the Macedonians, the Army took Cognizance of capital Crimes, in Time of War; and the People in Time of Peace; so that in this Respect the Kings had no Power, but by the Way of Persuasion. There is also in another Place of the same Author another Instance of this Mixture 23, The Macedonians decreed, that according to the Cusom of their Nation, their King should never hunt on Foot, or without being attended by some of the Nobles and of his Favourites. And Tacitus of the Goths, They were under the Government of 24 Kings, who kept them a little more in Subjection, than those of other Nations in Germany, but so as not to leave them an entire Liberty. He had said before (in speaking of the Germans in general) that their Kings, who were only the Chief or principal Men of the State 24, governed rather by Persuasion, than by their Authority. But elsewhere he describes an absolute Monarchy in those Words 25, They (the Suiones) are under the Dominion of a Prince, whose Authority is absolute, and not precarious. And Eusèbius describing the Republick of the Corecyans 26, saith it was a Mixture of regal and aristocratical 27 Government. I observe there was something like this in the Times of the Roman Kings: For then almost all Affairs were managed by the King. Ramusius (says 28 Tacitus) governed us as be pleased; and it is certain, that in the first Beginnings of the City, the Kings had all Power, says 29 Pomponius. Yet Dionysius Halicarnassensis 30 affirms, that even at that very Time, some Things were referred in the People. But if we had rather believe the Roman Authors, in some Cases, Appeals might be made from the King to the People, as Seneca 31 gathers out of Cicero's Book of a Commonwealth; and

19 De expedit. Alexander. Lib. IV. Cap. XI. The Author speaks of the Manner, how Alexander's Predecessors had acquired the Throne, with, without Utpuration or Violence, than of the Manner how they exercised the Royal Authority.

20 This Passage is followed by the ensuing Words: They oppried him (Alexander) in his Pursuit of Immorality with more Vigour than was expeditious either for themselves or the King. Lib. IV. Cap. VII. Num. 31.

21 Lib. VI. Cap. VIII. Num. 25.

22 Lib. VIII. Cap. I. Num. 18. Pufendorf, in a Differation De rebus gemitibus Philippus, which appears among his Academic Differences, § 16. pretends that from those Passages it follows only that the Power of the Kings of Macedon was limited. But, on a careful Examination of those Authorities, and others which he quotes, it will, in my Opinion, appear that they suppose somewhat more than a bare Limitation; at least if we consider the Origin of those Customs, and the Manner how they had been long practised.

23 Siumius Cap. XLIII. Num. 7.

24 Ibid. Cap. XI. Num. 6.

25 Ibid. Cap. XIV. Num. 3.

26 On Odyss. Lib. VI.

27 Laconicus Chalcociontyllus says, there was such a Mixture among the Peloponnesians, and English, Lib. II. in the Kingdoms of Algeria, and Newarr, Lib. V. The Magistrates were not created by the King of Newarr, he placed no Garrisons, without the Consent of the People; and had no Power to command any Thing contrary to the Laws, which were given to them by the People. And as we learn from the same Writer in the Place last quoted. Rabbi Levi, the Son of Genesis remarks, on 1 Sam. viii. 4. that some Kings are absolute, and others subject to the Laws. What Pliny says, in his Account of the Island of Taprobane, is curious: That the People chose a King distinguished by Age and Clemency, and was he had no Children. If he had any Issue of
Of the Rights of

Book I.

and also out of some pontifical Books, and Fennidella. Servius Tullius, who ascended the Throne through the Favour of the People, rather than by Virtue of a just Title, still more diminished the royal Authority; for, as Tacitus says, be enacted some Laws, to which the Kings themselves were to submit. Wherefore no wonder if Livy makes only this Difference between the Power of the first Consuls, and of the Kings, that the Confulhship was but for one Year.

The like Mixture of Popular and Arifocratical Government was in Rome 35 during an Interregnum, and in the Times of the first Consuls. 3 5 For in some Things, and thofe of Moment, what the People commanded was of no Force, 36 without the previous Approbation of the Senate. And there remained something of this Mixture even later, whilst the Power, as the fame Livy 37 says, was in the Hands of the Potricious, that is, of the Senate; and the Kelief, or the Right of Opposition, in the Hands of the Tribunes, that is, of the People. But afterwards, the Power of the People being increaæd, the Confulent of the Senate was no more than a mere Ceremony, and a vain Image of their antient Right; since the Senators ratified the Deliberations of the Assembly of the People, even before they knew what would be resolved in it, as Livy 38 and Dionysius observe. To conclude, Socrates pretends that the Government of Athens was, in the 39 Time of Solon, A Democracy mixed with an Arifocracy. These Things being premised, let us examine some Questions, which are often produced on this Subject.

XXI. The first is, Whether a Power inferior to any other by Virtue of a Treaty of unequal Alliance, may have the Sovereignty? 1 1 By unequal Alliance I mean, not such as is made between two Powers whose Strength is unequal; as when the City of Thebes in the Time of Pelopidas made a League with the King of Persia, and the Romans with the Magiflians; and afterwards with King Maffejius; nor such as foipulates some tranfiient Act, as when an Enemy is reconciled, upon paying the Charges of the War, or performing any other Thing once for all. But I mean, when by the express Articles of the League, some lafiting Preference is given from one to the other; or whereby the one is obliged to maintain the Sovereignty and Majesty of the other; as it was in the 3 League between the Efotians and the Romans, that is, to hinder any Attack on their Sovereignty, and to make

Livy, in regard to Hermonius, who had killed his Sifer, Lib. I. Cap. XXVI. See the fame Hilto- rians, Lib. VIII. Cap. XXXIII. Num. 8.


34. Dionysius of Halicarnaffus tells us, that In those early Times, in the Days of the King, the People gave the Senate Power to Please what Form of Government they pleased; that the Senate named the Interreges, or Regents of the State; that those Magiftrates made Choice of the Left Man they could find, either among their own Countrymen, or among those of other Nations, to be their King; that, if the Senate approved of the Person thus chosen, the People gave their Consent, and the Auguries proved favourable, he entered on the Government. Antiq. Rom. Lib. IV. Cap. XL. p. 233. Edit. Oxen. (242. Syb.) See the Pallace of Livy, to be quoted in Note 38 on this Paragraph.


38. Liv. I. Cap. XVII. Num. 9. Dionysius of Halicarnaffus says, that in his Time the Regulations of the People had the Force of a Law, without the Cognizance of the Senate, but that the Orders of the Senate were subject to the People's Determination. Antiq. Rom. Lib. II. Cap. XIV. Our Author means to speak of those Times, when § 19, he maintains, against Polybius, that the Govern- ment of Rome was Democratical: So that some of his Commentators have unjustly accused him of contradifping himself in this Point. We may fee in Chronvius's Observations on B. I. Chap. XXV. how the People by degrees incroached on the Right of the Senate, and at laft swallowed it up. It will not be improper to read a Differtation of Pufen- dorf, already quoted, De formal. Rop. roman. the he does all in his Power for saving the Authority of the Senate. See alfo Paul Merula, De Leg. Roman. Cap. II. § 12. and Cap. III. § 1. And Rabo Hermann Schelius, Dr. Juris Imperii, P. 41. 8.

39. In his Paenatonic Observations, where he fays that Livy copied that Form of Government, as much as was possible.

XXI. (1) See Pufendorf on this Subject, B. VIII. Chap. IX. § 3. 4. compared with our Au- thor, B. II. Chap. XV. § 7. 8c.

2. Plutarch, from whom the Author has cert- tainly taken this Fact, says, that Artaxerxes granted, among other Things, That the Thébans should be considered as the King's hereditary Friends. In Vit. Pelop. p. 254. Edit. Woch.

3. Livy, who gives an Account of this Treaty, adds, that this was to be done, fine duo man, without F feud, Lib. XXXVIII. Cap. XI. Num. 2.
their Dignity, which is denoted by the Word Majesty, to be respected; Tacitus calls that the having a Reverence for the Roman Empire; which he thus explains, The placed on their Banks, and beyond the Limits of our Empire, yet in Mind and Will they all with us. So Florus, Other People, who were not under the Dominion of the Romans, were subject to the Grandeur, and reverenced the Conquerors of Nations.

Andronicus Rhodius rightly observes after Aristotle, that this is proper to Friendship between Unequals, that the more Honour be given to the more powerful, and the more Affidence to the more weak.

To the Inequality in Question may be referred some of those Rights, which are now called Right of Protection, Right of Patronage, and a Right termed Mandubium; as also that which Father Cities had over their Colonies among the Grecians. For, as Thucydides says, those Colonies enjoyed the same Right of Liberty with the other Cities; but they owed a Reverence to the City whence they derived their Origin, and were obliged to render her tribute.

Livy, concerning that ancient League between the Romans, who were become absolute Masters of Alba, and the Latins defended from Alba, says, that in that Treaty the Romans were acknowledged Superiors. We know what Proculus replied to this Question, viz. that every People that does not depend on another is free, even tho' by a Treaty of Alliance they are bound to maintain and reverence the Majesty of another People. If then a Nation bound by such a Treaty remains yet free, and not subjected to the Power of another, it follows, that it still retains its Sovereignty; and the same may be said of a King. For there is no Difference between a free People, and a King that is really so. And Proculus adds, that such a Clause inferred in a Treaty of Alliance, imports only that one Nation is superior, and not that the other is not free. The Word Superiors ought to be understood here, not in regard to Power and Jurisdiction, (for he had said before, that the People inferior by the Treaty do not depend on the other, that are superior to them) but in regard to Reverence and Dignity, which the following Temporalities of the Pope. See likewise the Just Ecclesiastic Patrimonium, by Mr. Bohmer, Professor of Law at Hal[?], Lib. III. Cap. V. § 36, 37. where he gives a compendious History of the Right of Patronage, and points out such Authors as treat of it most satisfactorily.

The Word was written in the Editions published in our Author's Life, and immediately after his Death. In those which appeared since, we have Mandubium, from which the French have made Mambourme. But, however it is written, the Term, according to some, is derived from the old Teutonic Munitus, to defend or protect, and Burde, charge or burden. Others assign it a different Derivation; but all agree in its Signification, and call it a Sort of Right of Protection. See Gujaz, on B. H. Dr. Feudis, Tit. IV. Frauc. Guilliman, De Bohmi Helvet. Lib. I. Cap. IX. Num. 14. Edit. Lips. 1710. Jerem. Bignon on Marculphus, Lib. I. Cap. XXIV. p. 504, 506. Mr. Du Cange's Glossary, and Mr. Kerstu's Diligentia, before quoted. It is pretended, that this Word was used particularly, when speaking of a Prince's Right of protecting a Bishop or an Abbot.

See the learned Henry de Valois's Notes on the Excerpta Conficionarum Paraphry, in the Collection made by Mr. De Periæc[?], p. 6, 7. And our Author, B. II. Chap. IX. § 19. The Person introduced by the Historian, makes this Exception; So long as the Colony is well treated. Ev. pr. v. ch. 7.

Lib. I. Cap. LII. Num. 4.


Bb  
Words
Of the Rights of

Book I.

Words do explain by a proper Similitude. As we know (fays he) our Clients to be free, the they be not equal to us in Authority, Dignity, nor every Right; so they that ought to maintain and respect the Majesty of our State, are to be considered as free.

Clients are under the Protection of their Patrons: So Nations, who are inferior by a Treaty of Alliance, are under the Protection of the People who are their Superior in Dignity. They are under their Protection, not under their Dominion; as Silla speaks in Appian, on their Side, and not under their Subjection, as Lucy says. And Cicer, in his second Book of Offices, speaking of those Times when Virtue reigned amongst the Romans, says, They were the Protectors, and not the Masters of their Allies. To which agrees that of Scipio Africanus the Elder, The People of Rome had rather engage Men by Kindness, than by Fear, and gain foreign Nations by Protection and Alliance, than subject them by hard Bondage; and what Strabo relates of the Lacedemonians after the Coming of the Romans into Greece, they continued free, contributing nothing but what they were obliged to do as Friends and Allies. As private Protection takes not away personal Liberty, so publick Protection does not the Civil, which cannot be conceived without Sovereignty. Therefore you may see Lucy opposes the State of those who are under the Protection of another People, to that of those who are under their Dominion. And Augustus threatened Syllabus King of the Arabians (as Josephus relates)

14. *Tu re omni. This is the common but corrupt Reading, which our Author here follows. I should rather choose to read with Haldander, quae verus, that is not equal to us in Strength.

15. *See Cardinal Tomato, Pratici, Conful. 935. We have an Instance of this in the Dilinumites, (or Delinuates, a People of Persia) who thought, and governed by their own Laws, surprised by the Persians; as we learn from Agathias, Lib. III. Cap. VIII. [See likewise Procopius, De Bell. Cath. Lib. IV. Cap. XIV. and Baron Spanheim's Orbis Rom. Exercit. II. Cap. XVII. p. 452.] Thus the Emperors Irene designed to divide the Empire among her Husband's Children, in such a Manner as to make those who should be born afterwards, inferior to them in Dignity, but each of them Master of himself, and independent. See Krantzus's Sasanica. Lib. X. concerning the Cities which put themselves under the Protection of the House of Ayreria. Herodian, speaking of the Olymni and Armenians, observes, that the former were Subjects (to the Romans) the latter their Friends and Allies, Hist. Lib. VII. (Cap. V. Edit. Osen. 1678.) Grotius.

The Greek Palliace, here quoted without the Author's Name, may be taken from Theophrastus, and relate to the Terms of the Marriage, proposed between Irene and Charlemagne.

16. *It appears from the Palliace here quoted, that the Nations there mentioned had been given to Eumenes, (King of Pergamus) and to the Rhodians, then in Alliance with the Romans. Bell. Mithridat. p. 356. Edi. Amynt. (213. H. Senec.) So that those People were not independent, and such as we are to suppose our Author is speaking of.

17. *The Historian speaks there of the Olymniadians, a People of Spain, in regard to the Carthaginians, Lib. XXI. Cap. V. Num. 3.

18. *regard at length intand thus: Our Magistrates and Generals endeavoured to acquire a glorious Character, by defending the Provinces, and their Allies, with Equity and Honour. So that the Romans ought more properly be termed Protectors, than Guardians of the World. De Offic. Lib. II. Cap. VIII. See also Lib. I. Cap. XI.

19. *Livy, Lib. XXVI. Cap. LXIX. Num. 8. 20 Geograph. Lib. VIII. p. 562. Edi. Amynt. (365. Paris.) 21 In Isde & in diitae. Thus, speaking of the Sardinians, who were neither under the Protection (in Isde) of the Roman Peoples, nor subject to their Jurisdiction, (see ditae) Lib. VIII. Cap. I. Num. 10. And elsewhere, in Isde et tradire, is opposed to in servitutem, as when Romans, who appeared at the Head of the Embassy sent from the Etoliains, told to a Roman Consul, Nor in servitutem, sed in servitutem, we do not offer ourselves as your Slaves, but put ourselves under your Protection, Lib. XXXVI. Cap. XXXVIII. Num. 4. But the Consul soon let the World know, that in those Days the Romans, by in Isde tradire understood surrendering at Difference, and submitting to their Jurisdiction. See Spanheim's Orbis Rom. Exercit. II. Cap. X. p. 299. That Expedition became ambiguous, as the Romans began to act like Masters with their Allies. See our Author's Observation, B. III. Chap. XX. § 50. in which there is no Contradiction, as Beeler would infinuate, who threw me the Palliaces here quoted. He himself observes, that the Latins Writers, when they would avoid or correct a passage, would make an Addition of some Word, for avoiding the Ambiguity; as in the following Palliages, Quorum in Fide, & Clementia Regnum (Namtitia) evat. Floros, Lib. III. Cap. I. Num. 3. Memos et Careamus tender et non significamus caprunt (Bellovacis) sibi in suis Fidein & Patrifatum venire. Cesar De Bellis Gall. Lib. III. Cap. XVII. Bellovacis omni tempore in Fide atque Amicitia Civitatibus & Edus sujus. Ibid. Lib. Cap. XIV. But the fear of those Exploits, according to Spanheim, in his Orbis Rom. as above quoted, p. 307, signifies as much as the second.

22. *Here are several Mistakes in this Sentence, which the learned Gronovius has observed. Firstly, Sylabus was not King of the Arabians, but only Manderin of the General to Oboda, King of Part of Arabia. Secondly, This Menace regarded Oboda, and whom Sylabus had accused to Augustus, concerning his Expedition into Arabia; whereupon Augustus wrote to the King of the Jews, that he had taill then treated him like a Friend, but for the future would use him as a Subject. Josephus, Antiqu. Lib. XVI. Cap. XV. p. 472. Thirdly, Our Author doth not give us a just Idea of the Condition of the Kings of Arabia; for those Kings, as well as all the others from the West to Persia, at that Time depended on the
relates) if he did not leave off injuring his Neighbours, he would take Care that he should be made a Subject of a Friend; which was the Condition of the Kings of Armenia, who, as Petrus writes to Volgges, were under the Roman Jurisdiction, and consequently more Kings in Name than Reality; as were also the Kings of Cyprus, and some others, formerly Subjects to the Persians, as Dio Diodorus calls them.

Here may be objected what Proclus adds, if those who are Members of confederate States are summoned to appear before us; they are tried at our Tribunals, and are punished by Virtue of the Sentence passed against them. But to make this more plain, we must know there are four Kinds of Differences, or Subjects of Complaint. First, If the Subjects of the King or State under Protection, are accused of having done any Thing contrary to the Treaty of Alliance. Secondly, If the King, or the States themselves be accused. Thirdly, If the Allies under the

the Romans to much, that they received the Crown from them; and even a Son could not succeed his Father without their Consent. Josephus, in the very Place I have quoted, and in the following Chapter, tells us how much Augustus was provoked at Aretos, for entering on his Reign, after the Death of Obodas, without waiting for his Approbation. Augustus, accordingly, was obliged to make for appeasing the Emperor. It is well known likewise, that Archelaus, Son to the Herod already mentioned, went to Rome immediately after his Father's Death, to solicit the Confirmation of the Kingdom of Judæa, which he gained only under the Title of Ephphax; and some Years after, on the Complaints of the Jews, the Emperor bann'd him to Vienna. See the late Mr. Perizonius's Differtation, De Augufiis Orbis terrarum Digestion, § 3, 5, 6.

25 Tacitus relates what this relation, makes Petru say, The Armenians had always been subject to the Roman Power, or to a King chosen by the Emperor. Annal. Lib. XV. Cap. XIII. Num. 4. Florus tells us, that after the Defeat of Tiganes, Pompey required no other Subjection of the Arme- nians, than that of receiving their Governors from the Romans, Lib. IV. Cap. XII. Num. 43. See Spanheim's Orbis Romanus, p. 452. 24 Bibich. Hist. Lib. XVI. Cap. XLVI. p. 354. Edit. H. & K. Duff. Lib. XLIX. Tit. XV. De Captivis. Epit. 8. 22 Florus, & Pashminin. & Leg. VII. § 2. See what Pus- fendorf says to this, B. VIII. Chap. IX. § 4. in the first Note, where I have joined what he had written in two different Places. The Difficulty that vanishes on reading Spanheim's Orbi Rom. Exercit. II. Cap. X. The Alliance and Liberty of the Kings and People in Quœtion, were widely dif- ferent from what our Author conceives them to have been. The Inequality of those Alliances, im- plied a bare Inferiority of Rights, but a real De- pendence and Subjection; as is evident from several Places in Livy, who makes a clear Distinction be- tween Parusias quantum, and Parusias iniquum. When the People of Company applied to the Romans for their Alliance against the Samities, and at the same Time a perpetual Alliance, they said, that they made this Application at a Time when Fortune was favourable to them, as the Alliance would have been of a more early Date, so it would have been bound by a weaker Tyre: For then, as they should have entered it in equal Terms, (ex aequo) they perhaps had been as truly Friends, but his Subject and devoted (minus subjecti atque obseu) in the Romans. Lib. VII. Cap. XXX. Num. 2. The Rest of their Speech speaks this Dependence, tho they had not yet declared their Disposition to put themselves in Dependence under the Roman Power; which they had Orders to do, only on a Refusal of forming an Alliance with them on the Terms proposed. The same Histo- rian informs us, that the Apulians gained an Alliance (Pactus) not on equal Terms, (neque aequo flat- dere) but on Condition that they should be Subject to the Roman People, (in diutine Populi Romani). Lib. IX. Cap. XX. Num. 8. It was only in the Time of the Emperor Vitelinus, and before the War, that the Romans made Alliances, not prejudi- cial to the Sovereignty of their Allies; but from that Time they were only nominally such. The People, whom they termed Free, Allies and Friends, were so called, because the Roman People, with the Property of their Lands, gave them a Permis- sion to be governed by their own Laws, and the proper Magistrates of their respective Countries. But then they were to acknowledge that all this was a Concession from the Roman People; and that People made this Dependence appear by diminishing- or taking away that Liberty as they pleased. In Note 22 on this Paragraph we have given an Example of their Manner of treating Kings; and the Lawyer Servola makes it Tremain mutatis mutandis to hinder the King of a foreign Nation from obeying the Roman People. Digest. Lib. XLVIII. Tit. IV. Ad. Leg. Jul. Magnus. Leg. IV. A plain Proof that the Romans considered the allied Kings, and much more the Cities and Nations called Free and Allied, as dependent on them. Those People could neither undertake a War, or enter into an Alliance, without Permission from the Romans: They were obliged to find Quarters and Provisions for their Generals and Armies, and from Time to Time receive such Governors as were sent to regu- late Affairs: They paid Tributes and Impressions, un- less they had obtained a particular Exemption, and even that Exemption did not secure them from paying in certain extraordinary Cases. Add to all this, that those Nations, as well as the allied Kings, were obliged to furnish the Roman Troops on every Demand; and this was the Reason why all the World was to be enrolled, Luc. ii. 1. on which see Mr. Perizonius's Differtation, already quoted. We are not to be surpriz'd therefore, that the Romans, when they thought proper, took Cognizance of Charges brought against the Mem- bers of allied Cities or Nations, and exercised the Power of Life and Death on them. It must be owned however, that the Lawyer, whose Words gave Occasion to the Objection discussed by our Author, lays down a bad Definition of the Liberty of the People in Question, as being really in- dependent, (qni nulla alterius potentiae subiectus est) and, consequently, all our Author's Distinctions are superfluous, in the Application he makes of them; so that it is sufficient to examine them in them- selves.
Protection of the same King or State do quarrel among themselves. Fourthly, If Subjects complain of Injuries done by their Sovereign.

As to the First, If any Thing has been committed contrary to the Articles of Treaty, the King or State are obliged either to punish the Offender, or to deliver him up to them that are injured; which takes Place not only between unequal Confederates, but also equal; and even between such as are not engaged in any League, as we shall shew in 28 another Place. The Sovereign is also obliged to endeavour to have Satisfaction made, which in Rome was called the 29 Delegate’s Office. And Gallus Elbus in Feitus says, A Recovery is when the Law decides between King and People, Nations and Foreign States; how Things may be reformed by the Affiliation of a Judge Delegate, how they may be recovered, and how private Mens Cafes may be prosecuted among themselves. But one of the Confederates has no Right directly to seize or punish the Subject of another; therefore Decius Magnus, a Campanian, being seized by Hannibal, and sent to Cyrene, and from thence to Alexandria, declared, that he was seized by Hannibal contrary to the Articles of the League, and thereupon was set at Liberty.

As to the second, The superior Ally has a Right to compel the inferior to stand to the Articles of the Treaty, and upon refusal to punish him. But neither is this peculiar to unequal Alliances; the same Thing takes Place between equal Allies. For, to have a Right to punish any one that has repoded himself guilty, it is sufficient that one is not subject to him; which 28 shall be treated of elsewhere; wherefore Kings or Nations not allied, have also that Right in regard to one another.

As to the third Cafe, As in an equal Confederacy, Controversies are generally referred to 29 a Convention of the Associates, who are not interested in the Affairs in Question, as we find was formerly practised amongst the Greeks, Latins, and Germans, or to the Decision of Arbitrators, or even to the Judgment of the chief of the Confederacy, as to a common Arbitror: So in an unequal Confederacy, it is commonly agreed that the Things in Dispute shall be determined before him, who is the Head of the League. Therefore this does not imply any Jurisdiction; for even Kings have often their Causes tried before Judges appointed by themselves.

As to the fourth and last, Associates have no Right of Judging: When therefore Herod accused his own Sons before Augustus of certain Crimes, they replied, 29 You might have punished us by your own Right, both as a Father, and as a King. And when Hannibal was accused at Rome by some Carthaginians, 31 Scipio told the Senate, it did not belong to them to meddle in Affairs belonging to the Republick of Carthage. And ’tis in this 32 Arifotles says an Alliance differs from a State, that ’tis the Bufiness of Allies to take Care that no Injuries be done by one to the others, but not that the Subjects of a confederate State do not injure one another.

It may again be objected, that Historians make use of the Word to command, in speaking of the Prerogatives of a superior Ally; and that to obey, in speaking of the Engagements of the inferior Ally. But this should not affect us; for this is, when the Things concern either the common Good of the Allies, or the private Advantage of the Superior in the League. As to Things of common Concern, when the Assembly does not sit, even in an equal League, he that is chosen Prince of the League (זיו נוג, Dan. xi. 22.) commonly commands the other Allies, as Agamemnon did the Grecian Princes; and afterwards the Lacedemonians did the Grecians; and after them the Athenians. We read in 33 Thucydides’ Oration of

26 B. II. Cap. XXI. § 4.
27 Reciprocities. See Torrentius’s Commentary on Suetonius, in Neron, Cap. XVII. and that of Theod. Marcelli, on the Life of Vespasian, Cap. X.
28 B. II. Cap. XX. § 3.
29 This Sort of Allembly is called Κοινεία, in an ancient Inscription, where we find the Articles of a Treaty between the Πριαμιος and the Βιοτητισιανος, by which those People reciprocally bestowed the Right of Citizens one on the other. Grotius.
He should have said Μικραιβιον. Mr. John Price, a learned English man, first published this curious Inscription, in his Notes on Apeolius’s Apology, p. 59. &c. Ed. Paris. 1635. It is also found among the Oxford Marbles, p. 116. See Spanheim’s Oris Rom. Exercit. I. Cap. IV. and Exercit. II. Cap. XVI.
30 Ann. Trad. Lib. XVI. Cap. VIII.
33 Lib. I. Cap. CXX. Ed. Oxon.
the Corihiants. The Chiefs of an Alliance ought not to challenge any Advantage in what concerns their particular Interest: But it is just, that in the Administration of common Affairs they have the Pre-eminence. Socrates says, that the antient Athenians, whilst they were the Chiefs of Greece, were contented to take Care of common Affairs, but as for the Reft, they left to every People their Liberty: And elsewhere, being persuaded that they ought to have the Command of the War, and not to rule over their Allies. And again, Managing their Affairs like Confederates, not despotically. The Latin express by the Word imperare, to command, that Right of the principal Ally; but the Greeks more modestly use the Term dominare, to regulate. The Athenians having the Conduct of the War against the Perijans, as Thucydides relates it, did regulate which Cities should contribute Money against the Barbarians, and which Ships. So they who were sent from Rome into Greece, are said to be sent to regulate the State of the free Cities. But if he, who is only chief of the Confederacy, governs the common Affairs in the Manner I have now said, we must not wonder, that in an unequal Alliance, the superior Ally does the same Thing. Therefore Imperium, in this Sense, that is, suzerain chief, Command, does not take away the Liberty of others. The Rhodians, in their Oration to the Roman Senate, extant in Livy, thus addressed them, The Grecians formerly were strong enough to command: Where the Command is now, they wish it may be forever; they are contented to defend their Liberty with your Arms, not being able to do it with their own. Thus Diodorus tells us, after the taking the Fort of Cadmea, by the Thebans, many Grecian Cities joined in a League, to maintain in common their Liberty, under the Conduct of the Athenians. Dion Phúcens, speaking of thofe very Athenians in the Time of Philip of Macedon, said, Having at that Time abandoned the Command in War, they only retained their own Liberty. Thus Cæsar calls those People Confederates, whom a little before he had said were under the Command of the Sueviens.

But as to thofe Things which respect the particular Interest of each Ally, if the Demands of the superior Ally are often called Commands, that does not imply any Right to require fuch Things with Authority; but that Way of Speaking is used, because thofe Demands produce the fame Effect, as Commands properly so called, and the fame Regard is paid to them. In this Sense the Intreaties of a King are called Commands, and the Advices of a Physician Precriptions. Before this Confl (C. Pothumius) no Body, says Livy, B. 42. was ever chargeable, or any Ways burdenome to our Confederates; our Generals were abundantly supplied with Mules, Tents, and all Baggage necessary for War, that they should not Command the Allies to furnish them.

In the mean Time it is true, that it often happens, that if he who is superior in the League, be much more powerful than the Reft, he by Degrees usurps a Sovereignty, properly so called, over them, especially if the League be perpetual, and that he has a Right to plant Garrisons in their Towns; as the Athenians did, when they suffered their Allies to appeal to them, which the Lacedemonians never

37 As the younger Pliny says to one of his Friends, Remember you are sent into the Province of Achaea, that you are sent to regulate the State of free Cities. Lib. VIII. Ep. XXIV. Num. 2. Edit. Coddar. See Spanheim’s Orbis Rom. p. 314, 351, 394, 395.
38 Lib. XXXVII. Cap. IV. Num. 24.
40 I do not know in what Piece of the Grecian Orator thefe Words occur.
41 Sub imperio Sueorum. These People are here mis-named. Caesar calls them Norvii. De Bello Gall. Lib. V. Cap. XXXIX. The learned Gronovius observes alfo, that the Word Imperium is not to be taken in an improper Sense, because the Nations here mentioned, were really subject to the Norvii, but that of Alliae (Socii) which the Roman sometimes gave to the People of their own Provinces.
42 Lib. XLII. Cap. I. Num. 9.
43 I find Thucydides making this Observation on the Athenians, who finning one of their Frigours, pretext to Day, and another to Morrow, and having gained the Ionians with their Allies, induced them People to intrust them with the Command of a War on the Medus. Lib. VI. Cap. LXXXVI. Edit. Oxon.
44 The learned Gronovius supposes that the Author’s Memory failed him on this Occasion, and that he attributes to the Athenians what Pausanias says of the Romans, viz. that after the War with Perijans, they obliged several of the Athenians to appear at Rome, and answer to the Charges exhibited against them, of having favoured that vanquished Prince. Whereupon the Historian observes, that this Way of proceeding feemed strange to the Grecians; since nothing of that Nature had been
never did. Whereupon I pocrates compares the Rule which the Athenians exercised over their Confederates to that of Kings. Thus the 46 Latins complained, that under the 47 Pretence of a Confederacy with the Romans, they were brought into Servitude. So did the Athenians, 48 that they had nothing left but the bare Shadow, and empty Name of Liberty; and the 49 Achaians afterwards, that they had a League in Show; but in Reality a precarious Slavery. So in 50 Tacitus Civillis Boterus complains of the same Romans, that they used them not as at first, like Confederates, but as mere Slaves: And in another Place, 51 they falsely called that Peace, which was indeed a miserable Slavery. Eumenes also, in Livy 52, said the Confederates of the Rhodians were only so in Name, but really their direct Vassals. Alfo the 53 Magnæans complained that Demetrius was free in Show; but in Effect all Things were managed as the Romans pleased; and Polibius 54 remarks, that the Thespians were in 55 Appearance free, but in Truth under the Dominion of the Macedonians.

When Things go in that Manner, and Uulraption is changed at Laft into Right, by the tacit Conceision of thofe whouffer it, of which we shall treat in another Place; 56 then thofe who had been Allies become Subjects, or at leaft there is made a Partition of the Sovereignty, which, as I faid before, may happen sometimes.

been attempted by the Macedonians; who when at the Height of their Power and Grandeur, refer'd fuch Calls to the Amphictyons, or States General of Greece, Achæic. or Lib. VII. Cap. X. p. 216. Ed. Woch. I am perfuaded our Author has really committed a Miftake, and that his Commentator has discovered what gave Occaffe to it. It might be obferved, that our Author probably imagined he had read what he relat'd, in Isocrates, whom he afterwards quotes. But the Greek Orator is fo far from faying any Thing like it, that he maintains, on the contrary, that in regard to the Præfence in Qufition, and feveral other Things of which the Athenians were accused, he could make it appear, that the Lacedæmonians had add'd much worse, and more oppreffive than they. To which he adds, that the Lacedæmonians had put more Greeks to Death, without the Formality of a Trial, than had been improve'd and tried by the Athenians since they inhabited that City. Orat. Panath. p. 245, 246. Edit. H. Stepb. 55 Our Author probably had his Eye on a Paffage, &c. of the 69th Book, where he reproaches his Countrymen, the Athenians, with pretending to be of Opinion, that Tyranny, or Monarchical Government, was oppreffive, and pernicious, not only to the Subject but even to the Prince himfelf; and at the fame Time acting as if they looked on the Empire of the Sea as productive of the greatest Advantages, the in Reality, it differs not in the leaft from a Monarchy.

The Author in his Margin quotes Dionysius of Halicarnæsus, Lib. VI. but almost the fame Words he uler may be found in Livy, Lib. VIII. Cap. IV. Num. 2, where the Historian makes a Prefent of the Latiu fay, For if we can now bear Slavery, under the Shadow of an equal Alliance, &c. 47 Thus Plutarch fays of Aratus, the Athenian General, that he was accused of tempting Masters on the Ganges (of Achaia), giving them the free Appellation of Allies. Vit. Arat. (Tom. I. p. 1045. Edit. Woch.) Dilius Vettius, Lieutenant-General of the Roman Forces, speaking of fome People of the Macedon General, fays they had till that Time been under the Power of the Achaia: Taciti. Hift. Lib. IV. (Cap. LVII. Num. 4.) Festus Rufus, (as he is called by others, Sextus Rufus) speaking of the Rhodians, (and the Inhabitants of other Islands) oberves that, at first they enjoyed Liberty; but in Proofs of Time occupied themselves to obey the Romans, who engaged them to it by kind Ufage. Cap. X. Edit. Cellar. JULIUS CAESAR, having spoken of fome People as Friends and Clients of the Emphants, tells us, they had formerly been under the Jurisdiction of (of) Avergne. Bell. Gall. Lib. VII. Cap. LXXXV.) To which may be added, Frederic Minndaus, De procellibus, Lib. II. Cap. XIV. Num. 53. Ziegler, (ad auream Praxid Calvili). §. Lusolphi, Concluf. I. Num. 86. Gallius, Lib. II. OfServ. Liv. Num. 6. See also Agathus, Lib. I. where the Gods are informed what they may expect of the Franks in Time. Grotius.

In the Paffage, where quoted from Caesar's Commentaries, there is no Mention of Friendship. Perhaps he at the fame Time was thinking of another Place, which is as much to Purpose, and where that Word is infected, De Bell. Gall. Lib. VI. Cap. XII. The Paffage of Agathus, where referred to, is in Lib. I. Cap. XI. But the Writer doth not say the Gods were informed, &c. He speaks of Allgerns, a Godlike Prince, who being, a Godlike Man, and being with the Romans, is determined to take that Step from the Confederation of the fervile State to which he saw his Countrymen were on the Point of being reduced by the Franks, under the Shadow of an Alliance and Protection.

48 He (Alexander Prince of the Eulians) occupied the Romans of Franks, who under the pompous but empty Name of Liberty, kept Galleries in Caltagia and Demetrias. Livy, Lib. XXXIV. Cap. XXIII. Num. 8. They were now loaded with more splendid and honorai Chafirs, &c. Lib. XXXV. Cap. 38. Num. 10. 49 Idem. Lib. XXXIX. Cap. XXXVII. Num. 13. 50 Hiflor. Lib. IV. Cap. XIV. Num. 5. 51 ibid. Cap. XVII. Num. 3. 52 Lib. XXXVII. Cap. 53. Num. 4. 53 Livy, Lib. XXXV. Cap. XXX. Num. 12. 54 Hift. Lib. IV. Cap. LXXVI. 55 Such were the Latins, a People of Celts, in the Reign of the Emperor Julianum. PRAGOP. Poefis. Lib. II. Cap. X. Grotius.

See Spanheim's Orbis Romanus. Exciit. II. Cap. XVII. p. 447, 448. 56 See B. II. Grop. IV. 945. XXII. There
XXII. There are also Powers, who pay something to another, either to secure themselves from their Inults, or to get Protection, as Tributary Confederates, as it is in Thucydides; such were the Kings of the Jews, and of the 4 neighbouring Nations, after the Time of M. Anthony, Titus, the feudal power of St. Custom 44-.

XXIII. Many think it more difficult to determine, whether feudatory Princes may or may not hold their Nation by a feudal Tenure.

The personal Obligation is the same, whether a Man holds the Sovereignty by a feudal Right, or any Thing else, tho' lying in another Place. But such an Obligation, as it takes not from a private Man personal Liberty, so neither does it lessen the Sovereignty in a King or State, which is Civil Liberty. Which may be plainly seen in France Fiefs, which consist in personal Obligation only, but do not give any

XXII. (1) The Emperor Joffian paid the Perfons a certain Sum yearly. See Proc. R. Per. Lib. II. (Cap. X) and Guizot's Hist. IV. (or Hist. Melfignat. Cap. X.) This was in fofT Terms called A Tribute for securing the Cafian Gates. The Turks give the Armenians of the Mountains Money, to secure them from their Inults.

See to the fame Purpofe LAKUBON's Note on SPARTIAN, in Hadrianus, Cap. VI. and what Mr. HERTIUS fays, partly after him, though he doth not mention his Name, in his Elementa Prudent. Credit. Part I. Sec. XII. § 25. and Part II. Sec. XX. § 9.

2. De Bell. Cap. XIX. Edit. Osan. 3. De Bello Civil. Lib. V. p. 1135. Edit. Amftr. 715. H. Steph. JOSEPHUS tells us that Marcus Antonius, speaking of Herod, declares it was not reasonable that Prince should be called to Account for what he had done, as King; for then he would not be a King: and that it was just that, who involved him with that Dignity and Power, should allow him to enjoy them. Antiq. Jud. Lib. XV. Cap. IV. p. 516. The Jews, fays S. CARYFSON, that in their Decline, and Subjection to the Romans, were neither entirely free, as before, nor absolutely Slaves, as now. They were ranked among the Allies of that People; paid Tribute to their own Kings, and received Governors of their Nominations. They fuffered after their own Laws, and punished their Délitue according to the Guifon of their own Country. De Elemenioy. II. GROSUS.

The Example of the Kings of the Jews, and those of the neighbouring Nations, is not well appl. For at that Time the Authority of all those Princes was very precarious. See my 22 and 23 Notes on § 21. The very Pagines, alluded by our Author in this Place, are directly against him. What is here related of Marcus Antonius was faid on Occasion of some Complaints laid before him against Herod, on the Account of the Death of Aristobulus, his Brother-in-Law; and it is evident from those very Words, that all that Prince's Power was dependent on the Romans; tho' in the Cafe then under Consideration, Anthony, being gained by Preference, could make Cognition of the Charge urged against Herod, tho' but too well ground.; and that is the Reason why he laid so much Stress on the Quality of King, in Regard to Herod's Subjects. S. CARYFSON expressly fays, the Jews were subject to the Command of Cesar, Titus, 'the Raticr when the Jews were, and that they had more than the Spécious Title of Allies, in the Sense already explained. After all, JOSEPHUS expressly fays, that after Jerusalem was taken by Pompey, the Jews loft their Liberty, and became Subjects (súperiores) to the Romans. Antiq. Jud. Lib. XIV. Cap. VIII. See SPANIELS's Orbis Rom. Exercit. II. Cap. XI.

4. The Kings of those neighbouring Nations were not more independent than those of the Jews. See Note 22 on the foregoing Paragraph. But the learned GRONOVITUS quotes an Author who has produced more exact Inftances of Princes, who, without ceasing to be Sovereigns, paid Tribute to Foreign Nations, to prevent Inults into their Countries. See ADD. MARCELL. Lib. XXV. Cap. VI. p. 483. Edit. Fol. Gren. with FRID. LINDENBROGUS's Note on the Place.

XXIII. (1) See my 4th Note on PUTFENDORF, B. IV. Chap. 8. § 12.


3. Nulla iura in rem. Without any Right to the Thing itself. What a Prince holds here, agrees neither with the Idea which the Feudits give of France Fiefs, nor with the Nature of Fiefs in general. By the Term France Fief is meant, that which is exempt from all Charges and Services, which require considerable Labour or Expense; so that the Obligation of the Vaffal is reduced to Fidelity and Loyalty, which confift only in honouring the Lord, under whom he holds, feeking him from Damage, and doing him all the Good in the Vaffal's Power, as it is specified in the Form of the Oath of Fidelity. PUTFENDORF, Lib. II. Tit. VI. De formâ Fideิตatis, and Tit. VII. De novo formâ Fideitéatis. But this Exemption from Charges and Services does not deprive the Lord of a France Fief of a Right to the Thing itself, which the Vaffal holds in Fief, or hinder it from returning to him, when the Vaffal is guilty of Felony, or leaves no Heirs. The Exclusion of such a Right destroys the very Nature of a Fief, properly so called. The Fief of the Vaffal of a France Fief had a Power to alienate the Thing without the Content of the Lord, which the Doctors do not allow. till the Right of the latter would be perpetual over thofe, in whose Favour the Fief should be alienated. I am very much of opinion, if our Author has not here, and elsewhere, as B. H. Chap. XXIII. § 18., controverted what is called France Fiefs, with certain Engagements improperly termed Fiefs, on the Account,
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no Right to the Thing itself. For these are nothing else but a Species of that unequal League, of which we have treated already, wherein one promiseth Services, and the other Defence and Protection. But suppose a Vaffal has promiseth his Lord to serve him against all and every Man, which they now call Feudum Ligium, (for formerly that Word was of a larger Signification) that takes off nothing from the Right of Sovereignty which the Vaffal has over his own Subjects; not to mention, that there is always a tacit Condition supposeth, viz. that the War undertaken by the Lord be just: Of which we shall treat in another Place.

As to the Right of the Lord to the Thing itself, enjoyed by a feudal Title, it is such indeed, that if the Family of the Vaffal be extinct, or if he falls into certain Crimes, he may lose the very Right of Sovereignty: Yet the Power he has over his Subjects does not cease to be Sovereign; for as I have oftentimes said, there is a Difference between the Thing, and the Manner of holding it. And I find many Kings constituted by the Romans with this Condition, that upon the failing of the Royal Family the Sovereignty should return to themselves; as Strabo observeth of Paphiagonia, and some other Kingdoms; 

Account of some Resemblance between them in the Repeal and Homage paid. An ingenious Commentator, who has published curious Extracts from Rymer's Foederis, observeth, as a certain Fact, that Homage was frequently paid for simple yearly Pennys, without expressing the Coaft of such Homage. We have Examplers of this Kind, says he, in the first Volume of this Collection, p. 3., and in some other Places, in Regard to the Counts of Flanders, who paid Homage to the Kings of England, and Robert Count of Flanders, the King obliges himself to give him 400 Marks of Silver yearly in Fief, on Condition that Robert should be obliged to fend 500 Horse into England, for the King's Service, when he should have occasion for them. Biblioth. Graecia, Tom. XV. p. 100. I find Bodin had long ago made a like Observation. Our Ancestors, said he, abused the Word Liege in all their ancient Treaties of Alliance and Oaths. I remember I have seen 48 Treaties of Alliance and Forms of Oaths, contained in the Original Records, in which the three Electors on this Side of the Rhine, and several other Princes of the Empire, entered into Obligations with the Kings Philip de Valois, John, Charles the Fifth, Sixth, and Seventh, and Lewis the Eleventh, promising and swearing, in the Presence of the King's Deputies, to ferue him in his Wars against all Powers, except the Emperor and King of the Romans, acknowledging them all Vaffals and Liege-Men of the King of France: Some of them fliling themselves Counsellors, others Penfomers, and all Liege Vaffals, except the Archbishop of Treves, Elector of the Empire, who only calls himself Con- federate. And yet they hold nothing from the Crown; for only the Penfomers of France took an Oath to ferue the King, in the Thing, and on the Conditions specified in the Instrument. The Oath of the Duke of Guelders and the Count of Jullien runs thus: Ego Deo et Vaffalio ligius Carol., Regis Francorum, pro ruine quinquiscienta millia scu- torum auri, ante feldun D. Remigii mihi folvento- rum. That is, I become the Liege Vaffal of Charles, King of the Franks, on the Confe- dera- tion of fifty thousand Crowns of Gold, to be paid me before the Feast of St. Remigius. This Instrument is dated in the Month of June, 1401. This same Way of foaking was used even between Sovereign Princes; as in the Treaty of Alliance made between Philip de Valois, King of France, and Alphanco, King of Cathille, in the Year 1366, on which Occasion Prates appeared from both Parties, to require and give Alliances of mutual Homage and Fidelity. But this is an Exception of the Words Vaffal and Liege; for which Reason they are no longer admitted into the Oaths taken by the King's Penfomers, nor into Treaties. De la Repub. B. I. Chap. X. p. 175, 176. The French Edition, print- ed in 1608. I have set down this Passage at length, as it is of singular Use for explaining our Author's Meaning, and discovering the Origin of his Miftake, which none of his Commentators have ob- served. Since I penned this Note, I have found something in another Work of our Author to confirm my Conjeéture. It is in Chap. V. of his Trea- tise, De antiquitie Rep. Batav. where he maintains, that even tho' the old Crowns of Holland were Vaffals of the Empire of Germany, the Hol- lands would fill be a free and independent People. To prove this Proposition he observeth, that according to the Lawyer Prulculus, Clistes are not the less free, because not equal in Dignity to their Patron; nor a People, because obliged by a Cauce in a State of Alliance to reverence the Majesty of their Ally, provided they are not subject to his Dominion. Hence, says he, comes the Name of Fran Fief. But our Crowns never owned themselves subject to this Sort of Obligation of Fief.

4 Ligius Homo, or Liege, a Term supposed to be derived from the German Ledyt, empir, or- iginally signified no more than a Vaffal. See Vos- vius, De Fitis Sermoni, Lib. III. Cap. XX. un- der the Word Lige; and the late Mr. Hertius's Treatise De Finitis Siatlit, Part II, § 6; in Vol. II. of his Comment. on Op. etc. But in Proces of Time it has flood for a Liege-Man, or Liege-Vaff- fal, one who entered into an Engagement to re- peal his Lord more than all other Men, and serve him against every other; so that such a Vaffal cannot be Vaffal to two Masters in the fame Manner, and ought to acknowledge no other Sovereign. But in Reality, such an Engagement no more pre- judices the Sovereignty of the Vaffal Prince, than when a Prince, by a Treaty of Alliance, promises another, to whom he is not feudatory, to assist him in all his Wars.

6 See B. II. Chap. XXV. § 13, and Chap. XXV. § 44. 

7 But those Crowns were more than Feuda- tory. See Notes 22 and 50. For the author, Subiects (Turcos) to the Romans, Lib. VI. p. 440. Edit. Angli. I shall set down the whole Passage, because it
Chap. IV.  

**War and Peace.**

XXIV. We must also distinguish in Sovereignty, as well as Property, between the Right itself, and the Exercize of that Right, or between the first Act and the second. 1. For as a King, when an Infant, has a Right to govern, but cannot exercise that Right; so has a Prince that is Lunatick, or a Prisoner, or that lives in a foreign Country, so that he is not at Liberty to exercise himself the Acts of Sovereignty: For in all such Cases they have their Lieutenants or Vice-Royes to act for them. Therefore Demetrius, living confined under Seleucus, forbade any Credit to be given to his Letters, or Seal, but ordered that all Things should be administered as if he were dead.

It is computed in one Place, where I do not find any one has observed the Fault. The Geographer plainly distinguishes between the Kings of **A**sir, whose Families were extinct, and those who, revolting from the Romans, and being conquered by that People, had given them Occasion to reduce their Dominions into the Form of Roman Provinces. Among the former he reckons the Kings of Pergamus, those of Syria, Paphlagonia, Cappadocia, and, as it is in the original Text and the Latin Version, those of Egypt. The Examples of the latter are Abiridotes, lamented by Lactantius, and Cleopatra, Queen of Egypt. To *é wòmu  pute wòti tov Aéi*oiv u'eta; kalulêkex év tov tiviav dianuòma u'eta; únterouv, kalulêkex tov tv'Axiónov Basiavon, 2. 3. *Sýrion, 3. *Parlalévov, 4. *Kathomêxov, 5. *Aúiovavov,* 6. (I add this Particle, which is absolutely necessary) *πρόσλακτων, 7. *φίλω παραλογίας, 8. *καθήθω τί κεκομένων, καθήθω τί κέκομεν.*

I. **PRIVATE Men may certainly make War against private Men, as a Traveller against a Robber, and Sovereign Princes against Sovereign Princes, as David did against the King of the Ammonites;** and so may private Men against Princes, but not their own, as Abraham did against the King of Babylon, and other neighbouring Princes; so may Sovereign Princes against private Men, whether their own Subjects, as David 1. against the Party of Ishbosheth, or Strangers, as the Romans against Pirates.

The First Example is criticized by Commentators, who will not allow it to be just. *Ishbosheth,* say they, had been acknowledged King by the eleven Tribes, over which he reigned two Years, 2 Sam. ii. 10. David himself was so far from considering him as a rebellious Subject, that he gives him the Character of a just Man. Ibid. iv. ii. and punishes his Murthers. The Promise, which GOD had made of transferring the Crown to David, and his Descendants, specifcally no fast Time; nor was it to be fulfilled till after the Death of Saul and Ishbosheth. Hence it is concluded, that those who sided with Ishbosheth were his Subjects, and not David's. But it appears from the sacred History, that tho' David had been principally appointed by Samuel, and that but Few were at first acquainted with the Will of GOD, who designed he should succeed Saul; it afterwards became publicly known, and reached the Court of the Prince on the Throne. *Jonathan says to David, in the Wilderness of Ziph, Thou shalt be King over Israel, and I shall be next unto thee; and that all my Father Saul kneweth.* 1 Sam. xix. 17. Saul himself makes the same Declaration, when he acknowledges the Generosity of the Man, whom he had perfecuted with so much Rage and Cruelty, I knew well that thou shalt surely be king, and that the Kingdom of Israel shall be established in the Hands; Swear now therefore unto me by the Lord, that thou wilt not cut off my Seed after me, and that thou wilt not destroy my Name out of my Father's House. Ibid. xxiv. 20, 21. From which Words it is evident, that he looked on David as the Man who was to be his immediate Successor, according to a Promise from Heaven. When the eleven Tribes made their Submission to David, they owned they knew the Lord had fai to him, Thou shalt feed my People Israel, and thou shalt be a Captain over Israel. 2 Sam. v. 2. So that, by Verite of that Divine Election, all who were acquainted with it, were obliged to receive David as their lawful King, on Saul's Demise. For the Cae was not the name among the Hebrews, as among other People, who being directed by no extraordinary Revelation, bestowed on their Kings all the Power they had over them. The Israelites were but lately come out of the
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The only Question is, whether private or publick Persons may lawfully make War against those that are set over them, whether as supreme, or subordinate. First, it is agreed on all Sides, that they that are commissioned by the higher Powers may make War against their Inferiors, as Nebemial did by the Authority of Artaxerxes, against the neighbouring petty Princes. Thus the Roman Emperors allowed the Proprietor of an Heritage to drive away Harbingers or Quarter-masters. But the main Question is, What is lawful for Subjects to do against their Sovereign, or those that act by his Authority. This is allowed by all good Men, that it is the civil Powers command any Thing contrary to the Law of Nature, or the Commands of God, they are not to be obeyed. For the Apostles, when they advised, that we must obey God rather than Man, did but appeal to a Principle of Reason, engraved on the Minds of Men, which Plato expresses almost in the very same Words. But if for this, or any other Cause, any Injury be done us by the Will of our Sovereign, we ought rather, to bear it patiently, than to resist by Force.

II. Indeed all Men have naturally a Right to secure themselves from Injuries by Resistance, as we said before. But civil Society being instituted for the Preservation of Peace, there immediately arises a superior Right in the State over us and ours, so far as is necessary for that End. Therefore the State has a Power to prohibit the unlimited Use of that Right towards every other Person, for maintaining publick Peace and good Order, which doublets it does, since otherwise it cannot obtain the End proposed; 1 for if that promiscuous Right of Resistance should be allowed, there

the Theocracy; and though GOD, in Compliance with their imprudent and obstinate Demand, had granted them a Change of that happy Form of Government into a Human Monarchy, he did not thereby divest himself of the Right of making the immediate Choice of their Kings, when he pleased. It was thus that Saul the first King of Israel attended the Thrice. David, therefore, having been anointed by Samuel, in Saul’s Life-time, had an incontestible Title to the Succession; and consequently, the eleven Tribes, who owned Ishbosheth, might be considered as so many rebellious Subjects against the lawful Sovereign; and the more so, because they need only have consulted their usual Oracle, the Urlim and Thummim, in Order to know the Will of GOD. If David punished the Murthers of Ishbosheth, as having killed a just, or innocent, Man; it was not because he did not look on him as an Usurper of his Right, but he ELECTING in regard to Restab and Barneboim, who had dispatched him by their own private Authority, without any Injury received from him. And he himself would have spared the Lives of Saul’s Children, on the Account of the Oath he had taken to his Father, in Consideration of which he pardoned Ishbosheth, and would never have hurt him. See Mr. de Clerc, on 2 Sam. iv. 11.

2 Licentiam enim Dominio (Pradici alteri, fabreque pleris Severitatis nostra commissam, ut eum, qui praeparand pradix ad pollifinmn venire, expellendi honbeat facultatem, nec erim autem appertinent ex quom skill arbitratione ultius fcin fid fiss concussum; relique aureligium prior arcan, qui prius inuenti. Cod. Lib. XII. Tit. XLI. De Metatis & Epidemiet. Leg. V.

3 See Book II. Chap. XXVI. § 3.

4 In Socrates’s Apology, where he makes that Philosophers express himself in the following Manner: I honour and love you; [speaking to the Athenians]; but will obey GOD, rather than you. Tom. I. Memorabilia. Ed. Steph.

II. (1) We are here to consider, first all Persons, and then the Body of the People. In regard to all Persons, it is certain that the End of civil Society in general requires that each of them should not have a Right to resist the supreme Power, as often as he thinks himself aggrieved by it. For, besides that a Superior may be wrongfully accused on that Article, whoever submits to human Authority, must be sensible that the Person, in whose Favour he divests himself of part of his Liberty, is and always will be Man; that is, subject to Mistakes, and Failures in the Discharge of his Duty; and is therefore to be supposed to acknowledge him for his Master on that Foot. Consequently, be it at the same Time grants him a Right, not to treat him in any Manner unjustly (no Man can ever give or have a real Right to commit the least Injustice) but to require that he shall not be divested of his Authority, for every Abuse of it. A Man, who never abides his Power, ought to be considered as a Man not to be found; and no Authority would be lasting, or sufficient for producing the Effect, for which it is designed, if it could be so easily lost. But it does not thence follow, that a particular Person is to be subject to every Thing from his Superiors, without ever opposing Force with Force. Were it so, those who enter into any Society, where they are to obey, would without Dispute be in a worse Condition, than before; and nothing could oblige them to dis obey themselves of that natural Liberty, in which every Man is so jealous. Even such as submit to a Conqueror, would have done better, had they continued in a State of War with him. We must distinguish therefore between doubtful, or supportable Injustices, and manifest or impregnable Injustices. The former are to be born; but, strictly speaking, there is no Obligation to bear the latter; and if we sometimes ought to bear them, it is by no Means out of Regard to the Person, who commits them, but for the Good of Society. So that, if there is no Room to apprehend that Resistance will occasion greater Evils and Disorders, than those to which the Society already is exposed, or those to which it is in Danger of being exposed, we may freely employ our whole Right against the Man, who, by an Unjust and Licentious, is disengaged us the Right of Subjection, and entered into a State of War with us. Now, that there are some manifest and enor mous Injustices, in regard to which a private Person cannot conceive himself, and conceive an unwarrantable Prejudice against his Prince will be easily granted, if we enquire well into the Nature of Things.
there would be no longer a State, but a Multitude without Union, such as the Cyclops were, every one gives Law to his Wife and Children. A Mob where all are Speakers, and no Hearers. Or the *Galatians*, who had neither Cutsmons, Laws, nor Magistrates. So we find that the Restraint in Question, is looked upon as unlawful, according to the Usage of all States. All human Societies (St. Augustine *tells us*) unanimously agree to obey Kings. So ἡλιος, 6 τοιχος μανής κα ὕπο πλευρας καθαρος, A King absolute, accountable to none. And in Sophocles, 7 ἡράνεις σιν, ὡς Σ' ὕποθεσιν τι μοι; They are Princes, we must obey; why not? And in Euripides, 8 τας Σ' καταλιθής δύνατον καθαρος, We must bear with the Follics of Princes. Agreeably whereunto is what we quoted above out of Tacitus; and in another Place he says, *The Gods have bestowed a sovereign Power on Princes, leaving Subjects the Glory to obey. And, The bad Treatment we receive from a King, must be looked on as good*

Things, and the Conduct of Sovereigns, become Tyranny. Who can doubt, for Example, whether a Prince, who attempts to kill one of his Subjects, or deprive him of his Goods, without any Crime committed by the Sufferer, and without the Formality of a Trial, for no Reasone but his own Good Pleasure, for some Reason evidently unjust, as for his refusing to believe what he knows to be false, particularly in Matters of Religion; who, I say, can doubt that this is one of those enormous and inupportable Abuses of the supreme Authority, the Toleration of which, is so far from being neceffary for the Sake of preferring Order, and for the public Peace, that it is directly contrary to and destructive of both? Have we not even commonly very great Reafon to believe, that a Prince who proceeds throfe Lengths in Regard to one more particular Perfon, will not stop there, and that the reft may expect the like Treatment? If the public Interest requires thofe, who obey, should suffer fome Thing, it no lefs requires that thofe, who command, fould be afraid of putting their Patience to the utmost Trial. A Man, who imagines himself allowed to do what he pleases to his Inferiors, is capable of doing every Thing. It is true, indeed, that commonly speaking, one, or some few particular Perfons, would refufe to no Purpofe, and only draw greater Conftitutional Abuses. But this is a prudential Consideration, which makes no Diminution in their Right, to oppofe a Superior, who by enormous and inupportable Abuses of Injuftice, and the Violation of his Engagemens to them, has efcharg'd them of their Obligations to him. What I have already laid down, takes Place, and that much more, in Relation to a whole People, or the greater Part of it. The greater the Number of the Oppreffed is, the more Oppreffor deserves to be brought to Reafon. The Tyrant in that Case has lefs Reafon to complain, as hardly any Thing but a horribile Exced of Ambition and Madnefs could have obli-ged the Body of the Nation to rise againft him. See what I have faid on FuNDE. Bell. Cap. VII. Cap. VIII. § 6. Note I.

2 Odys. Lib. IX. v. 114, 115. Estrup. In Cyclop. v. 120.

3 Bell. Catalin. Cap. VI.


But all the Poets here means it, that those People obtained no Law, but Suffered, and lived in their Behaviour to others; as appears from the Sequel, where he tells us, they killed all Strangers, who

landed in their Country, and sacrificed them to Neptune. The following Verses, from the fame Author, sufficiently explain those already produced:

> Non hae, ait, hafis vita Terra, Viri; non hae ulis reverentia vita Patera: non habetis, facerque his littera pagina.

P. 146.

But, to evince the Want of Exactnefs in the Application, it is sufficient to fay, that the Country of the *Babarians* was a Kingdom, where *Ancus* reigned, as the fame Poet informs us. v. 99, 101.

5 Gorgiff. Lib. III. Cap. VIII. This Paffage, which is quoted in the Canon Law, Dictiæ. VIII. Can. 2. only fays that a Sovereign is to be obeyed. Who doubts it? The Question is only how far he is to be obeyed. All the Authorities, al-ledged by our Author, or others, when well examined, do not prove it has been the general Opinion of all Nations, that the Subject is to bear every Thing from the Sovereign, and that it is never allowable to refufe him in any Cafe. The fame Authors, in whom we find fuch Sentences, as the Parfians of absolute Non-reffiance affifed to keep together, in other Places sometimes belowe the most exalted Character on fuch as have had Courage enough to difpatch a Tyrant; as the learned Schelius ob- serves, in his Tractate De fere Imperii, p. 336.

6 Ecriulus speaks of an independent King, who exerces his Power with Severity, as a Mat- ter of Fact only.

7 Sophocles makes Ajax fay this in Regard to Menelus and Agamemnon, acknowledging his Fault in giving Way to a violent Excess of Follies, because Achilles's Arms had been given to another. Ajax. v. 677.

8 This Paffage is entirely mifapplied. It doth not contain a Precept, though Cicero calls it fo, in a Letter to Atticus. Lib. II. Epift. XXV. It only expreffes the Neeffity, to which Men are reduced of fuffering the Follics of thofe, on whom they depend. Pofticus excuses himself to his Mo- ther for having married the Daughter of Achaicus, King of Argos, with a View of facilitating his Re- turn to his own Country, and mounting the Throne from which he was debarred by his Brother Eteocles. On this Occafion, he fets forth all the Hardhips of Banishment, and among the reft, that in that Situation, a Man is obliged to bear with the Follics and Extravagancies of thofe subjefts, in the Place of their Exile. Phrafis v. 396. fo that he is very far from defiring to fpeak of a Right inherent in Kings to commit fuch Follics with Impunity.

9 The Historian makes M. Tarentius, a Roman Knight, speak to the Senate, and add the higheft Respect to them, as if he was prefent, in this Manner: *The Gods have given you, &c.* Annal. Lib. VI. Cap. VIII. Num. I.

**Treatment.**
Of the Rights of

Book I.

Treatment. Seneca 11 says, "We must bear patiently whatever the King commands, whether just or not: A Thought which he borrowed from 12 Sophocles. And likewise in Sallust, 13 "To do any Thing with Impunity, is peculiar to a King.

Hence it is, that the Majesty (that is, the Dignity and Authority) of the Sovereign, whether it be King or State, is fenced with so many Laws, and so many Penalties 5 which Authority could not be maintained, if it were lawful to resist. 14 If a Soldier reft his Officer that corrects him, if he lays hold on the Lance, he is degraded; but if he wilfully break it, or strike again, he is punished with Death. And in Aristotle, 15 "If a Magistrate strikes, he shall not be struck again.

III. By the Hebrew Law, he that was disobedient, either 1 to the High-Priest, or to the extraordinary Governor appointed by God, was to be put to Death. But that which in Samuel is spoken of the Right of Kings, 2 to him that thoroughly considers it, appears not to be underfoot of a true Right, that is, of a Power to do honestly and justly, (for a different Way of living is prescribed to a King, in that Part of the Law which treats of a King's Duty) nor of barely what he will do; for that would not have been extraordinary in him, when even private Men do likewise Injuries 3 to private Men; but it is to be underfoot of an Action, whether

10 Regum aucta origine Regis Imperium formavit: these are the Words of Crem, King of Corinth, in Med. v. 195. The preceding Line, Indigna digne babenda font, Res qua factis, is only a Parody of a Sentence in Plautus, Indigna digne babenda sunt Herus que factis. Capv. Ath. II. Sen. 1. v. 6. I find that Lipsius has parodied the Verite of the Latin Poet in the same Manner in his Politicis, Lib. VI. Cap. V. from whom perhaps our Author took it.

11 Antigone, c. 681, 682.

12 Bell. Turgurio, Cap. XXXVII. This is said by Memnon, in a Tribute of the Roman People, and a zealous Affectator of public Liberty. He had no Intention to compliment Kings with a Right to do what they pleased with Impunity; he only meant that Affairs usually take this Course, that such is the Custom of Kings, and the Success of their evil Actions. Upon which Milton (Deufip. Cap. II. p. 34.) judiciously alledges the following Quotation from Cicerone, which the Reader may compare with the Passages in the Book of Samuel, of which we shall speak in a Note on the next Paragraph. Neminem Deus cognovit a praetaxis regum, exceptus a praetaxis of Kings, though we cannot speak of it from our own Experience. This is the Stile of their Orders, Take Notice, and obey; if you add to your Requests Complaints: and this of their Monarchies, If I find you here a second Time, you shall die. Terms, which we are not only to read and consider for our Amusement, but consider as a Lamen to caution us against coming under such a Peril. Orat. pro C. Rabiuro Pultam. Cap. XL. Our Author, in a Note on this Place, refers us to a Passidge of Josiah, which he had before quoted, in Note 3. on § 22. of the foregoing Chapter.


14 Ethic. Nicom. Lib. V. Cap. VIII. p. 64. Edit. Paris. This Passidge is not intirely to the Purposo. The Philosopher is treating of the Penalty of Retaliation: to shew that it would be sometimes contrary to Justice, he infinues in the Cafe of a fatal Magistrate, who should, without just Cause, strike one of his Inferiours; and maintains that it would not be suitable to the Character of such a Person, that he should be sentenced to receive Correction in the same Manner. It can be inferred only by Way of Conquence, from this Example, and that of Military Discipline, before alleged, that, commonly speaking. Injuries ought nor to redit the Supreme Power, or subordinate Officers, acting in his Name, and by his Authority.

11 (1) The Law speaks of such as should infally dispute (for so it is in the Text) the Decision of the Judges established by GOD, for explaining and applying the Laws of Moses, in doubtful Cases. So that this is wide of the Question in Haec, where we must always suppose a manifest Injustice. See Mr. Le Clerc on Deut. XVII. 12.

2 Our Author, with several Interpreters, supposes that, when Samuel told the Judges how Kings would treat them, he spoke of Right, and not only of Facts. Puffendorf, in B. VII. Chap. VI. § 9. gives us a Paraphrase on the Words of the Prophet, in which he explains them to us so as to make them mean no more than what a King, whether absolute or not, may lawfully require. But in Order to perform this to his Mind, he is obliged to soften the Force of the original Expressions, contrary to the Rules of Criticism. We need only consider the following Words: He (the King) will take your Fields, and your Vineyards, and your Oliveyards, the half of them and the third part to his Servants. v. 14. These are manifest Acts of Tyranny; and the Story of Nahash sufficiently shows, that the most abandoned Princes dared not maintain that Subjects were obliged to suffer the Seizure of their Goods or Estates, even though they are represented to them beyond their just Value. Whence it appears, that it was not thought that Samuel in any Manner designd to fix the Right of a King, or the Obligation of the Subjects, but only to let the People know to what Calamities they would be exposed by the Abuse of the royal Power and Strength. The Prophet's View, which was to divert the Judges from perverting in their Demands, requires no more; and the original Word, usuall rendered Right, jus, frequently signifies in Scripture the Advantage of Proceeding, or Corn. The Example, which I have given, after the Commentators, on Puffendorf, as before quoted, is sufficient for putting this beyond Dispute. Besides, the divine Goodness and Sanclity do not, I think, allow us to imagine he designd to give the least Infinition, which might give Kings a right, even if there be not a single Words warranted to do what they pleased, and neglect the Duties so clearly prescribed in the Law. This would be a sort of Contradiction, unworthy of an infinitely perfect Being.

2 True, but there is a wide Difference between the Injuries, which private Persons may do
whether just or not, as has in it some Effect of Right, that is, it implies the Ob- 
ligation of Non-refistance. Therefore it is added, when People are thus oppre-
sed, they should cry unto GOD for Help, if as if no Remedy were to be expected 
from Man. It is then a Right, in the same Sense as it is said that, the Pretor 
renders justice, even when he pronounces an unjust Sentence.

IV. Where Christ in the New Testament commands to give to Caesar the Things 
that are Caesar’s, he certainly intended, that his Disciples should yield as great, if 
not a greater Obedience (both active and passive) to the higher Powers, than what the 
Jews were bound to pay to their Kings. Which St. Paul (who could but interpret 
the Words of his Lord) largely describing the Duties of Subjects, says among other 
Things, He that refists the Power, refists the Ordinance of God, and they that refist 
shall receive unto themselves Damnation. And a little further, for he is the Minister 
of God to thee for Good. And again, Wherefore ye must needs be subject, not only for 
Wreath, but also for Conscience Sake. He includes in Subjection the Necessity of 
Non-refistance, not only such as arises from the Apprehension of a worke Evil, 
but such a one as flows from the Sense of our Duty, whereby we stand obliged not 
only to Man, but to GOD also: He adds two Reasons for it; First, because GOD 
has approved of this Ordinance of commanding and obeying, both formerly in the 
Jewish Law, and now in the Evangelical, wherefore the publick Powers are to be 
obedient by us, as ordained by GOD himself; for we make those Acts our own, 
which we support and countenance by our Authority. Secondly, because this Ordinance 
tends to our Advantage. But some may say, to bear Injuries is not advantageous; 
to which others, more truly, than pertinently to the Apostle’s Meaning, as I suppose, 
say, these Injuries are also advantageous to us, because such a Patience shall not lose its Reward. The Apostle seems to me to have regarded the general 
End propos’d in this Ordinance, which is the publick Peace, wherein is comprehen-
ded that also of every particular Perfon. And certainly this Advantage we
commonly receive from the sovereign Powers: For no Body ever wished ill to himself, and the Happines of the Prince depends on the Happines of his Subjects, *sunt quitis imperis, leave none to reign ever,* 5 said one to Sulla. The Hebrews have a Proverb, *if there were no sovereign Power, we should swallow up one another alive.* To which agrees that of *St. Chrysostom, Take away the Governors of States, Men would be more savage than Brutes, not only biting but devoursing one another.*

If the supreme Magistrate sometimes, through Fear, Anger, or some other Passion deviates from the straight Path, that leads to publick Tranquillity; it ought to be considered as a rare Case, and an Evil which, *as Tacitus* 6 observes, is made up by good Offices. It is enough for the Laws to regard that which generally happens, as *Thophraslius said, and to which we may apply that of *Cato, No Law can be convenient for every particular Person, it is enough, if it be beneficial in general, and to the greater Part.* But as to such Cases, which rarely happen, they ought to be submitted to the general Rules. For though the Reason of the Law does not take Place in such or such a particular Case, yet it subsists in its Generality, to which particular Cases ought to make no Exception; because that is much better, than to live without Law; or to allow every Man to be a Law to himself. 

Seneca speaks pertinently to this Purpose. *It is better to not admit of an Exeque, though just, from a few, than that all should be allowed to make what Exeque they please.*

Here we shall cite that remarkable 10 Saying of Pericles in Thucydides. *I esteem it better, even for private Men, that the State in general flourish, though they themselves do not thrive in it, than that they should flourish in their Affairs, and the Publick suffer.* For let a Man's private Affairs be never so prosperous, yet if his Country be left, he must perish with it. On the contrary, if the State flourish, a Man in bad Circumstances may mend his Condition. Since then the State can relieve private Persons in their Misfortunes, but private Persons cannot do the same Thing in regard to the State; ought not every one to concern in defending it, instead of acting like you, who, being overawed with your domelick Laziness, abandon the Care of the publick Safety? Which Livy speaks in short. *If the Commonwealth flourish, it secures every Man's private Estate, but by betraying the Publick, you will never preserve your own. And Plato observed, to the Jews, the Care of the State is the Care of the publick Good, and that which destroys them is the minding only one's private Advantage; therefore it concerns both the State and private Men, to prefer the Interest of the publick to that of particular Persons.* And Xenophon's 11 *ου καν ἀλλὰ τό πάντα, &c. He that


4 It occurs in the PERI OF ABOIT, or sentences of the Jewish Doctors; and is attributed to the Rabbi HANNAN: *Peray, saies he, for the Peace of the Kingdoms, for, if there was no Fear (of the Magistrate) Men would eat one another alive.* Cap. III. p. 42. Edit. P. Fugio. 1544.

5 De Statu. Hom. VI. That Father repeats the same Thought in two or three other Places. *If you take away the Courts of Judicature, you are the same Time take away all Order of Life, ibid. Tell me not of Persons, who have obeyed their Authority; but consider the Beauty of the Establishment itself, and you will for the great Wisdom of the God Author of it, ibid.* If you take away them (the Magistrates) all is ruined. We shall then have no Citi- zens, no Laws, no Market-Places, or any Thing fixed and certain. *All Things will be turned Toppy-turny, and the Stronger will devour the Weaker.* In Epit. ad Romanos. We have another Parallel to the same Passion on the Englishmen, into the Ephesians, GROTIIUS.

6 Idem Lib. IV. Cap. LXXIV.

7 Digest. Lib. I. Tit. III. De Legibus, &c. Leg. VI. See also Lib. V. Tit. IV. Si pars hæred- ditatis potuerit. Leg. III.

8 See comm. comm. omnium &c. sufficiently accommodated to all, &c. LIVY, Lib. XXXIV. Cap. III. num. 5.

9 The Philosopher says this in regard to Laws concerning insolvent Debtors; on which Occasion he asks: *Do you supposse our Forefathers not prudent and judicious enough to understand it should be the highest Piece of Insufficiency to treat a Man, who has thrown away what he borrowed in Gaming and Debauchery, in the same Manner, as one who has left both another Man's Substance, and his own by Fire, Robbery, or any other sad accident? They admitted of no Exception, says he, that Men might know they were obliged to keep their Word. For it was better, &c. De Benefic. Lib. VIII. Cap. XVI.*

10 Lib. II. Cap. LX. Edit. Osen.

11 Thus likewise St. AMBROSE lays it down for a Maxim, that the Interest of each particular Person is the same with that of the Public. De Offic. Lib. III. (Cap. IV.) The Lawyers hold the same in the Contrat of Partnership: *For that it is always to be done which is to the Advantage of the whole Company, not what is for the private Interest of one of the Partners.* Digest. Lib. XVII. Tit. II. Pro Secl. Leg. LXXV. § 5. See also Cod. Lib. VI. Tit. II. Il. De Caducis tenendum. Leg. unice. § 14. GROTIIUS.

12 Lib. XXVI. Cap. XXXVI. num. 9.


mutinies against his General in War, offends against his own Safety. And *Jambli-
chus, 15 private Interest is inseparable from the Publick, each particular Advantage is included in the Publick; for as in the natural Body, so in the political, the Preser-
vation of the Parts depends on that of the Whole.

Now, in publick Matters there is nothing more considerable than the Order of Government I have spoken of, which is incompatible with the Right of Restitu-
ence to private Persons. I shall explain this out of an excellent Place in Dion Cassi-

dus, &c. &c., &c. &c. 16 I think it neither decent for a Prince to submit to his Subject, nor can one ever be in Safety, if those who ought to obey pretend to command. Do but consider what a strange Disorder it would cause in a Family, if Children should be allowed to dispute their Parents, and what in Schools, if Scholars should 

flight their Masters; what Health for Patients that will not be ruled by their Phys-

icians? Or what Security for theft in a Ship, if the Sailors will not follow the Or-

ders of the Pilot? For Nature has made it necessary, and useful to Mankind, that 

some should command, and some should obey.

To the Testimony of St. Paul, we shall add that of St. Peter, whose Words 

are these, Honour the King; Servants be subject to your Masters, with all Fear, not 

only to the Good and Gentle, but also to the Fiercous; for this is thank-worthy if a 

Man for Conscience toward GOD endure Grief, suffering wrongfully. For what 

Glory is it, if when ye be buffeted for your Father, ye shall take it patiently? But if 

when ye do well, and suffer for it, ye take it patiently, this is 17 acceptable with 

GOD. He immediately confirms this by the Example of CHRIST. And Clement 

in his Constitutions, expresses the fame Senec in these Words, 18 2 Cor. 2. &c. Let the 

Servant love his Master with the Fear of God, though he be wicked and unjust.

Here we may observe two Things. First, that what is said of Submission to Mat-

ters, however froward they are, ought 18 to be applied to Kings. For that which 

follows, being built upon the same Foundation, respects the Duty of Subjects as well 

as Servants; and secondly, that the Submission, to which we are bound, implies 

an Obligation to bear Injuries with Patience; as it is usually said of Parents, 

Love your Parent if he is just; if not, bear with him. 19 A young Man of Ere-

tria, who had been long a Disciple to Zeno, being asked, what he had learnt, 

answered, ἵνα παρέλθῃ στοιχεῖο, To bear my Father's Anger. And *Justin says of Lyb-

mackus, He suffered the Cruelty of his King as patiently, as if he had been his Father. 

And in Lyc. As the barys Temper of our Parents, so also that of our Country, is 

to be softened by patient Suffering. So in Tactitus, 20 The Humours of Kings must be 

borne. And in another Place, God Emperors are to be deified, but whatsoever they

Our Author has quoted this Paffage in Latin only. I have not been able to find it either in 

Jamblichus's Life of Pythagoras, nor in his Pre-

reption. Perhaps he has used the Name of that 

Philosopher for that of some other. However, we have a Thought very like it in Hiero-

clès. Wherefore we are not to separate the public from the 

private God, but consider them as one and the same. For 

what is advantageous to our Country, it is common to 

all, and shared by each in particular, for the 

whole, considered as separate from the Parts, is no-

thing. In Stor. Serm. XXXIX.

16 This is part of Tertullian's Speech to his 
murcious Soldiers at Phaligare. Lib. XII. pag. 189. 

Ed. H. Steph.

17 Tertullian says that in faurio Men are 

honor GOD. De Parent. Grotius. Chap VI. 

But the Difcours there turns on a different Sub-

ject.

18 This Consequence can be drawn only by 

Accommodation; and even then it will not follow 

that the Subject is obliged to suffer every Thing, 

since even a Slave has a Right to the Protection 

of the Laws, when he meets with insupportable 

Treatnent from his Master. See Mr. Noodt's 


Second Edition of the French Translation. Besides, 

the Precepts here laid down by the Apostle, were 

partly grounded on particular Circumstances, as we

shall see in the 24th Note on the 7th Paragraph.

In short, one may reason of these general Precepts, which recommend Submission to the sovereign 

Power, what our Author himself says of those which relate to the Submission of Slaves to their Masters, 

Book II. Chap. V. § 29. See likewise Schellius's 

Interpretation of these Paffages of St. Peter, in 

St. Paul, in his Trestle De Juris Imperti, p. 316, &c.

19 PUBL. SYRUS, v. 27.

20 ALIAN, Var. Hist. Lib. IX. Cap. XXXIII.

21 JUSTIN. Lib. XV. Cap. III. num. 10. Lip. 

Lib. XXVII. Cap. XXXIV. num. 17. Terence makes a young Man say, it is his Duty to bear with 


I. § 21. Cicero lays it down as a Precept, that 

Men ought not only to be silent in regard to the In-

juries received from their Parents, but also to suffer 

them with Patience. Orat. pro Cluentio. St. 

Chrysostom has some beautiful Thoughts on this 

Maxim on the Epistle to Timothy, and in his fifth 

Book against the Jews. To the same Purpope is 

what Ercutius, and his Commentator Simpli-

cius have said, of every Thing having two Han-

dles. Cap. LXV.

22 Annual. Lib. XII. Cap. XI. num. 3, and Hist. 

Lib. IV. Cap. VIII. num. 3.
Of the Rights of Man.

Chapter IX. - Of the Right of the People to Liberty.

Thus St. Augustine, writing on the second letter of the Lord, says: "In the name of Christ, let not the faithful be subject to any man's flesh, but to the word of Christ." And the same author, in the same work, says: "It is not for man to be subject to man, but for man to be subject to Christ." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Law." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Word of the Lord." And in another place, he says: "It is not for man to be subject to man, but for man to be subject to the Spirit of God."
ed the Fathers of the Church. The Conduct of the Perdon under Consideration sufficiently made it appear, that he thought Refitance allowable. Even two Passages, here quoted from him, were written on the Occasion of a Signal Act of Resistance done by that great Saint. In giving the first, I shall borrow the very Words of Mr. Bayle's Narration, formed on the Circumstances, admitted by Mr. Flicher, and Maimbourg.

Mr. B. points out to us, that on the Occasion in the Life of Theodosius: the latter in his History, of Arianism. 'On the Death of Gratian, the whole western Empire falling to Valentinian, his Brother, he made an Edict, at the Intencyt of Jutina (his Mother) allowing the Arians the public Exercise of their Religion, and declaring all who should oppose the Execution of the said Edict, to be put to the Foul. The Emperor going to take Possession of the Cathedral, found St. Ambrose with all his People as it were barricaded in, who were resolved to defend both the Church and Paftor, to the last Drop of their Blood.

B. The Emperor went to the Church, and summoned St. Ambrose, by Vertue of the late Edict, to surrender it. The Bishop answered that he would never willingly quit it. A Remonstrance was made to the Emperor concerning the Difficulties of that Affair, and he was advised to extricate himself out of them by some Accommodation, because the Court was concerned in the Contest. The Emperor sent a very civil Melfage to St. Ambrose signifying, that he left him the quiet Possession of his Cathedral, and was willing to grant him some Benetfts or Subsidies; that it was reasonable that, as the Prince made some Abatement in his Demands for Peace Sale, the Prelate should do the same. But all to no Purpose; the People according to their Pastor's Intentions, cried out with one Voice, that no Accommodation could be made in this Case, but that the Catholics were to be allowed the Churches which belong to them. Whereupon, a Party of Soldiers was sent by the Court, with Orders to make themselves Masters of the Church in the Suburb; but the People took Arms and opposed them: The whole City was in a terrible Confusion: The Magistrates sent the Munitionists to Prition, and punished them severely; which was an exasperated rebellion Populace. Several Lords of the Court went to St. Ambrose, and defied he would appease the People, and put an End to the Disorder, since the Emperor demand-ed only one Church in the Suburb, obviating that it was but just that the Emperor should be answered, as by the Archbishop, that the Emperor had no Right over the House of God; nor even over the House of one of his Subjects, which he could not seize by Force, without a Violation of Justice:

The Archbishop answered them: 'Church, and Sacilege in a Prince to seize on it is, that, as for his Part, he did not raise the People; pleasure, whom he exhorted to defend themselves only with Prayers and Tears; but when they were once spirited up to Rage and Fury, God alone could appease them. The Emperor and Prefepts, reliving to go in Person, and take Possession of old Ballia, sent a Party of Soldiers to put up the Imperial Canopy.

St. Ambrose formally excommunicated all the Soldiers, who had the Indulgence to seize the Churches. This Stroke surprized them so that they went over to his Party. The Emperor found himself reduced to the hard Necessity of fearing he should be abandoned by all his Subjects; and said to his chief Officers: I believe that I am here no more than the Shadow of an Emperor, and that you are disposed to give me up your Bishop, whomever he commands you. He then dispatched one of his Secretaries to St. Ambrose, with Instructions to him: Whether he was resolved on an obstinate Resistance of his Minister's Orders; and pretended to enjoy the Empire, like a Tyrant, that Preparations might be made for dif-puting the Point by Force of Arms. The Saint answered, that he retained the Respect due to the Emperor, and revered his Power; but did not entrust him with it. He had indeed no Reatum to entrust his Power, for his Authority was superior to that of the Emperor, as is the Pontiff from that Prince's being at last obliged to leave Ticinum as he found them, and recall the Edict published in Favour of the Arians. This now appears to me a real and formal rebellion. We see on one Side the Emperor's Troops going to take Possession of a House, pursuant to the Edicts and Orders of a Sovereign: On the other a Mob's affumptions, and their Archbishop, and resolved to spend the last Drop of their Blood in Opposition to the Execution of those Edicts. We see an Archbishop excommunicating Soldiers employed in the Execution of the Emperor's Orders, and consequently dispensing Subjects from the Oath of Fidelity, which binds them to their Prince. We see a whole People taking Arms, even when an Emperor waves his Right. And we see all this happen, not under Circumstances, when a King requires his Subjects to do what is forbid-den by the Law of GOD: For then it juicibly disobeys; but at a Time, when the Prince makes a Demand of bare Walls, and permits Men to believe what they please, and serve GOD, according to their own Fancies: It is a surprising Illusion to imagine that a Building, designed for the Service of GOD, is the Inheritance of JESUS CHRIST, over which the secular Power has no Right, &c. General Criterium on Mr. Maimbourg's History of Calixtus." Lett. XXX. 5 2, 3. p. 275, &c. Third Edit. It may be added that the Perons who then obstinately refused to allow the Arians to have the Church, and the Emperor himself, were not furnished with any particular Privilege, by Victory of which they could pretend their Sovereign had no Right to take it from them without their Consent. There was neither a fundamental Law of Conquest, nor a perpetual and irrevocable Con-cession, which secured them the Possession of it against the Will of their Sovereign.
Of the Rights of

Book I.

gory Nazianzen relates, that Julian the Apostate was diverted from bloody designs (against the Church) by the Tears of the christians, adding, "this was the only Remedy against Persecution." Yet his Army was almost all christians. Besides, as the same Nazianzen observes, that Cruelty of "Julian was not only full of Injustice towards the christians, but had exposed the State to the utmost Danger: To which we shall add that of St. Augustine, where he expounds those Words of St. Paul to the Romans, "It is necessary for the Good of this Life, that we submit to the Sovereign Powers, and not resist if they should take any Thing from us."

VI. There are some Learned Men in this Age, who, fuiting themselves to Times, and Places, first (as I think) perverted themselves, and then others, that what we have already said (in Relation to Non-re sistance) takes Place only in regard to private Men, but not in regard to inferior Magistrates, who they think have Right to reft the Injuries of their Sovereign; nay, and that they fail in their Duty when they do not; which Opinion is not to be admitted. For as in Logick there is a middle Species, which with Respect to the Genus above it is still a Species, but in Respect of the Species below it, a Genus: So those Magistrates, in Respect to their Inferiors, are publick Perfons, but in Respect to their Superiors, are but private Perfons. * All the civil Power, that such Magistrates have, is so subjed to the Sovereign, that whatever they do against his Will is done without Authority, and consequently ought to be considered only as a private Act. In a Word, according to the Maxims of Philosophers, which may be here applied, all Order necessarily relates to something that is First; and they, who think otherwise, seem to me to introduce such a State of Things as the Ancients failed to have been in Heaven before there was a sovereign Majesty, when the lefser Gods had not submit to Jupiter. That Order which I have spoken of, and θαλαμος, Sub di nation, is not only apprehended by common Sense, as appears by the excellent Sayings which we find on that Subject in Authors both Pogan and Chriftian; but it is also supported by divine Authority; for St. Peter bids us be subjed to the King, otherwise than to Magistrates; to the King as supreme, that is, without Exception, but only to those Things which GOD directly commands, who approves, and not forbids, our bearing of an Injury. But to Magistrates as deputed by the King, that is deriving their Authority from him. And when St. Paul would have every Soul be subjed to the higher Powers, he also included inferior Magistrates. Neither do we find among the Hebrews, where there were so many Kings regardles of all Right both divine and human, that any inferior Magistrates, among whom there were many pious and valient Perfons, ever assumed the Liberty to reft their Kings by Force, unless they had a special Commission from GOD.

Rom. xii. 1.

1 Peter ii. 13.


11 Propop. LXXIV. But St. Augustine adds, to which their Power over temporal Affairs is extended. Our Author has omitted these Words, as seeming to contain a Restriction, which confines the Doctrine of Non-re sistance to thofe Cafes, where the Sovereign does not exceed the Bounds of his Power. But the Sequel of the Dictatrix is not sufficiently clear, for determining what was St. Augustine's Opinion at that Time.

VI. 1 The Author, in a Note on this Place refers his Readers to Peter Martyr, on Judges iii. Parkeus, on Rom. xii. Junius Brito Vindicius, contra Tyrannis; and Dakeus, Lit. VI. Polit. &c. 2 This is true; but it may be likewise said that, supposing it lawful even for private Subjects in certain Cafes to reft their Prince, as we have already shown it ; it will follow that the Magistrates, as Perfons of a public Character, who therefore must be better acquainted with State Affairs, and are capable of making an effedual Restraint, are on that Account more particularly authorized to labour for the public Good. For, in short, it is necessary that some body should begin, and shew others the Way.

3 Thus in a Family, the Father is the first; the Mother and Children hold the next Places; after them are the ordinary Servants, and then the extraordinary Servants. See St. Chrysostom, on 1 Cor. xiii. 3. Grotius.

4 Every Kingdom depends on a more powerful Kingdom. Seneca, Thyges, v. 612. All Things govern and are governed in their Turn. Status, Lib. III. Sylo. III. v. 49. 50. St. Augustine has a remarkable Paffage to this Purpofe. Consider, fays that Father, the Degree of Subordination in human Affairs. If an Intendant of the Public com mands a Thing, is it to be done? But when the Prin cipal orders the contrary ; the fame is to be paid when a Chief requires one Thing, and the Em peror another. In which Cafe, you do not defir the Power, but only choose to obey a Superior Power. Nor ought the Inferior to reft this Command, which gives the Preference to the Superior. This is quoted in the Canon Law, Canfi. XI. Quofi. III. Can. 97. We find almost the fame in his VI Sermon, De Veris Dominii. That Father elsewhere fays, speaking of Pilots, that GOD gave him power on Authority, as judged him to that of the Empire. In Ioan. Tom. IX. p. 369. Edit. Bof! Kritos. Grotius.

5 Our Author, as the learned Gronovius observes, gives these Words a different Explanation in his Notes on the New Testament: as Sovereign, that is, as one, who owns no Superior.
who has a sovereign Power over Kings themselves; on the contrary, what the Duty of great Men is to their King. Samuel instructs us, who before the Elders and the People gave to Saul, though now governing wickedly, the usual Reverence. And so likewise the State of the publick Divine Worship always depended upon the Will of the King, and the 

Sam xl. 30. Who preserves Time 'Tis in the Camp, that he may be tolerably evident, his life is but official, and by Pliny's Panegyrick) the flier was tolerated. However, as to the Senate and People, whose Decrees the Captain of the Guard was to execute, even against the Prince himself: The like we read of M. Antoninus, who would not touch the public Treasure without consulting the Senate.

VII. A more difficult Question is, whether the Law of Non-refistance oblige us in the most extreme and inevitable Danger. For some of the Laws of GOD, however general they be, seem to admit of tacit Exceptions in Cases of extreme Necessity; for so it was determined by the Jewish Doctors concerning the Law of their Sabbath in the Time of the Maccabees; whence arose the famous Saying, The Danger of Life drives away the Sabbath. And the Jew in Synag, gives this Reason for the Breach of the Law of the Sabbath, as the Jews in similar Cases, were in manifest Danger of our Lives, which Exception is approved of by CHRIST himself; as also in that Law of not eating the Slew Bread. And the Hebrew Rabins, following an old Tradition, rightly add the same Exception to their Laws concerning forbidden Meats, and some others of the like Kind. Not that GOD has not a full Right to oblige us to do or not do some Things, even though we should thereby expose to certain Death; but that some of his Laws are of such a Nature as cannot be easily believed to have been given in so rigid a Manner, which ought still more to be premised as to human Laws.

I do not deny, but that some Acts of Virtue may by a human Law be commanded, though under the evident Hazard of Death. As for a Soldier not to quit his Post; but it is not easily to be imagined, that such was the Intention of the Legislator;

VII. What is to be done in Case of extremity and imminent Necessity.

6 I have already observed that the Antiquity and Perpetuity of the Sabbath, suppos'd by our Author, are at least uncertain.

7 That is, the Attachment, which every Israelite ought to have for his Religion, obliged neither private Persons, nor inferior Magistrates, to become Iconoclists by their own Authority, or in any other violent Manner oppose the idolatrous Worship introduced or tolerated by the King; because that would be an Incroachment on his Right. But the present Question does not turn on such Cases.


9 Pertinax and Maximus imitated Trojan in that Particular, as appears from the fine Speeches put into their Mouth by HERODIAN. Gronius.

But why is it not supposed that a good Emperor or modest Sovereign Prince may entertain a just Idea of the Extent of his Power? In Reality, we see but few of that Character; but such may be found; and unless their Conduct belies their Words, our Regard for their Dignity should oblige us to avoid harbouring Sufpicions to their Disadvantage.

XIPHI LIN, in that Emperor's Life, p. 231. VII. (4) See 1 Maccab. ii. 41. Since that Time the common Opinion of the Jews was, that the Law allowed them to defend themselves, but not to attack the Enemy, on the Sabbath Day. JOSEPHUS, Antiq, Lib. XIV. Cap. VIII. Our Author alludes to this in Mere. iii. 4. Mr. LE CLERC has very well observed.

2 This Sentence occurs in the Babyl. Tal. ned. See our Author on Matt. xii. 11, and Buxtorf, Synag. Jud. Cap. XVI.

3 See JOSEPHUS, where he speaks of Saul's Guards. We learn from PLOYPHUS, that among the Romans, he who quitted his Post was punished with Death. GROTIUS.

The Pallace of JOSEPHUS, here meant by our Author, is where David having found Saul's Guard asleep, calls out to Abner, who commanded it, that this was a Crime worth with Death, because it gave him and his Men a fair Opportunity of entering the Camp, and advancing even to the King's Tent, without being observed. Antiq. Lib. VI. Cap. XIV.

So that it is evident, the Cave was not the same with
Legulator; and it is very probable that Men have not received so extensive a Power over themselves or others, except in Cafes where extreme Necessity requires it. For all human Laws are, and ought to be so enacted, as that there should be some Allowance for human Fraility. But this Law (of which we now treat) seems to depend upon the Intention of those who first entered into civil Society, from whom the Power of Sovereigns is originally derived. Suppose then they had been asked, Whether they pretended to impose on all Citizens the hard Necessity of dying, rather than to take up Arms in any Cafe, to defend themselves against the higher Powers; I do not know, whether they would have answered in the affirmative: It may be presumed, on the contrary, they would have declared that one ought not to bear with every Thing, unless the Reftitution would inoffentially occasion great Disturbance in the State, or prove the Distraction of many Innocents. For what Charity recommends in such a Cafe to be done, may, I doubt not, be preferred by a human Law.

Some may say, that this rigorous Obligation to suffer Death, rather than at any Time to refit an Injury offered by the Civil Powers, is not imposed by any human but the Divine Law. But we must observe, that Men did not at first unite themselves in Civil Society by any special Command from GOD, but of their own free Will, out of a Sense of the Inability of separate Families to repel Violence; whence the Civil Power is derived, which therefore St. Peter calls a human Ordinance, tho' elsewhere it is called a Divine Ordinance, because GOD approved of this wholefome Institution of Men. But GOD, in approving a human Law, is thought to approve of it as human, and after a human Manner. Barclay, the flouteft Afferter of Regal Power, does thus far allow that the People, or a considerable Part of them, have a Right to defend themselves against their King, when he becomes excessively cruel; tho' otherwise, that Author considers the King as the whole Body of the People. I can easily apprehend that, the more considerable a Thing is which runs the Risk of perishing, the more Equity requires that the Words of the Law be restrained, to authorize the Care of preferring such a Thing. But I dare not condemn indifferently all private Perfons, or a small Part of the People, who finding themselves reduced to the last Extremity, have made use of the only Remedy left them, in such a Manner as they have not neglected in the mean Time to take care, as far as they were able, of the publick Good. For David, who (bating some particular Facts) was so famed for living exactly according to Law, did yet entertain about him, first four hundred, and afterwards more, armed Men; and to what End did he so, unless for the Defence of his own Person, in Cafe he should be attacked? But we must also observe, that David did not do this till he was affurred by Jonathan, and many other infallible Proofs, that Saul really fought his Life: And moreover, he neither seized on any City, nor fought Occasions of Fighting, but lurked about, sometimes in by-Places, sometimes among foreign Nations; with this Resolution, to avoid all Occasions of injuring his own Countrymen.

The Example of the Maccabees might likewise be alluded here. For tis in vain that some pretend to justify their Enterprise, upon the Account that Antiochus was only an Uturper. In all History, we do not find that the Maccabees, and those of their Party, give Antiochus any other Title than that of King: And indeed they could not call him otherwise, since the Jews had for a long Time acknowledged the Kings of Macedonia for their Sovereigns, to which whole Right Antiochus had succeeded. It is true the Law forbade a Stranger to be set over them; but that ought to be understood of a voluntary Election, and not of what the People might be forced to do through the Necessity of the Times. As to what others say, that

with that under Consideration. The Passage of Polybius is here quoted, as our Author found it in Suidas, under the Word πολιτικος; for the Terms are very different in the Original, Lib. I. Cap. XVII. See likewise Iustus Lipsius, De Militia Rom. Lib. V. p. 293, 383. And the Treatise De Pontis militari. Rom. Cap. IV. written by Mr. Sichterman, who in that small Piece has let the World know what might be expected from him, if his Fortune had not forced him out of the Road of Letters into that of Arms.

4 Some Commentators on this Place say, that David, having been anointed King by Samuel, was not from that Time to be considered as a private Subject. But it has been judicially answered by others, that David was not to be King during Saul's Life; and that he himself, from the Time of his being anointed to the Death of Saul, constantly acknowledged him the lawful King of Israel.
the Maccabees acted by Vertue of the Right which their Nation had to demand Liberty, or the Power of governing themselves, this Reason has no more Weight in it than the other. For the Jews having been formerly conquered by Nebuchadnezzar, were fallen by the same Right of War, under the Dominion of the Medes and Persians, Successors of the Chaldeans; and the whole Empire of the Medes and Persians had passed to the Macedonians: Hence Tacitus calls the Jews, the most contemptible People that were conquered, while the East was under the Dominion of the Affyrians, Medes, and Persians. Neither did they obtain any Condition from Alexander, or his Successors, but without any Terms submitted to them, as they had before done to Darius. And tho' they were sometimes allowed to use publicly their own Rites, and their own Laws, this was only a precarious Right, granted by the Favour of the reigning Princes; and not by Vertue of a fundamental Law of the Government. There is nothing then that could justify the Maccabees (in taking up Arms) but extreme and inevitable Danger, which might do it, so long as they kept within the Bounds of Self-Prefervation, and like David, retired to secret Places for Security, without using their Arms unless first assaulted.

There is still another Caution to be observed here, which is, that even in such Extremity the Person of the Sovereign must be spared. Tho' who think that David spared Saul, not to discharge an indispensible Duty, but out of Generosity, founded on the Desire of arising to an extraordinary Degree of Perfection; tho', I say, are certainly mistaken: For David himself openly declared, that no Man...
Man could be innocent, that stretched forth his Hand against the LORD's Anointed. For he knew it was written in the Law, Thou shalt not revile the Gods, that is, the Supreme Judges. Thou shalt not curse the Rulers of thy People. In which Law special Mention being made of the supreme Powers, it plainly-shows, that some special Duty is required. Wherefore Opitatus Militibus, speaking of this Fact of David, says, GOD's special Command, coming fresh into his Memory, retrained him. And makes David say, I was willing to overcome mine Enemies, but I chose rather to keep the Commands of GOD.

10. To slander any private Person is not lawful; therefore of a King we must not speak Evil, to shew it to be true. Because, as the Writer of the Problems (fathered upon Aristoph.) says, εναπατείας, &c. He that speaks Evil of the Magistrate, offends against the whole Body of the People. But if we must not speak Evil of believed the Fact, he ordered him to be killed on the Spot, who, on the Supposition of the Truth of the Report, had done Saul a Service. See Mr. Le Clerc on 2 Samuel i. 14. It may farther be observed, that, as Saul had been chosen by GOD in an extraordinary Manner, anointed and consecrated by one of his Prophets, honoured with the Gift of Prophecy, and made a visible Instrument in the Hand of the Almighty, for gaining great Victories over the Enemies of Israel, David might have been tender of his Life on those Considerations, which will not conclude in Favour of all other Princes, who arrive at their Dignity by the common Ways. Besides, when he twice spared Saul's Life, he was able to do it without endangering his own: so that his Conduct on those Occasion is nothing to the Purpose, in regard to such as have no other Remedy against a Tyrant, than that of committing murder even with the Hazard of killing him. And after all, the Words of David, however they may be understood, are not an Oracle or Divine Precept. There is no Rest for believing that he then spoke by Divine Inspiration, or that GOD put these Words into his Mouth, as a Rule for all Men's Conduct.


There are not the Words of 'Sabb but of Abia, the Son of Zerubiah, and Brother to 'Sabb. I do not know why the Author chose rather to quote Josephus on this Occasion, than the sacred Historian, 2 Samuel xix. 21. Shall not Shimel be put to Death for this, because he hath cursed the LORD's Anointed?

9. The same Jewish Historian observes, that when David had cut off a Piece of Saul's Garment: when he surprized him in the Cave, he immediately repented, and said it was not lawful for a Subject to kill his Master. Antiq. Lib. VI. Cap. XIV. and a little after, that when he entered Saul's Tent, and found his Guards asleep, Abiathar would have killed him; but David diverted him from that Action, saying, It was a heinous Crime to kill a King, even the be was wicked; and that the Prophet who should commit it, would be punished by him, who invested him with the Royal Dignity. Grotius.

The two Passages taken from the Jewish Historian, are neither exactly quoted, nor fully translated. In the former our Author has forgivc those Words, which immediately follow, 'Messer, or him whom GOD has invested with the Kingdom. This determines the Maxim to something in particular, which would make general. See Note 7. In the other, the Words κατασκευάσας οικῆς γιὰ τὸν ἄνεξ, are not translated, which signify ordained, or established by GOD. The last Words of the same Passage δέν τοι γὰρ δέξεί χ&aacute; τον αυτόν, co...[rest of text garbled]...in every case, to be taken into the purposes. When it is thus understood, it is easy to perceive the Application is not just. him,
him, much less must we use Violence against him. David was struck with Remorse, for having cut off a Piece of Saul's Garment: So much did he regard the Person of a King as sacred! And indeed, the Sovereign Power being necessarily expos'd to the Hatred of many, he that is invested with it, ought in a particular Manner to be rendered venerable, and secured from every Sort of Influent. The Romans even secured the Authority of the Tribunes of the People, declaring their Persons inviolable. Among the Sayings of the Ephesians, this was one, Kings are to be accounted facred. And we find that famous Psalm in Hower,

Und ergo de Deo trinum,  
Messiah.

16 He was afraid left any sad Accident should happen to the Leader of the People. It is not without Reason, that those Nations, who live under a monarchical Government, reverence the Name of Kings, as if they were Gods; as Quintus Curtius observes. See Aratus the Perian, Among many excellent Laws we have, this seems to be the best, which commands us to honour and adore our Kings, as the Image of GOD, who presides over all Things. And in Plutarch, of Agis, &c. No one must be in the least surpriz'd, &c. It is not permitted by the Laws of GOD or Man, to offer Violence to the Person of a King.

But here is a more difficult Question, Whether what was lawful for David and the Maccabees, may be lawful for us Christians, whole Lord and Master, CHRIST, so often bidding us take up our Cross, seems to require from us a greater

12 It was not because he thought he had violated the Refpect due to his Enemy; but, as Mr. Le Clerc observes, this David did this to convince Saul how easily he might have killed him, if he had been so disposed, he felt some inward Uneasiness, (for that is the Sense of the original Expression, David's Heart faute him, not be repeated) he felt, I say, some inward Uneasiness, left Saul, being whimsical, should put a different Construction upon the Matter.

13 Quintilian says, Such is the Fate of all who are engaged in the Administration of the Commonwealth, that they are expos'd to some Hatred and Envy, even when they are doing what is most condu-cive to the publick Good. Declam. CCCXLVIII. See Livius's Speech to Augustus on that Subject, in Xiphilin's Abriffion of Dion. p. 38, 36. Edit. H. Steph. Grotius.


15 The Author quotes no one in this Place. All I find to the Purpose in Josephus is, that according to the Emissaries, Fidelity is due to all Men, but chiefly to Princes, because they are not rais'd to that Dignity without the Will or Permission of GOD. De Bello Jud. Lib. II. Cap. XII.

16 If a Man kills a Sheep, says St. Chrysostom, he only makes a small Diminution in the Flock; but when the Sheep is killed, the whole Flock is disturbed. On 1 Tim. I. Sineca delivers himself in the following Manner, The Subjects are on the Guard in the Night for their Prince's Security: They surround and defend him, and meet those Dangers which threaten his Person. It is not without good Reason that Nations and Cities have agreed this to love and defend their Kings, and sacrificing their Lives for the Preservation of their Sovereign. Nor is it folly, or a Neglect of one's own Life, which induces so many thousands to expose themselves to the utmost Dangers for one Person, and by the Death of great Numbers, redeems the Life of one who is, sometimes, in the Clutches of Nature near his End. At the whole Body is interested in the Care of the Soul — so this immense Multitude, acting for the Defence of one Man's Life, is governed by him as their Soul, and is influenced by him in such a Manner, that the Subjects would defend themselves by their own Strength, were they not supported by his Prudence and Whilom. They are therefore careful of their own Safety, &c. De Clementia, Lib. I. Cap. III. See what is said on this Subject, B. II. Chap. I. § 9. Grotius.

The Philosopher is speaking of a good Prince, as appears from the preceding Words. It is easy to discern how far the Comparison of the Shepherd and his Sheep may be carried. See Mr. Le Clerc, on 2 Sam. v. 2.

17 Ibid. Lib. V. ver. 566, 567.

18 Lib. X. Cap. III. Num. 5.

19 This Psalm has been quoted in Notes on Job 6. on Chap. III. § 16.

20 He says that when Democritus, one of the Euphori, was going to fetze Agis, King of Lacedemon, the publick Officers, and others on the Spot, declared the Fable, thinking it unseasonable to lay Hands on the King's Person. Vita Agid. &c. Chor. p. 804. Tom. I. Edit. Wech.

21 Our Saviour, at two several Times, commanded his Disciples to carry their Cross, when he gave the twelve Apostles Instructions for their Behaviour in Preaching the Gospel. Matt. x. 38. Mark viii. 34. Luke iv. 23. and when he was going to Ciparina Philippis, followed by great Crowds of People, Matt. xxiv. 24. Luke xiv. 27.

By which Words he meant no more than that Christians ought to be disposed to bear Persecutions and all Sorts of Afflictions in general, with Patience, when they are not in a Condition to guard themselves against them; for he no where forbids the Use of innocent Means, when in our Power.

As a sick Person, therefore, who has the Power he may be obliged to Patience, is allowed to take what he thinks conducive to his Cure: So a Man, unjustly oppressed, may employ what Force he is able to.
greater Measure of Patience? Indeed when the higher Powers threaten us with Death for our Religion, CHRIST grants Leave to flee, especially to those whom the necessary Duties of their Calling tie to no particular Place; but he allows nothing beyond Flight. And St. Peter tells us, That CHRIST in Suffering left us an Example, that we should follow his Steps, who did no Sin, neither was Guile found in his Mouth; who being reviled, reviled not again; when he was suffered, he threatened not; but committed himself to him that judgeth righteously. Nay he bids us Christians give Thanks to GOD, and rejoice, when we suffer Persecution for our Religion. And it was this Confinacy in Suffering, that chiefly contributed to the Establishment of Christianity, as appears from History.

Wherefore, I think that the primitive Christians, who活着 near the Times of the Apostles, and of apostolical Men, understood and practis'd their Precepts, better than the professors of them, in these later Ages.

Mater of, for delivering him from Oppression. Besides, as the learned Gronovius observes on this Place, our Lord's Precept regards all Christians in general, of all Ranks and Stations. Now, as this Obligation to Patience does not tie up the Hand of Princes and Magistrates, deprive them of the Power of chafing their rebellious and sedi- tious Subjects, so neither does it deprive private Persons of a Right to refit the Rage of a Prince or Magistrate, who behaves himself like a Tyrant to them.

23. The Paffage intimated by our Author, is that of Matthew x. 23. When they persecute you in one City, fly to another. This Advice is directed to the Apostles, and relates to them in particular, as appears from the Words immediately following. For with whom I go unto you, you shall not have gone over the Cities of Israel, till the Son of Man be come. See Dr. Hammond and Mr. Le Clerc on that Text. So that here is no general Maxim, for teaching all that is allowable for Christians, when in any Maner oppressed or persecuted; and Gronovius's Answers here are superfluous. Our Author has confuted himself, in his Commentary on the Gospels, published since the Work now before us, where he thus paraphrases the Paffage under Confe- deration. "The Meaning is, when you shall be driven out of one City, let not this make you renounce the Functions of your Ministry: Fly then to some other Place; not to a Defart, to provide for your own Security, but to some other City, to endeavour to produce Fruit by your Instructions. Whence it appears, says he, why in this Paffage will no Means afford a Proof for deciding the Question, Whether it is allowable to fly, with the side View of avoiding present Dangers?"

24. The Patience to which we are obliged by our Saviour's Example, is to be understand in the same Sense with his Exhortation to carry our Cross, of which we have already spoken in Note 21. on this Paragraph. Were we obliged to imitate the Con- duit of JESUS CHRIST in all Particulars, every Man ought voluntarily to offer himself to Tor- mens, and an Ignominious Death, which our Au- thor would not allow. He has himself refuted the Argument drawn from the Example of JESUS CHRIST, for the Support of the Opinion, which he himselt thinks too rigid, of those who pretend we ought not to rebel an Enemy so far as to take away our Lives. Chap. II. § 5. and Chap. III. § 7.

25. I have already observed, and shewn by Ex- amples, (Note 2. on § 52. of the Preliminary Dis- course to this Work) that the first Christians cannot be considered as the bell Expositors of the Holy Scripture, for the Majority of our Conducts appears to be taken from the later Times. We are very well affur'd that they entered extravagant Notions on the Point before us, which put them on extending the Obligation of suffering Martydom, far beyond its just Bounds. Our Author, who was fenible of this, renreced the following Words in the later Editions, which in the first appeared at the End of this Paragraph. "That was a very great encouragement to the first Christians, to continue their Faith in that Manner, did thereby receive a full Re- mission of all their Sins; that immediately after their Death they in some Manner enjoyed a Glo- ry like that expected after the Resurrection; and that at the Promise of a large Reward in the World to come. See Mr. Donowell's XII. Differa- tion on St. Opinion. To this we may add, that from some Paffages of Scripture intermisitered, they imagined the Day of Judgment very near, as is observed by the learned Gronovius; and while they were full of this Perftime, we are not to be surpriz'd, that they had no Concern for the good Things of this World, or even for Life itself, the Preparation of which animates Men to repel the Injuries of a Tyrant. They also sometimes gave too literal a Sense to what the Gospel says concerning the good Things of this World, the Concern for which our Saviour would have us neglet, not absolutely, but only when we cannot en- joy them without Prejudice to our Conscience. Thus the Conduct of those first Votaries of Chris- tianity, of all Countries, was not the same. All Christians in general, who have not the same Ideas, nor are in the same Dispositions: Even tho' they had been inclined to repel their Persecutors, they would not have been in a Condition of attempting it. It is in vain to amuse the World with their great Numbers; they were a scattered Multitude, and very incomparable, in Comparison of their Enemies; they were for the most part Perfons in mean and low Stations, without Arms, without Forces, without any other Leaders than the Ecclesiarchs, who were not Men of much Distinction; they afforded so little, and consequently could not get together in great Numbers: A single Legion would have been sufficient for defeating all their Projects. But when the Emperors had embraced Christianity, the Christians proceeded on very different Principles. See MILTON, De收到, IV. p. 136. Also the Speech of Dr. Burnet, late Bishop of Salisbury, at Dr. Burnet's Trial. In short, it was of the utmost Importance to the Establishment of the Gospel, that the Christians should not be too much Cautious, too much diffident, and enter upon the World with so much diffidence. And that the more, because, as our Author himselt observes on Rom. xiii. 1. the Jews, from
ter than the Christians of following Ages, are very much injured by those who suppose that they rather wanted Power than Will to defend themselves, in imminent Danger of Death. Indeed Tertullian would have been very imprudent, nay, impudent, to have so confidently affirmed a Falshood to the Emperors, who could not be ignorant of it, writing thus, 25 If we had a Mind to deal with you as declared Enemies, and not only as secret Enemies, could we want Forces and Troops sufficient for such an Enterprise? The Moors, the Marcomanni, the Persians themselves, or such other Nations, which, however great they be, are yet confined within a certain Extent of Country, and within the Bounds of their own Dominions; Do those Nations, I say, form a more numerous Multitude than we, who are spread over the whole World? We are but of Tuesday, in a Manner, and yet we already fill all Places in your Dominions, your Cities, Islands, Provinces, Castles, Towns; your very Camps, Tribes, Wars, Palace, Senate, Courts of Judicature, publick Places; and in a Word, we only leave you the Temples of your Gods. Dipped as we are to suffer ourselves so willingly to be butchered, what Wars should we not have been in a Condition to undertake, and with what Ardour should we not have engaged in them, however inferior we might have been in Forces, had we not been taught by our Religion, that it is better to be killed than to kill? Also Cyprian follows his Master, and thus declares, 26 Hence it is, that none of us, when apprehended, makes Resistance, or defends himself against your unjust Violence; tho' our People are extremely numerous. The certain Hope of a future Vengeance produces in us this Patience. Thus the Innocent yield to the Guilty. And Laetentius, 27 For we confide in the Majesty of GOD, who is able as well to revenge the Contempt of himself, as the Hardships and Injuries done to his Servants. Wherefore we suffer inexpressible Miseries, and do not repine, but refer the avenging of them to the Almighty. St. Augustin had precisely in View the Cafe under Consideration, when he said, 28 A good Man should take Care above all Things not to engage in War, but when he may do it lawfully; for that is not always lawful. And again, 29 When Princes err, they pretently make Laws to defend their Errors, to the Prejudice of Truth, by which the Righteous are tried, and crowned (with Martyrdom). And again, 30 So are Sovereigns to be enduring by their Subjects, and Masters by their Servants, as that by suffering those temporal Things with Patience and Reputation, they may have just Reason to hope for Rewards that are eternal. Which he further illustrates by the Example of the primitive Christians. 31 Neither did the City of CHRIST, (for it was then wandering and vagabond upon Earth, and bad vast Numbers of People to afflict it against its wicked Persecutors) fight for temporal Salvation, but chose rather to make no Resistance, that it might obtain an eternal one. They were bound, imprisoned, beaten, tormented, burnt, torn in Pieces, massacred, and yet they multiplied more and more. To fight for Safety, was, in their Opinion, nothing else than to deftich this Life, in order to acquire another that is more excellent.

from whom the first Disciples of the Gospel came, were prejudiced by a false Notion, founded on a Paffage in Deut. (xvii. 15.) misinterpreted, which made them look on all Authority excercised by Foreigners as unlawful, so that they did not think themselves obliged in Conscience to obey any Sovereign but those of their own Nation. If therefore the Christians in those early Times waved their Right to so strong Considerations, no Consequence can be drawn from their Behaviour, that will affect those who have lived since Christianity is established in the World.

25 Apol. Cap. XXXVII. Edit. Herold. 26 Ad Doct. p. 192. Edit. Fell. Bruno. The same Father elsewhere expressly himself in the following Manner: The Enemy knows that the Soldiers of JESUS CHRIST are fibre and vigilant, and armed armed for the Encampments; that they may die, but cannot be conquered, and are therefore invincible, because they fear not Death, nor avail those who attack them, not being allowed, tho' uncertain, to kill the guilty; but thinking themselves obliged to, raffin their Life, and their Blood cheerfully, Lib. I. Epist. I. Edit. Erasm. (Ep. LX. Edit. Fell. p. 142.)

Grotius.

27 Inl. Div. Lib. V. Cap. IX. Num. 9. Edit. Cellier. 28 Of Lib. VI. Quaest. X. in Jesuam. This Paffage is quoted in the Canon Lox, Cap. XXIII. Quaest. II. Can. II. 29 Edit. CLXVI. This Paffage is also quoted in the Canon Lox, Cap. XI. Quaest. III. Can. 98.

30 The Author doth not tell us whence he took this Paffage. It is probable he quotes it on the Credit of his Memory, as well as the preceding, which is therefore somewhat differently written than the Original.

31 De Civ. Dit. Lib. XXII. Cap. VI. Saint Cyril hath some excellent Expressions on the same Subject; in his Explanation of that Paffage of St. John, where Peter's Sword is mentioned, Chap. XVIII. Fr. 11. Grotius. Hh

Nor
Nor are the Observations of St. Cyril less admirable, upon that Passage in St. John of St. Peter's Sword. The Theban Legion, as we read in the Acts of their Martyrdom, consisted of 6666 Soldiers, and all Christians. Who, when the Emperor Maximianus would have compelled the whole Army to sacrifice to false Gods, at Oedoraunum, first removed to Agaunum, and when the Emperor had sent one thither, to command them to come and sacrifice, and they had refused to do it; he sent Officers to put every tenth Man to Death, who easily executed his Order, no Man offering to resist.

Mauritius, 32 Commander of that Legion, (from whom the Town of Agaunum in Switzerland, was afterwards called St. Mauritius) as Eucherius, Bishop of Lyons, records, thus spoke to his Soldiers at that Time. **How did I fear, left any of you, under the Sway of Self-Defence (as it is easy for armed Men to do) should have endeavoured by Force to prevent their blessed Martyrdom? I was preparing, in order to divert you from that Design, to set before you the Example of JESUS CHRIST, who expressely commanded the Apostle to put the Sword into the Scabbard, which he had drawn in his Master's own Defence; teaching us that all the Force of Arms is not able to shake Christian Confinancy. This, I say, is what I intended to represent to you, that none of you, by employing a mortal Arm, should oppose the Glory of an immortal Action; and that, on the contrary, every one might finis with Steadfastness the Work be both so happily begun. When, this Execution being over, the Emperor commanded the same Thing to the Survivors, as he had before done to the others, they all unanimously answered, Indeed, Caesar, we are your Soldiers, and we took up Arms in Defence of the Roman Empire, never has there been seen amongst us either a Defector, or Traitor, or Coward: And we would willingly obey the Orders which you give us to Day, if the Christian Religion, in which we have been instructed, did not forbid us to worship Demons, or approach Altars always polluted with innocent Blood. We know you designed either to make Christians commit Sacrifice, or to frighten us, by the Example of those that have been decimated. But you need not search far off for People that do not conceal themselves: We are all Christians, and we declare it to you. Our Bodies are in your Power, but you cannot make yourself Master of our Souls, which are always turned towards CHRIST their Creator.

Then Eucherius, Standard-Bearer to that Legion, thus addressed them. You see me (brave fellow Soldiers) carry the Standards of SECULAR Wars. But it is not to that Sort of War that I now call you; you have other Battles to fight: There are other Arms you ought to make Use of, to open the Way to the Kingdom of Heaven. And then he sent this Message to the Emperor, It is not Defpair, the most powerful Resource in Dangers, that has armed us, O Caesar, against you. We have Arms in our Hands, 33 but we do not resist, because we rather choose to die, than overcome, and to fall Innocents, rather than to live Criminals. And again, We throw away our Weapons, your Executioner shall find our Hands without Defence, but our Hearts armed with the Buckler of Christian Faith.

32 The Swift pay a great Veneration to the Memory of that Martyr. See Franc. Guilliman, De rebus Helvet. Lib. I. Cap. XV. and Lib. II. Cap. VIII. The Legion commanded by Mauritius is also placed in the Rank of the most illustrious Martyrs, who suffered Death in the tenth Persecution; as appears from an old Relation of the Translation of St. fugina's Relicks, to the Monastery of new Carick. Albert Krantzius speaks of some Martyrs of the Theban Legion, whose Bodies were removed to Brunswick. Saxonic. VII. 16. Grotius.

The whole Relation of the Martyrdom of this Legion is a mere Fable. The Story itself carries several Marks of Falhoot; and the small Treatise, in which it appears is not the Work of St. Eucherius, Bishop of Lyons, whose Name it bears. We need only observe that it mentions Diguan, King of Persia, so dead several Years before, whereas St. Eucherius himself had been long dead, when that Prince reigned. All this is proved at large in a Diflertation, written by the late Mr. John du Bourdius, formerly Minifier at Montpellier, and afterwards of the French Church in the Savoy, London. This historical and critical Diflertation on the Martyrdom of the Theban Legioin, was first published in English, in 1696, and then in French, in 1700. I lay nothing of what else might be objected against our Author's Note; but for a more full Eviction of the Fallacities of the Fact under Consideration, I refer the Reader to the late Mr. Dowell's famous Diflertation, De pani- tatis Martyrum, which is the eleventh of those on St. Gregory.

33 The Jews of Alexandria formerly expressed themselves in a like Manner to Flaccus, We are, as you see, unarmed; and yet we are by some accused of coming hither as Enemies. We hold our Hands, while Nature has given every Man for his Defence, behind our Backs, where they can be of no Service to us; exposing our Bodies to any who are disposed to kill us. Grotius.

After
Chap. IV. War and Peace.

After this followed the Slaughter of those Soldiers who suffered Death without Reliance, of which Eucherius gives this Account. The Greatness of their Number did not secure them from Sufferings, though innocent; whereas even Criminals come off with Impunity, when numerous. We have the same Account of it in the old Martyrology. They were massacred on every Side, without saying a Word. They threw down their Arms, and presented their Throats and naked Breasts to their Persecutors. They took no Advantage of their great Number, nor made Use of the Arms they held in their Hands, to defend the Justice of their Cause at the Point of the Sword; but nobly taken up with this Thought, that they confessed the Name of him, who was led dumb to the Slaughter, and as a Lamb did not open his Mouth, they also like the innocent Flock of CHRIST's Sheep, suffered themselves to be torn in Pieces by furious Wolves.

And when the Emperor Valens wickedly and cruelly 35 persecuted those Christians who according to the Holy Scriptures, and the Traditions of the Fathers professed CHRIST to be the Son of God Experience, (with God his Father) though they were very numerous, they never defended themselves by Arms. Certainly where Patience is recommended to us in the new Testament, there we find 36 CHRIST's own Example propounded to us (as we have just now read it was to the Theban Legion) for our Imitation; whose Patience reached even unto Death. And he himself declares, that whoever lost his Life in that Manner truly finds it. Thus having proved, that those who are invested with the sovereign Power, cannot lawfully be refited; we must now admonish the Reader of some Things, left he should think those Men trespassed this Law, who really do not.

VIII. Firstly therefore, 1 Those Princes who depend on the People, whether they at first were established on that Foot, or their Authority was thus reduced subordinate by a posterior Agreement, 1 as in Sparta, if they offend against the Laws, and the State, may not only be refited by Force; but if it be necessary, may be punished by Death, as it befel Paufanius 3 the Spartan King. So, was the Condition of the most ancient Kings of divers Countries in Italy; so that it is no Wonder, if Virgil having related the horrible Cruelties of Mezentius, adds,

5 All Etruria, justly incensed and rising up in Arms against that King, required him to be immediately put to death.

IX. Secondly, If a King, or any other Prince, has abdicated his Government, or manifested abnormally 1 it; after that Time, we may do the same to him, as to any private Man; but Negligence 4 in discharging the Functions of Government is not to be taken for a real Abdication.

These Words were not spoken by the Jews of Alexandria, but by the Jews of Ptolem. Severus, Governor of Syria, not to Ptolem. We find them in Philo, De Legat. ad Caium, pag. 1025. Our Author has confounded two different Stories, related in two different Pieces of that Jewish Writer.

34 The Greatness of their Number did not assure them from Suffering, though innocent; whereas even Criminals come off with Impunity, when numerous; quam invulsu (not militum, according to our Author's Correcion) ob filia, ob multitudine deliquit.

35 See the Fragments of Joost of Antich, published from a Manuscrifice, in the Hands of the late Mr. de Peiresc, a Perfon worthy of immortal Reputation. p. 846. Grotius.

36 See my 23 Note on this Paragraph.

VIII. (1) Plutarch tells us that Lynder being killed (in a Battle) the Spartans were so deeply afflicted at his Death, that they pronounced Sentence on the King. (Paufanius) who fled to Tegea, to avoid the Execution of it. In Lyfand. p. 470. Tom. I. Edit. Weeh. The same Author says, that the Lacedemonians detested fome of their Kings, whose infirmity of Lives had rendered them unworthy of the Royal Dignity. Compar. Lyfand. and Sisler. p. 476. See likewise what he says of Aji, who was condemned to die, though unjustly. The Mofynæans, (or Mofynæs, a People of Ptolem.) did their Kings, keep them under strict Confinement; and oblige them to fast a whole Day, when they commit a Fault in the Execution of their Office; says Pompon Mela, Lib. I. Cap. XIX. Note. See also Isaac Vossius's Note on that Place. Grotius.

2 This Paufanius, the Spartan General, was in deed of the Royal Family, but not King. He had been no more than Guardian to his Cousin Pifcaridas, Son to King Leonidas, as the learned Grotius here observes. See Thucyd. Lib. I. Cap. CXXX. Edit. Oxon.

4 VIRGIL. Ad. viii. v. 494, &c.

IX. (1) As Henry III. King of Poland, being apprised of the Death of his Brother Charles IX. King of France, left Cracow privately, and went for France, in 1574. Whereupon, the Poles chose another King, the following Year. See also the Debates between the two Houses of Parliament on the Abdication of James II. King of England, in the Supplement to Sir Rich. Steele's Crit. 2 Provided such Negligence be not very considerable; for if it be carried so far that the King lets the Affairs of the State run entirely into Disorder and Confusion, I make no Doubt that the People have a Right to consider his Conduct as a real Abdication. The Thing speaks for itself; and I find Mr. Vander Mullen of the same Opinion, in his Commentary on this Place.

X. Thirdly,
X. Or against a King that would alienate his Kingdom, but safe to prevent the Dele-

tion of it. Lib. III. Ch. XVI. Advers. Myn."
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WAR and PEACE.

ing are inconsistent together. Wherefore he that declares himself an Enemy to the whole Nation, is presumed by that very Act to renounce the Government. But such an Excess of Fury, as has very hardly, in my Opinion, enter the Thoughts of a King, that is in his right Sense, and that governs only one Nation. But if he governs several, it may so happen, that in Favour to one, he should endeavour to destroy another, in order to people the Lands of the former with Colonies sent from the latter.

XII. Fifthly, If a Kingdom be forfeited, either for Felony against him of whom it is a Fief, or by virtue of a Claus in the Act whereby the Sovereignty had been conferred, and which declares that if the King does such or such a Thing, his Subjects shall from that Time be absolved from all Alliances to him, then also a King becomes a private Person.

XIII. Sixthly, If a King should have but one Part of the sovereign Power, and the Senate or People the other, if such a King shall invade that Part which is not his own, he may justly be reftited, because he is not Sovereign in that Respect. Which I believe may take Place, though in the Division of the Sovereignty, the Power of making War fell to the King, for that is to be understood of a foreign War: Since whoever has a Share of the Sovereignty must have at the same Time a Right to defend it. And when the Cafe is so, the King may, by the Right of War, lose even his Part of the Sovereignty.

XIV. Seventhly, If in the conferring of the Crown, it be expressly stipulated, that in some certain Cases the King may be reftited; even though that Clause does not imply any Division of the Sovereignty, yet certainly some Part of natural Liberty is reserved to the People, and exempted from the Power of the King. Now every one in alienating his Rights in Favour of another may do it under what Restriction he pleases.

XV. We have treated of him, who has now, or has had a Right to govern; it now remains, that we say something of him that usurps the Government; not after he has either by long Possession, or Agreement obtained a Right to it, but so long as the Caufe of his unjust Possession continues. The Acts of Sovereignty exercised by such an Usurper may have an obligatory Force, not by virtue of his Right, (for he has none) but because it is very probable that the lawful Sovereign, whether it be the People themselves, or a King, or a Senate, chuses rather that the Usurper should be disarmed during that Time, than that the Exercice of the Laws and Justice

2 A Prince may be in the Cafe here specified, though he do not, like Guilielmi, with the whole People had but one Head, that he might dispatch them at one Stroke; or though he expresses no formal and direct Design of destroying his Subjects. It is sufficient that his Actions have a manifest Tendency to it. Nor is there any Obligation of waiting till there is no Remedy for the Evil. See Note I. on Puffend. B. VII. Chap. VIII. § 6.

3 Philip II, King of Spain was charged with such a Design, in regard to the Low Countries. See somewhere of the like Nature, attributed to Philip, King of Macedon in Liv. LIV. LI. Cap. III.

12. (1.) See the foregoing Chap. § 23; (2) See also Chap. III. § 16.

XIII. (1.) We have an Instance of this Kind in the Republic of Genoa in Peter Bizar. Lib. XVIII. and in Bohemia, under Wenceslaus, in Dubrav's Hist. Liv. X. See Azor, Inhibita. Matris. Lib. X. Cap. VIII. and Lambert of Schaffhurz, in Relation to the Empire Henry IV. Grotius.

2 The learned Grotius observes that our Author in this Place gives a tacit Answer to the Heads of the Charge brought against Barneveld; and refers the Reader to his Defence, entitled Aliis, ticius exam, qui Hollandiae Waltherino, &c. ex legibus preservant ante materiae quem eventum anno 1618. Cap. X. But the Cafe is not exactly the same; as will appear on comparing what our Author says in that Piece with what he says here.

XIV. (1) See some Examples of this Kind in Mr. De Thou's History, Lib. CXXXI. on the Year 1604. p. 1037, 1038. Ed. Franc. and Lib. CXXXIII. on the Year 1605. p. 1074; both relate to Hungary. As also in Meyden's Amst. Belgic. on the Year 1339, in regard to Arland and Flousders; and on the Year 1468, in Relation to the Treaty between Lewis XI. King of France, and Iohannes, Duke of Burgundy. See also what Chys trom says of Poland, Saxony, Lib. XXIV. and what Bonfinius relates of Hungary, Decad. IV. Lib. IX. Grotius.

The Inferences here alleged are not to the Author's Purpose; as will appear on examining each apart. III. § 5.

2 Why is it not plainly and directly said that this Reservasion diffigaces the Subject from their Obedience, whenever the Cafe happens; so that if the Prince is obiolutely bent on doing what is prohibited by such a Clause, which has the Force of a fundamental Law, the People ought to consider him no longer as their Sovereign? It is not conceivable that the Resttriction can naturally have any other End, or Effect.

XV. (1) See B. H. Chap. IV. § 14. Compare all this with what Pufendorf says on the same Subject, B. VII. Chap. VIII. § 9, 10. and in his academical Differtation De Interregna. § 16. 

i should
Of the Rights of

Book I.

should be interrupted, and the State thereby exposed to all the Disorders of Anarchy. Cicero condemns Sylla's Laws, as cruel upon the Children of the Outlaws, making them incapable of Honour; yet he thought they ought to be observed, affirming (as Quintilian 1 tells us) that this was so necessary, considering the Circumstances of the State at that Time, that if they were abrogated it could not subnit. Florus also says of the Acts of the fame Sylla: Lepidus endeavoured to repeal the Acts of that great Man, and not without Reason, if he could have done it, without great Hurt to the Commonwealth. And again, It was necessary for the State, then sick and wounded, to rest at any Rate, lest her Wounds should be ripped open in going about to cure it.

But in those Things, which are not so necessary for the public Good, and which contribute towards establishing the Usurper in his unjust Possession, if by disobeying we run no great Hazard, we must not obey. But the Question is, whether it be lawful to depose such an Usurper, or even to kill him.

XVI. An Usurper may be killed during the War, if no Contract be made with him.

XVII. By virtue of an ancestor's Laws.


2 Because the Children of the Outlaws would have put the whole State in Confusion. And the Perons, on whom Sylla had bestowed the Estates of those Outlaws, would not easily have restored them, as Florus observes, in the Quotation here alleged, which stands thus at large. For Lepidus, failing of Insignes, and fear of Innovations, attempted to annul the Acts of that great Man, and not without good Reason, if it had been practicable without great Prejudice to the Commonwealth. For when Sylla, the Dictator, by the Right of War, had enslaved his Enemies, who formerly were Resolution, Lepidus, by recalling them, only called them to reno the Wars; and since the Estates of the profligate Citizens, though unjustly seized, and alienated by Sylla, had been taken from them by some sort of Right; a Re-demand of such Estates would certainly have involved the State in fresh Troubles. It was advisable therefore on any Terms to allow the Usur and wounded Commonwealth some Repos, left its Wounds should be opened again by the very Means taken for its Cure. Lib. III. Cap. XXXIII. Num. 2.

3 XVI. (1) See B. II. Chap. XIII. § 15, and B. III. Chap. XIX. § 2, &c. of this Work.

4 The learned Gronovius in this Place appHes what a Roman Senator said in regard to the Decemvirs: As if the Roman People had any War, which were deftroyed their Attention than that which Men, who, though but private Perons, assumed Marks of Magistracies, and acted in the Character of Sovereigns. Liv. Lib. III. Cap. XXXIX. Num. 8.

5 Apol. Cap. II.

6 The Roman Law speaks thus: We allow Perons in every Province full Power and Right to divers Difacters. If they shall dare to reft, we command that their Punishment be expeditious, wherever they are found. Let all Men know they are hereby interd with a Right to act in the Name of the Public against public Robbers and traitors unfit from the Army; and that this Right is to be employed for the Peace of the Commonwealth. Cod. Lib. III. Tit. XXVII. Quaeno licet unicunque fines judic. in vindica. &c. Leg. II.

7 XVII. (1) I shall let down Plutarch's Way of Reasoning, on which our Author grounds the Opinion here attributed to him. The Philosopher undertakes to prove that it cannot be false all Things are directed by Fate, or are so many Effects and Consequences of Fate, καθ αἰτίαν, though every Thing is included in Fate. He then makes him, that an Action of extraordinary Bravery, killing a Tyrant, or other great Achievement, is according to Law. For only what the Law enjoins disjures that Appellation. If therefore the Law enjoins the Actions already specifed, how shall a Man be charred of Disobedience, and offending against the Law, who engages in none of the said Actions? Or if he is thereby disobedient, and offends against the Law, would it not be just to punish a Peron? But if this is absurd, that only, which is prescribed by the Law, is to be termed, leg., and according to Law; and thus only what necessarily follows from, or is conformable to the diene Regulations and Determinations, can be said to be done by Fate, or according to Fate — — — Fate doth indeed comprehend all Things — — but they will not fall out by Neceoffy; but every Thing will come to pass according to its Nature. De Fato, p. 570. Ed. Wech. Tem. II. This Comparison is somewhat far fetched, and grounded on a Quibble, which is unworthy of a Philosopher.
Chap. IV. War and Peace.

him, should affault a Fort, or kill a Citizen uncondemned, or illegally condemned, or presume to create a Magistrate without being elected by legal Votes. Many such Laws were extant in the States of Greece, with whom it was reputed lawful to kill such Tyrants. Such was 5 Solon's Law at Athens, after the Return from the Persians, against such as should abolish popular Government, or after its being abolished, should exercise any publick Office. And such was the 3 Valerian Law at Rome, if any one bore an Office without the Order of the People; and the Consular Law, after the Decemviral Government, 4 that no Man should create a Magistrate without an Appeal; and he did that might lawfully be killed.

XVIII. Nor will it be less lawful to kill an Ufurper if there be an express Order for it for the lawful Sovereign, whether King, People, or Senate. The Guardians of the Heir to the Crown have the same Right; and it was by Vertue of that Right, that Jeboiada drove Athalia from the Throne, which belonged to his Pupil Joaob.

XIX. Unless in one of these Cases, I do not see how it can be lawful for any private Man, either to dethrone or kill an Ufurper. Because it may be, he that has the true Right, had rather leave the Ufurper in quiet Possession, than engage his Country in dangerous Troubles and bloody Wars, which generally follow the expelling, or killing such Men, especially if they have a strong Faction at home, or powerful Friends abroad. It is at least uncertain, whether the King, or Senate, or People, to whom the sovereign Authority lawfully belongs, would be willing that Matters should be brought to that dangerous Extremity; and whilst their Mind on that Head is not known, all Force would be unjust. Favorinus said 1 γενομένου καὶ τό πάσον τοῦ καθαρτιον, A Civil War is worse than the Necessity of submitting to an unlawful Government. And Cicero, 2 * Any Peace is preferable to a Civil War. And T. Quintinius Flaminius, 3 that it was 4 better to leave Nabid Tyrant

2 I find it mentioned by the Orator Andociodes, who, addressing himself to Epichares, tells him, that a Man who should kill him, would be deemed innocent, even according to the Law of Solon, &c. If any one abolishes the Athenian Democracy, or exercises any publick Office after such abolition, let him be reckoned an Enemy to the Athenians, and be killed with Impunity to the Person who discovers him. Orat. l. p. 219, 220. Edit. Hanv. 3 Dionysius of Halicarnassus reports this Law in the following Terms. He (Valerius, the most excellent Lawgiver, in great Advantage to the People, in one of which he expressly ordered, that no Man should act in a publick Office, except he received it from the Hands of the People, under Pain of Death; and declared the Person who should kill such an Infruder innocent. Anbq. Rom. Lib. V. Cap. XIX. p. 281. Edit. Oxon. Livy expresses himself thus, on the same Occasion, He made Laws for appealing to the People against the Magistrates, and punishing the Man with Confitution of his Estate, and Death, who should attempt to seize the Sovereignty. Lib. II. Cap. VIII. Num. 2. Edit. Cleric. See his Note on that Place. Our Author quotes the two following Passages from Plutarch, in a Note, where he expresses himself in Terms somewhat different, For if any one attempts to become a Tyrant, Solon ordered him to be seized and punished; but Publicola allows such a one to be dispatched without that Formality. Vit. Poplic. p. 110. He made a Law which allowed any one to kill the Man, without any Trial, who should aspire at the Tyranny, and ordered, that the Person who dispatched him, should be deemed innocent, on bringing Proof of the Crime, p. 101. Where it may be observed, that Plutarch is mistaken concerning the Law of Solon, as is evident from the Passages of Andociodes, quoted in the foregoing Note.

4 Our Author here uses the Words of Livy, tho' he doth not quote them. This Law was made by Valerius, Grandison to Publicola, in Conjunction with his Colleague in the Consulship, M. Horatius, Lib. III. Cap. LV. Num. 4, 5.


4 Plutarch expresses this in the following Manner, Titus alleged in Defence of his Conduct, that he had put an End to the Wars, because he perceived the Tyrants could not be destroyed, without doing great Damage to the State of the Spartans. Vit. T. 2, Flamian, p. 376. It will not be amiss to give the Reader in this Place, the Saying of a Lacedemonian, who in reading an Epigram, the Sense of which was, They fell before the Gates of Solon, in attempting to extinguishe Tyranny: said, They deferred to die, for they ought to have waited till the Tyranny came to itself entirely. "Ω δὲ ανδραίοι ου τέραμαμά την,"
Of the Rights of the

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rant of Lacedemon, in Possession of the Government, than to ruin that City by endeavouring to restore its Liberty. To this Purpose was the Advice of Ariosto, not to nourish a Lion in the City, but if he were nourished, to bear with him.

It is certainly a Matter of the utmost Consequence, to determine whether we ought to continue quiet, or endeavour at any Rate to recover Liberty; as Tacitus speaks. And Cicero calls it, a difficult Question in Politicks, whether when our Country is opprest with Tyranny, we may endeavour to rescue it, tho' with the extreme Hazard of the State. Therefore private Persons must not set up for Judges in such an Affair, that concerns the whole Body of the People. So that there's great Injustice in this Exprefion,

Detrahdimus dominus urbi servire paratus.

We take up Arms to free the City from Tyrants, to whose Take it is ready to submit. As there is also in that Aniwer of Sylla, who being asked, why he came into his Country so armed; replied, to deliver it from Tyrants.

Plato, and after him Cicero, lay down a more reasonable Maxim, Do not meddle, say they, in what concerns the Government, but so far as you can promote yourfelf the Approval of your fellow Citizens; offer no Violence either to your Father or your Country. To the fame Sense is that of Sallo.f: 13 For the you could govern your Country, or Parents, by Force, and correct Offences, yet it is an odious Enterprize, especially when all Changes of Government are generally attended with Slaughter, Banifhments, and other Miseries of War. Not much different is that of Stallius in Plutarch, in the Life of Brutus, It is not fit for a prudent and wise Man to expose himself to Dangers and Troubles for Knaves and Fools. To which we may refer that of St. Ambrofes. 14 This also will gain you Reputation, to rescue the Poor out of the Hands of the Oppreffor, to deliver the Condemned from Death, as far as you can do it without accufing Troubles and Difforders, left otherwise you should seem to have done it more out of Sentiment than Compaflion, and so cause greater Wounds than those you propofe to cure. Thomas Aquinas laid, that one becomes sometimes guilty of Sedition, by attempting to defy even a tyrannical Government.

4. The Fac of Ebud, against Eglon King of Moab, should not move us to the contrary Opinion; for the Scriptures positively tell us, that GOD raised up Ebud to deliver Israel; that is, by giving him a special Commiflion for that Purpofe. Neither is it certain, that this King of Moab had not by Agreement any Right of Sovereignty; for GOD did execute his Judgments even against other law-

rather have let it burn and confume itself entirely, instead of preferring it.

So that the Criticifm falls on the Word extinguished, which seems to signify, that the Perfon mentioned in the Epigram had maintained the Tyranny; whereas the Poet's Meaning was, that they had destroyed it. And consequently, the Lacedemonian's Remark, rightly understood, is misapplied in this Place, being to far from making any Thing to our Author's Purpofe, that it is directly againft him.


6 Tacitus. Fiji. Lib. IV. Cap. LXVII. Num. 5.

7 Epift. ad Attic. Lib. IX. Ep. IV.

8 Lucan. Lib. I. v. 351. They are the Words of Julius Cofa.

9 Thuc Aniuebrah the Great, underaking a War againft the Romans, did it under Pretence of giving the Grecians their Liberty, who had not Need of it. Plutarch, Vit. Cat. Moji. p. 342. Grofius.


11 Our Author here quotes that Philofopher's seventh Epitile to Perdiccas. I have given the Paffage at Length, in my Remarks on Pufenfore, B. VII. Chap. VIII. § 5. Note 1. But it is more probable, that Cicero had the following Words of the Dialogue, entitled Crits, in View, In the Conduct of War, in the Tribunals of Juftice, and in all other Occafions, the Orders of the State, and our Country are to be obeyed; or we are to adore what is just in its own Nature. But it is not allowable to commit Violence either on a Father or a Mother, and much less on our Country. Tom. I. p. 51. Edit. Steph.


15 De Off. Lib. II. Cap. XXI.

16 There is nothing in Judges iii. 15. that authorizes this Explication. It is only told that GOD raised up Ebad to deliver the Israelites. See Mr. L'Clerc's Comment on Verfe 20th of that Chapter.

17 Nor do we find any Thing that gives Room to bufpeft it.

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Chap. V.

War and Peace

I

Who may lawfully make War.

8 in other Things, so also in moral Actions, there are wont to be three Efficient Causes, Principals, Affiliants, and Instrument.

The principal Efficient Cause in a War, is generally the Person interested. In a private War a private Person; in a publick, the Civil Power, especially the Supreme. Whether a War may be justly undertaken in Behalf of another, not making War, shall be treated of in another Place. In the mean Time this is most certain, that every Man has a natural Right to revenge himself; and therefore were Hands given us.

II. 1. But it is not only lawful for us, as far as we are able, to be beneficial to another, but also commendable. They who write of Offices, justly say, that there is nothing so useful to one Man, as another Man. Now there are several particular Ties, which engage Men mutually to assist each other. Kinmen affieme to help one another: Neighbours and Fellow-Citizens call for the Aid one of the other; whence comes that Saying, Porra Quirites et Quiritari. Aristotle said it behoved every one to take up Arms, either to defend himself upon an Injury offered him, or for his Kinmen, or Benefactors, or Allies. And Solon declared that a happy State, wherein every Man looked upon the Wrongs done to another, as done to himself.

2. But tho' there were no other Obligations, it is enough that we are allied by common Humanity. For every Man ought to interest himself in what regards other Men. It was well said of Menander, 4

Injuriarum, si improbit, &c.

If every one would heartily engage in the Defence of those that are injured; if Men would look on Injures done to others, as done to themselves, and would heartily assist one another; the Wicked would not become daily more bold and enterprising, but finding themselves watched on every Side, and suffering the just Punishment of their Crimes, few or none would run the Hazard of it. And this of Democritus, 5 It is every Man's Duty to the utmost of his Power, to assist the Injured, and by no Means to neglect it; for this is just and good. Which Laetanius thus expresseth, 6 GOD, who has denied Vindict to all other Animals, has furnished them with such natural Arms, as may secure them from Injults and Dangers. But be as Man naked and weak; challenging to adorn him with Vindict, than endow him with Force;

Stop the Course of Injures before it reaches you.

Praeterequte injurie prins collum, quam ad vos per-


Grotius.

4 In Stob. Aum. Tit. XLIII. See Mr. Le

CLERC's Note on that Fragment, p. 3, 4.

5 In Stob. Semn. XLVI. p. 310.


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be has given him, amongst other Things, a Sentiment of Affection, which prompts him to defend those of his own Species, to love them, to cherish them, to give to them, and receive from them Affinity against all Dangers whatsoever.

III. By Instruments, we mean not Arms, nor such like Things; but certain Perfons who act by their own Will, but yet so that their Will depends on another, that they do no Motion: Such is a Son to his Father, being part of himself naturally; or a Servant, as a Part of his Mafter by Law. For as a Part is not only a Part of the Whole, in the fame Relation as a Whole is the whole of a Part, but that very Thing which it is, because of the Whole on which it depends: 2 So the Thing possessed makes in fome Manner part of the Possessor. 2 Deinonierius said, Servants are to be used as Members of our Body, Fome to every Purpofe, and fome to another. As a Servant is in a Family, the fame is a Subject in a State, and is therefore the Instrument of the Sovereign.

IV. Nor can we doubt, but all Subjects may naturally be employed in War, tho' some particular Laws may exempt fome; as formerly Slaves among the Romans, and now every where the 3 Clergy; which Law notwithstanding, as all others of that Nature, must be understood with the Exception of Cafes of 3 extreme Necessity. Let this suffice to be spoken of Affilats and Subjects in general. For what Questions particularly relate to them, fhall be handled 4 in their proper Places.

III. (1) Thefè Ideas of the old Philosophy afford but little Satisfadion. It is theleficient that, when a Son or a Slave are confidered as mere Instruments, they act, or are fupplied to act, by the Orders of a Father or a Mafter, fo that without fuch Directions, they would not have determined themselves to Action. See what I have faid on the Abridgment of Puffendorf's Treatie Of the Duties of a Man and a Citizen, B. I. Chap. I. § 27: Note 1, 2. third and fourth Edition.

2 In Stob. Ser. LXII. p. 385.

IV. (1) See Puffendorf, B. VIII. Chap. II. The Author, in a Note on this Place, refers us to Servius, on Aenid, IX. ver. 547; where we have this formal Law: Slaves are excluded from all military Service; if they engage in it, they are punifhed with Death. Digest. Lib. XLIX. Tit. XVI. De Re Militari, Leg. XI. See Lipsius, De Militiis Romanis. Lib. I. Dial. II. p. 22. &c. Edit. Wujal. and Anael. p. 444. As also the Notes of Father Abram, 2 in Stob. on Cicero's Orat. in Pisonem, Cap. X. & pro Rege Diftatare. Cap. VIII.

2 The Leitci also were excufed from bearing Arms, as Josephus obferves, Antig, Juf. Lib. III. Cap. XI. As to what concerns Eccleiftics, see Nicetas Chroniater, Lib. VI. The Constitutions of Charles the Bald, in Sparras, XXXVII. and the Canon Law, Distinct. L. Can. V. and Cauf. XXIII. Ques. VIII. Those are the Regulations made by the Canons, but we may fee in the History of Anna Comnenes, Lib. X. Cap. VIII. how much more strictly they have been obferved than the Greeks by the Latins. [Compare them with what is faid in Vetus pro Pace Ecclefiaftice, Art. XVI.] Grotius.

See Chap. II. § 10. Num. 3. and Mr. Bohmer's Ihis Ecclefiaftical Pratifum, Lib. III. Tit. I. § 62. &c. and Tit. XX. § 71, &c. as also Mr. Thomasius's Notes on Lancelot's Inftr. Juris Canon. p. 154, and 359. I find nothing in Nicetas Chroniater, quoted by our Author, concerning the Exception granted to Eccleiftics; that Historian only fays, in the Life of Manuel Comnenes, Lib. VII. Cap. III. that that Emperor ordered the Monks fhould posfefs no Lands, that they might be free from fuch Distractions as attend the Care of temporal Affairs, and devote themselves entirely to spiritual Exercises.

3 Thus, after the Battle of Cannes, the Romans, being in great Want of Soldiers, bought 8000 young and able bodied Slaves, and lifted them in the Service. Livy, Lib. XXII. Cap. LVII. Num. 13, 12.

4 See our Author, B. II. Chap. XXV. XXVII.
H. G R O T I U S,

OF THE

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

B O O K  I I .

C H A P .  I.

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

I. 1.

L E T us now proceed to the Causes of War, I mean such as are properly said to justify it; for there are some Motives of Advantage, sometimes different from just Occasions, that determine us to take up Arms. Polybius, accurately distinguishes these two Sorts of Causes, the one from the other, and both from the beginning of the War, or that which gave Occasion to the first Acts of Hostility, as was the Stag wounded by Ajax, 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

I. (1) See Chap. XXII. of this Book, and Furfendorf, 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, illias, Causes, and the Reasons urged for justifying such a Step, Pretexts, Pretexts, both which, as he observes, precede the beginning of the War, that is, the actual Execution of the Design formed, or the first Acts of Hostility, Chap. VI. He then applies this to the War between the Grecians and Persians, and that made on the Romans by Antinuous. In the former two Causes were alleged, 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 Agis's Expedition in Asia, which confirmed Philip of Macedon 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 Revenion of the Italians, who in Revenge for the Marks of Contempt given them by the Romans, engaged Antinous to oppose 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 Antinous landed at Thermus with a Fleet. All this may be read in the Original, Chap. VI. VII.

3 This is what Virgil calls Exordia pugnas, Aeneid. VII. 40. Grotius.

4 Æn. VII. §91, &c.
Of the Rights of

Book I.

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. 2 You Romans, 3 (say the Deputies) profess to believe that the Success of your Wars are happy, because they are just; and you glory so much in the Victory that determines them, as in the 7 Beginnings, or because you do not undertake them without Reason. In which Sense Attilian filles them ἄφγας των ἀρχαίων; 3 and Diodorus Siculus, treating of the War of the Lacedemontians with the Alcian, calls them ἃπαξ ἀκριβεῖα τῶν ἄρχων. 4

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, 4 to set it by your principal Care, that the Cause of your War be just and honest. And Dionysien}, 9 As in the Building of Houses, Ships, ccc. 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 These Wars are unjust that are undertaken without Cause. And in another Place 12 he blames Craliss, because he had pafted the Euphrates, Where there was not the least Grounds for a War.

3. What has been said touching the Justice of the Caufe, ought to be observed in publick Wars, as well as in private. And Seneca with Reafon complains of the Difference that is put in that respect, 13 We paifie, says he, Murders committed between private Persons: But do we all in like Manner with regard to Wars, and the Slaughter of whole Nations? It is a glorious Crime, Avarice and Cruelty reign there without Restraint. — Barbarities are authorised by the Decrees of the

5 Lib. XLIV. Cap. XXII. Num. 6. 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 ἄτοπον this Dion Cassius finds in his beautiful Compendium of the Romans with Philo of Macedon and Antiquus. Except. Peirec. (p. 514. &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. Legatus. And to come to no Resolution without mature Deliberation. Except. Peirec. (p. 341.) Grotius.

The Passages quoted from Suidas appears in the Place specified; but the Lexicographer doth not attribute it to POLYBIUS. The Compendium 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 Excipuua Periscipient, which I have marked exactly. I do not find in the Excerpta Legatuum, the Passages 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 § 57. of the Preliminary Discourses. In the same Sense EULIUS uses the Words ὑπερπάντων ἃς ἀκριβείς; Var. Hist. Lib. XII. Cap. I. III. DIODORUS of Sicily, treating of the War between the Lacedemontians and Elcians, calls them ἄπαξ ἀκριβεῖα, Lib. XIV. (Cap. XVIII. p. 509. Edit. H. Steph.) and PROCOPIUS, Διακοσμηκαί, ἕσσις. Goth. Lib. III. Cap. XXXIII. see the Beginning of Chap. XXII. of this Book. The Emperor JULIAN makes Use of the Word Καρδίαια, Orat. II. De Laudis Cons- tantin, (p. 95. Edit. Spanheim.) Grotius.


10 Lib. XII. p. 139. Edit. H. Steph. 11 Lib. Bell. infixo fonte, quod fontem curavit Jovis. Thus our Author quotes the Passagie, and in his Margin refers us to the third Book of Cicero's Treatise De Republica. But I do not find those Words in the Fragments of that Illustrious Roman's lost Work, I see only a Thought which bears some Reference to it, preserved by St. Au- gustine, and taken from the same third Book, De Rep. A well regulated State enters into no War, but for making good its Engagements, or for its own Security. De Civ. Dict. Lib. XXII. Cap. VI.

12 De fect. Lib. 12. Med. Lib. III. Cap. XXII. 13 APPIAN of Alexandria says, that The Tribunes of the People (ἐν δυναμείᾳ) opposed Craliss's Motion for making War on the Parthians, from whom no Offence had been received. (De Belo Civili. Lib. II. p. 733. Edit. Tell. 488 Steph.) And Plutarch in his 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 Bella Parth. p. 320. Edit. Tell. p. 335 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 Attius was the only Man who dared oppose Craliss's unjust and rash Designs, in which he was not supported by the other Tribunes, as PLUTARCH also oblevs. 14 Epif. XCV. p. 564. Edit. major Elzevir. 1672.
Chap. I. War and Peace.

Senate, and Orders of the People; and what is prohibited in private 13 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, deficiently 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 Jutfin, speaking of his Father Philip, said, 21 that two Kings of Troy were dethroned by the Fraud and Villany of a Thief. To which may be referred that Pasage of St. Austin, 22 What are Kingdoms without Equity, but so many great Robberies? So that of Laclantius, 23 That Conquerors being dowered 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, 22 The Iniquity of one Side, that is, the Injury received, furnishes a just Occasion of War. Iniquitas in this Place is taken for Injury; as if we should use the Greek Word athena instead of athena. 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 a Loss that is apprehended; and other Things included in the Decrees of the superior Judge, which prohibited any Violence. For the Second, that Reparation may be made, or Punishment inflicted; two Sources of Obligation, which Plate, and before him Homer, have judiciously

15 The same Philosopher elsewhere says, that Same Enterprise are often glorified, which were looked on as Crimes, while the Execution of them could be hinder'd. De Ira. 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 Bene. Lib. I. Cap. XIII. Justin Martyr says, The Power of this Prince, who prefer his own private Opinions to Truth, is just as great as that of Highwayman in a Desert. Apol. II. And Philo the Jew calls such as are ambitious of Power, as many great Robbers, who deprive their Crimes under the fictitious and worshipable Names of Sovereignty and Government. (De Decal. p. 763. Edit. Parisi.) Grotius.

18 Felix Prado; a fortunate Highwayman, Lib. X. Ver. 21.

19 You are a Man, like others, with this Difference only, that killing yourself with Things which do not concern you, and animated by a criminal Ambition, you have left your own Kingdom, and tra - vers'd so much Ground, to torment yourself, and others. Arian. De Expedit. Alex. Lib. VII. Cap. I. Edit. Grenv.

20 Nonius Marcellus has preferred us this Exposition in a Passadge, which he quotes from the third Book of Cicero's Tactica, De Ropah. A Pirate being asked by Alexander, on what wicked Matrix he infin'd the Sea; replied, on the same Matrix which puts you on infin'ding the whole World. In Vose Mopora. p. 514. Ed. Marcon. See also Augustini, De Civit. Del. Lib. I. Cap. IV. 21 Lib. VIII. Cap. III. Num. 15.

22 De Civil. Del. Lib. I. Cap. IV.

judiciously distinguished. As for Reparation, it belongs to what is or was properly our own, from whence 5 real and some 6 personal Actions do arise, or to what is properly our due, either by Contract, by Default, or by Law. To which also we may refer those Things which are said to be due by a 7 Sort of Contract, or a 8 Sort of Damage: From which Heads all other personal Actions are derived. The Punishment of the Injury produces Indemnities and 9 publick judgments.

2. Most Men affign three just Causes of War, Defence, the Recovery of what's own, and Punishment: Which three you have in Camillus's Declaration against the Gaul. 10 Omnia quae defendi repeti? & ulcei fac est: Whatever may be defended, recovered, or revenged; in which Account, if the Word Recovered be not taken in a greater Latitude than usally 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 inflicted, or plundered; but also when imposed upon, or treated in any fraudulent Manner. To which agrees that of Seneca," 12 It is a very equitable Saying, and founded on the Law of Nations, Pay what you owe. And it was a Part in the Form used by the Roman Herald, 13 That they neither gave, paid, nor did, what they ought to have given, paid, and done: And as Salute has it in his History, 14 I demand my own by the Law of Nations. Saint Aulph, 15 when he said, that Those Wars which are to revenge our Injuries, are generally

paying handomely for what they had eat and drank in his House, and giving him what Quantity of Gold and silver he defited. To which Ulysses replied, that the would retire him all his Father's Fortune and Effects, which were in their Hands, and even make a large Addition to them, he would not flap his Hand, till he had made them pay for all their Extravagancies. Odys. Lib. XXII. v. 62, 63. Cato explicates, that When we have waived our Right of punishing, we ought at least to suffer no Damage. Ut qui vindicat remanens, damna minimi fontanum, Lib. V. Epist. XXXV. See below, Chap. XVII. XX. Grotius.

In the Passages here quoted from Homer, Madam DACIER explains those Words in the first Line, οὐδεὶς γὰρ κατέγραψε, as if meant of the Patrimony of the Suitors themselves. But I leave the judicious to determine whether the Word Σκάπνες, which signifies to refer, does not better agree with our Author's Explanations, 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 Vindications, or Actions in rem. See Note 4. on Pufendorf, B. IV. Chap. IX. § 8.

6 Such are, as the learned Gronovius observes, Fifth, Conditio caufii datii, or ob caufam datii, caufii non sequentur. A personal Action for redem- manding a Thing, which was given on a Condition which is not fulfilled. See Digest. Lib. XII. Tit. IV. De Conditionibus caufii datii, &c. Secondly, Conditio ob turpem vel injuriam caufam, ibid. Tit. V. which is when any one redemands what was given for an unjust or dishonourable Thing done by the Peron who received it. Thirdly, Conditio indelti, 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, Conditio furiosis. A personal and civil Action on the Account of Theft. Lib. XIII. Tit. I.


8 The Roman Lawyers by that Term under- stand certain Tribunals, in Consequence of which the Peron is obliged to Indemnification, tho' it was not committed with a bad Intention, or even was committed by another, without the least Con- currence of the Defendant. Thus a Judge was obliged to pay the full Value of the Lots of a Cause, to the Person to whom he had condemned wrongly, tho' he had committed 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 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 Veilid, House, or Stable, tho' they themselves had no Share in the Theft or Damage. This was termed Quaefi Malum, or Quaefi Delinitum; because there was a Sort of Fiction in such Causes, by Venue of which a Person was judged culpable, tho' not really so. See Inftit. Lib. IV. Cap. V. De obligationibus, quae quaex ex delini inferantur.

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 Occa- sions. Of this Sort were Tresafm, Abduction, Mur- der, Perjuries, Forgery, publick or private Violence, Peccati, the Crime of those who monopolize and raise the Price of Goods, &c. Inftit. Lib. IV. Cap. XVIII. § 8. De publiciis judicatis.

10 Those Words of Camillus are not part of a Declaration of War, but of a Speech to his Sol- diers, 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, or on their Wives, their Children, on their native Land disfigured with the Calamities of War; and every Thing that might be lawfully defended, re- demanded, and punished, &c. Livy, Lib. V. Cap. XLIX. Num. 3.

11 Alcibiad. p. 109. Tom. II. Edist. II. Steph. 12 Lib. IV. Chap. XIV.

13 Livy, Lib. I. Cap. XXXII. Num. 11.


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
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generally termed "juif: He took the Word Revenge in a general Sense, which implies all Removal, Ceflation, Abolition, and Reparation of Injuries, which appears by the Sequel, where there is not so much an Enumeration of the Parts, as an Illustration by Examples. So, says he, That Nation or City may be invaded, that shall neglect to punish the bad Actions of those that depend on it, or to restore what's unjustly taken from another.

3. Conformable to this Principle of natural Equity did the Indian King (as Diodorus 17 informs us) accuse Semiramis, that she had commenced War against him, without having received any Manner of Injury. Thus the Romans argued 18 with the Semnories, that they ought not to make War on a People that had given them no Provocation. Afraste observes, 19 that Men usually make War on those who first have done some Injury. So Curtius 20 speaking of the Abian Scythians, They were reputed the most juif of the Barbarians; they never took up Arms, but in their own Defence: "The juif Cause therefore of a juif 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 juftly defcry the Aggressor; and from this Injustice, 1 'which every one must allow us, it appears, that such a private War may be juif and lawful. It is to be observed, that this Right of Self-Defence, arises directly and immediately from the Care of our own Prefervation, which Nature recommends to every one, and not from the Injustice or Crime of the Aggressor; for if the Perfon be no Ways to blame, as for Injustice, a Soldier who 2 carries Arms with a good Intention; or a Man that should mistake me for another; or one deftrict 3, or delirious, (which may possibly happen) I don't therefore lose that Right that I have of Self-Defence: For it is fufficient that I am not obliged to suffer the Wrong that he threatens to do me, no more than it was a Man's Beft to came that to set upon me.

IV. 1. It is a Matter of Dispute, whether an innocent Perfon, 3 who happens to be in our Way, and hinders that Defence or Escape that is absolutely neceffary for the Prefervation 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 left Moment than the Prefervation of our Lives: But the Law of Charity, especially the Evangelical, which has put our Neighbour upon a Level with our Selves, does not permit it.

2. It which War is to mife, either has neglected the Punishment of its own Delinquents, or the Retribution of what was taken away unlawfully, Lib. VI. Quee. X. on Ytbyra. This Paffage is quoted in the Canon Laws, Cap.XXXIII. Quee. II. Quod Bellum fit justum, l.28. Cap. 2.

16 Servius has obferved, that when the Romans defigned to make War, the Chief of the Herals 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 reftore the Country they had injured, or give up the Offenders. On Amid. Lib. IX. v. 53. Grontius.

17 That Prince being informed, that the Queen was marching toward him, sent an Embafty with this Accufation. Lib. II. p. 74. Edit. H. Steph. Cap.XVIII.

18 Livy, Lib. V. Cap. XXXV. Num. 5.


20 Lib. VII. Cap. VI. Num. 11.


III. (1) In Chap. II. § 3. of the foregoing Book. See Puftenborn, B. II. Chap. V.

2 Bond fide militi. The Author means those who serve their Sovereign in a War which they sincerely think juif, tho' it is not really fo. See Chap. XXVI. of this Book. Puftenborn, B. II. Chap. V. § 5. misunderlands our Author, as if he had in his View the Cate of a Soldier, who takes his Com- rade for one of the contrary Party; which Cate is specified in the Words immediately following, aut alium non potes quin fun. The learned Grono- vius also gives the Words in Quetion a wrong Explanation, and asfoppes them spoken of every Soldier, lified in Form.

3 We may here add the Example of such as walk in their Sleep. See my first Note on Puftenborn, B. I. Chap. V. § 11.

IV. (1) See Puftenborn, B. II. Chap. VI. § 4.

2 The Laws of Charity, however underftood, require us to love our Neighbour as ourselves, not more than ourselves, which we should do in the Cafe 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 Prefervation is certainly
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2. It was well observed of Thomas Aquinas, if apprehended rightly, that in our own Defence we do not purposefully kill another; but not that it may be sometimes lawful, if all other Means prove ineffectual, to do that purposefully 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 that he 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. 1. But here 'tis necessary that the 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 hereby mistaken, and deceive others, who admit that any Sort of Fear gives a Right to take away the Life of another. 'Tis very justly observed by Cicero, that one frequently commits Injustice, by attempting to hurt another, in Order to avoid the Evil which he apprehends from him. So Clearchus in Xeno-phen, or, &c. I have known many People moved either by some false Report, or by Suspicion, who for Fear of others, and to be before-hand with them, have done most horrible Injuries to those, who never would have offered, nor ever designed to offer them any Hurt in the World. So Catull, in his Oration for the Rhodi-ans, Shall our Selves be first guilty of that which we allege they intended to do? It was excellently laid by Aulus Gellius, That a Gladiators Condition is just, that he must either kill or be killed; but human Life is not under such unhappy Circum- stances, that we are necessitated to do an Injury to prevent the receiving one. And as Tully in another Place no lets admiringly expresses it, Whoever maintained, or to whom can it be allowed without exposing the Life of every one to the greatest Dan- gers, that a Man may lawfully destroy another, through a Pretence of Fear, left the other should One Day kill him? 'To which this Passage of Euripides may be applied,

'Ec γαρ σ' ἐμελέτη, &c.

Your Husband, say you, would have killed you: You should have said till he is actually attempted it. So Thucydiades. What is to come is yet uncertain; nor should any one be so far transported with the Approbations of what may happen, as to engage in a declared Enmity, accompanied with present All of Homicide. The same Author, where he eloquently describes the Evils that Fanion had brought upon the States of Greece, blames those People, because It was thought commendable in a Man to

5 Idem. Ibid. p. 383.
7 Your Husband. It ought to have been rendered My Husband; for it is Mirrhe, Sitter-in- Law to Polybionis, who speaks thus to that Prince, guilty of her Husband's Murder. Our Author, however, has committed the same Mistake, in his Excerpta in Trag. & Com. Graeci, published since this Work, p. 390. The two Veris may be seen in Aulus Gellius, as more than once quoted; and Mr. Barnes places them among the Fragments of a lost Tragedy, entitled Cyclophantis. 8 The Historian's Words are these, What may happen in regard to the War (which the Coreys- reefs apprehending, exhort us to begin the Attack) is as yet uncertain, &c. Lib. I. Cap. XLII. p. 26. Edit. Oxon. Where our Author, as is evident, makes a general Maxim of what was said on Occa- sion of the Fear of a particular War.
9 Lib. III. § 32. p. 195.
injure another first, for Fear of being injur'd himself. A very shameful Thing, as Livy calls it in Dion Cassius. Livy says, that By taking Precautions against what we apprehend from another, we give Occasion first to apprehend something from us, and we do to others the Injury we would repel, as if there were a Necessity either of doing or receiving Wrong. One may apply such as act in that Manner, that of Vibia Crispus, so much celebrated by Quintilian. 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 sufficiently appear that it may not be avoided. For Time gives us frequent Opportunities of Remedy, and there may be many Things happen, as the Proverb has it, but few wax the Ship and the Life.

There are however both Divines and Lawyers, who are a little more indulgent in this Affair: But the other Opinion, which is certainly the safer and better, has also its Partisans.

VI. But what shall we then say of the Danger of losing a Life, or a Member of a Person, 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 fame may be done on Account of a Chastity, can scarce be here any Matter of Dispute; when not only the Opinion of the World, but even the Law of GOD, has made it equivalent to Life itself. So Paulus the Lawyer...

In a Discourse, where the gives Augustus Advice for his Conduct, Lib. LV. p. 640. Edit. H. Stephens.

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 Passdge on this Occasion, in Appian of Alexandria, Bell. Civil. Lib. II. Grotius.

I do not know where this fine Passdge 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 promis'd 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 XII. Apian takes no Notice of this Passdge, with which Caesar disquieted his Ambition; on the contrary, he makes him safe, 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 take him he himself had received. p. 443. Edit. H. Stephens. So that it is not improbable our Author, troubling his Memory in quoting, has confounded these two Histories. See also an Expression of Caesars, after the Battle of Pharsalus, as related by Asinius Pollio, on whose Authority Suetonius, (in Jul. Cap. Cap. XXX.) and Plutarch, (Vit. Cap. p. 730.) have inferred it in their Writings.

13. This Question was put to one who appeared armed in the Forum, and pretended he did it out of Fear. In Lib. VIII. Cap. V. p. 723. Edit. Burton.

14. Inter as & effam. This old Proverb is fix'd down by A. Gallus, on which he quotes the Words of one of Cato's Speeches, Saepe audire, inter as & effam multa interire papa. Nolt. Atic. Lib. XIII. Cap. XVII. See also Erasmus, in his Adages.

VI. (1) Compare this Paragraph with Pufendorf, B. II. Chap. V. § 10.

VII. (1) See the Place last quoted from Pufendorf, § 11. and what I have said in Note 1, on the Abridgment of The Duties of a Man and a Citizen, B. I. Chap. V. § 22. in the third and fourth Edition.

2. Seneca places Liberty, Chastity, and a found Understanding, after Life, without which three valuable Things a Man may indeed live, but as that Death would be preferable. De Benefic. Lib. I. Cap. XI. St. Augustine observes, that The Law allows the Killing of a Ravensher, 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. Abitr. Lib. I. (Cap. V.) Grotius.

3. It hath been doubted, whether our Author could find any Passdge 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 hasted Damfel in the Field, and force her, and lie with her, then the Man only who lay with her shall die; but was the Damfel then guilty of nothing, there is in the Damfel 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 these Words, that Chastity and Life are of the same Value. For the Legisla-
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VIII. Self Defence may sometimes be omitted.

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 spake before, when we showed that the King’s Perfon is sacred and inviolable, but also by the very Law of Nature. For natural Right, considered as a Law, does not only respect what we call expiatory Justice, but comprehends the Acts of other Virtues, as of Temperance, Fortitude, and Prudence; so that in certain Circumstances they are not only benefic, but of an indispensible Obligation. Besides that, as to what we were now speaking of, Charity does also oblige us.

2. Neither am I ever the less of this Opinion, on Account of what Pausanias afferts, 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 by an evil Action, unless it be 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 ob lige, not a bare Pernission. See my 5th Note on Petendorf, B. II, Chap. V. § 2. Second Edition; and what that Author says in § 14. of the same Chapter.

4. Porphyl. (Lib. V. ver. 68. etc.) Thus Grat i anus recommends to Alexander the Great, that, while he expiats himself to such evident Dangers, he forget that he drew after him the Ruin of so many Souls. Quintus Curtius. Lib. IX. (Cap. VI. Not. 8). Grotius.

IX. 1. (See B. I, Chap. I. § 9.) 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, to be 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 to afflict himself, 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:

Yes, 4. that to defend ones Charify, 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 Charify, Heliodorus records that Act of Heraclea, which he calls apolus vixen, &c. 6 A just Defence of her injured Honour.

VIII. Tho’ some agree with me in what I observed before, 1 that tho’ I may lawfully kill him who attempts to take away my Life, ’tis more commendable to die one’s self’ than to kill another: Yet they will only grant it upon this Condition, that we 2 except Persons that are useful to many others. But it seems to me not very safe to maintain, that all those whose Lives are of Advantage to others, are under such an Obligation as that, so contrary 3 to Patience; and therefore I think this ought to be limited to thoes 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 Luican, 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.
unless it be decreed by some particular Law; but what Law was there ever enacted, that Kings should be dethroned for an Injury done to a private Person? Surely there is no such Law yet in Being, nor I believe ever will, for what a Confusion would it make? But what Vespasian 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, so as soon as the Advantage of it ceases in some Respect. What he further urges, that every Man does only for his own Sake with well to the Commonwealth, and that therefore he ought to prefer his own Good to that of the Publick, is likewise a weak Argument. This true every Man for his own Sake wishes well to the Commonwealth, but not for his own Sake only, it is also for the Sake of others.

3. The most judicious Philosophers have with Reason rejected the Opinion 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 ⁷ "Tis no Wonder that Kings and Princes, and in general all the Governors of the State, whatever Title they bear, 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 considered 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,⁷ ⁸ that Every one finds more Pleasure in saving his Country, than in extricating himself out of Difficulties. So the same Seneca;¹⁶ Callistatus and Rutilius, the former an Athenian and the latter a Roman, refused to be recalled from Exile, because it was better that two Persons should suffer unjustly, than that their Return should expose the State to any Danger.

X. 1. There are some of Opinion, that if a Man is in Danger of receiving a Box on the Ear, or any Injury of the like Nature, he has a Right of revenging to final a Crime, even by the Death of him that attempts it. If Regard be here only had to expeditor Justice, I don't deny it; for tho' there be no Manner of Proportion between Death, and so flight an Injury; yet, whoever shall attempt to wrong me, gives me from that Time an unlimited Right, that is, a certain Morjury, or is without running away. Should suppa. Power But there are some Acts of Injustice dispositively contrary to the End for which Sovereignty is established; and consequently, whenever the Sovereign vilely and deliberately proceeds to such Executions, 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 falls considerably, and such a Prejudice arises as is evidently contrary to the End for which a Thing was established, who can doubt but that then the Thing itself is destroyed.

§ 5. It is certain that a Regard is to be had for the Interest of others, and especially for that of a considerable Number; and that we are sometimes obliged to sacrifice our own Interest to it. But the Question is, Whether we have sufficient Grounds for believing that a Prince, who is guilty of the Executions of a former Conscript, 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 confers 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 Clementiis, Lib. I. Cap. IV.

8. According to Plutarch, the principal Act of Virtue is to prefer him, who prefers every Thing else. Plut. Polybius (p. 128. Tom. I. Edit. Woch.) Cassiodorus (or rather Peter of Blas) says, that If the Hand, by the Affinity 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 fears more Concern for another Limb than for its own: — Consequendy, those who saw their Master's Life, at the Expense 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 Confidence 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 Nation. Grotius.


10. De Benef. Lib. VI. Cap. XXXVII.

X. (1) On this Question see Pufendorf, B. II. Chap. V. § 12. and Mr. Vander Mullen, 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
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3<5

Chap. 2.
From friendship, for Wisdom. But

And mean their meaning. There is

For that it is the power of Nature, that he can, whenever he pleases, act above Nature, has a Right also of prescribing Laws to us, even in those Things which are in their own Nature free and indifferent. How much more then can he command us to do that which is naturally honest, tho' not obligatory?

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 Afront, 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 argued a Meaness of Soul in Man, not to be able to bear an Afront. As we have elsewhere observed.

3. From hence it appears too, that we ought not to approve what many Caesars affect, 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 Marner of Dispute) may, 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 affect, 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 preferring one's Character.

XI. We now proceed to those Injuries that affect our Estates or Possessions; 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 Perfons, 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 plead that Man who is making off with my Effects, if there's no other Method of recovering them. So Demoglyphones in his Oration against Aristocra-
tes: * It is not, says he, highly unjust, and contrary not only to written Laws, but also to that which is common to all Mankind, that I shall not be suffered to use Force against him that robs me, and so commits an Act of Hostility against me? Nor does Charity, by Way of Precept, (if we consider it abstractedly from all Human and Divine Laws) disallow of this; unless in those Things that are in themselves too inconsiderable to be regarded; which Exception some Authors do very justly subjoin.

XII. 1. But let us see in what Sense the * Mosaic Law * is to be understood, to which agrees that 1 old Law of Solon, which Demoblines urges against Timocrates, from whence 2 the Law of the Twelve Tables was taken, and 3 Plato's Maxim, in his ninth de Leg. all which consist in this, that they make a Distinction betwixt a Night and a Day Thief. But it is not agreed upon what Reason that Difference is founded. There is some who think it only regards this, that by Night it cannot be discovered, whether the Perfon who comes in upon you be a Thief or an Affijian, and therefore he ought to be treated of 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 4 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 5 who is running away, to recover by his Death what he had stolen from me: But that if I am any Ways in Danger of my own Life, 'tis lawful then to secure myself, tho' it be at the other's Peril. Neither is it any Objection to me, that I brought myself into this Extremity, by endeavouring rather 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, confines 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 Perfon who declares that he flew him in his own Defence, since he was armed with some dangerous Instrument. For this the Hebrew Law supposes, where it treats of a Thief taken, 2 Orat. aduersa Arist. p. 436. Edit. Basil. 1572.

XII. (1) This is examined both in the Text, and Notes on Puffendorf, 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 Hittites, 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 Perfon who enters his Court-Yard in the Night, except he submits to be bound. 

5 If a Thief enters a House by Night, with an Intent to steal, and be taken and killed, let the Slayer be reckoned innocent. De Legib. Lib. IX. p. 874. Tom. II. Edit. H. Stephens.

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 of his, that we ought not to kill any one precipitately and directly for the Preservation of our Goods, it can be allowed only in this Sense; that he who finds a Thief in his Houfe, ought not directly and principally to propofe killing him, but only making Use of that Right which every Man has to preserve his Property, on account 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 precipitately, 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 Perfon robbed is not in Danger. Besides, Puffendorf has very well observed, that, if it is not allowable to kill any one precipitately 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 fugiuntis tela perficuntur, &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 fugiuntis incerti- cum tela perficuntur, &c. as the Sequel of the Discourse evidently requires. For we must sup- pose 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 Sub- stance of the Quotation, our Author's Opinion still remains exposed to the Objection offered in the Note of the foregoing Note.
in the Act of Piercing, or as some better translate it, with a stabbing Instrument; in which Sentences also the most learned Rabbiners 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. 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 Cogus

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... observes on this Law. On the contrary, 'tis the Opinion of Ulpius, that what is said of Killing a nocturnal Thief with Impunity, 10 is to be understood of killing him, when we could not secure our Goods and spare him, without running the Hazard of our own Lives.

3. This therefore is that Prefumption 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 preface 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 frappize a Thief, either by Day or Night, have apprehended, incurs the Penalty of the Cornelian Law. But it is probable, that that antient Lawyer inadvertently wrote Leges Cornelia, instead of Leges Apulei, as the learned and judicious Professor thinks, whole 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 Caufes of which we are ignorant. Secondly, The Law under Consideration is taken from Book XXXVII. to the Edict of the Pretor. Now it appears from several other Passages in the same Book, quoted elsewhere, that it does not treat of Murder, or any other publick Caufe, but of some private Caufe only. Thirdly, ULPIUS'S Fragment, preferred in the Collectio Leg. Moesiae & Roman, speaks only of the Aquilian Law, both before and after these Words, Erga etiam Leges Cornelia taebulat, nor doth it appear to what Purpose they are inferred. So that it is highly probable here is a false Reading, and, consequently, that in the ninth Law, Art. Legum Cornelia, &c. which belongs to the same Lawyer, impune ferit, signifies no more than to be exempt from paying Costs and Damages: We find inimicium off in the same Sense, Tit. de Leg. Apulei, Leg. XLV. § 4. I add that the Adverb impune was 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 Path, he may kill him with Impunity, (impune) and the Person in whom he (impune) said, shall be allowed no Action for Damages, (utile Adsum) DUGDALE, Lib. XLV. Tit. I. De verborum obigat. Leg. XCVI. But, whatever becomes of this Quotation, Mr. NODDY'S Reasons seem to me well grounded, even after the Perusal of Mr. VAN DE WATER'S Observations against them, in his Observationes Juris Romani, Lib. I. Cap. XVIII. The famous Mr. SCHULTING, Mr. NODDY's Colleague and Relation, owns that ULPIUS'S two Fragments treat of the Aquilian Law, but he has some Difficulty in allowing the Cornelian Law to be erased from this Place, because he thinks it was Aggregated to it. 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 Passages very difficult, supposing no Mistake in it. See what he says on that Subject, in his excellent Notes on the Jurisprudentia ante Tyflinianam, p. 742.

8 This Consequence is not just. All that can be inferred, is that the Laws of the Twelve Tables suppos'd 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 Fortis, Leg. LV. § 2.

10 Digest. Lib. XLVIII. Tit. VIII. Ad Legum Cornul. de Sicariis, &c. Leg. IX. Mr. NODDY, in his Probatoria Juris, Lib. I. Cap. IX. and his Tresstitae, Ad Legem Aquilam, Cap. V. has given very plausible Reasons for proving that TRIBONIAN has misplaced this Law, and that it ought to appear under the Title of the Aquilian Law, which relates to the Reparation of Damages done by one who had killed another Man's Slave, caught in the Act of Stealing, and not the Punishment of Murder. His Opinion is grounded on the following Considerations. First. The Cornelian Law punish'd only such Murtherers as were committed maliciously and deliberately (deum); and in Particular, with Regard to that in Quillon, it was entirely conformable to the Laws of the Twelve Tables, which allowed of Kiling a Night Thief, without any Distinction of Cases, as appears from Cicero's Oration in Defence of Milo, Cap. III. ULPIAN, Collect. Leg. Moesiae & Roman. Tit. VII. § 2. PAULIN, Thib. ex Leg. V. Sententiarum. Ad Leg. Cornul. de Sicariis, &c. Tit. XXIII. § 9. To which he adds a Passage in the Law of Datasets, quoted in the Declaratory, Lib. V. Tit. XII. De Hominiis volunt. vel equiis. Cap. III. ULPIAN, indeed, in the Place already specified, and in another of his Fragments. Digest. Lib. IX. Tit. II. Ad Legem Aquilam. Leg. V. terms to say, that the Man who kills a Night Thief, whom he might shall
shall signify it by an Outcry, (as we learn from Caius 11) in Order that the Magistrates or Neighbours may come in to his Affilience, or be Witenesses of the Fact: But because, as Ulpian 12 observs, 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 Perfon who afferts his Danger then.

4. Much like this is the Jews Law in Caf of a Rape, which if committed in the Field, the Woman's bare Word was Evidence sufficient; but 13 if in the City the Cafe was otherwise, it being presumed that the ought to have called for Affilience, 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 Greatnes 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, prefers the fame Thing to the People that Charity enjoins, I mean, not to kill any Perfon 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 observs, No private Perfon is permitted to kill another, except in defence of that which, if once left, is irreparable, as Life and Chaffity.

XIII. 1. What shall we then say of the Gospel in this Affair? Does it allow the fame that the Law of Moses did? Or does it, as it is in other Things more perfect than the Mosaic Law, require something more of us in this Respect also? In my Opinion it is not to be questioned but that it does. For if CHRIST has commanded, rather to part with a Cloak or a Garment than contend about it; and 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 defend from the common Father of all Mankind? Wherefore, if there's any Possibility of preferring our Goods, without running the Hazard of committing Murder, we may certainly do so; but if not, we should rather be the Losers, unlefs 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.

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 Jews and.

Deul.xxiii. 23, sc.


13 Philo the Jew, explaining this Law, judiciously observs, that the Difference of Places is specified only, as the most common Example of Cafes 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 content to be despatched in the Fields. De speci. Leg. (p. 578.) 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 does not immediately know he has taken a Thing of small Value; he hath very good Reason to presume the contrary; for Perions of that Character do not usually leave the belt Goods; and even that at first he had a Design on certain Thing only, it is well known that Opportunity makes the Thief.
Of the Rights of

Roman Laws; for they say, if the  
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,  
How can Men be guilty in the Sight of  
God, who even for Things that a Christian ought to disfeye, shall embrace their  
Hands in Human Blood? Indeed in this, as in other Cases, Christianitie is fallen  
from its primitive Purity, and the Interpretation of the Gospel is by Degrees ac-  
commodated to the Customs of the present Age. In former Times the Clergy at  
aught were obliged to follow the ancient Maxim; but at Length they also were  
exempted from all Censure on this Account.

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 excute 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 Scoto is very probable, who affirms that it is not lawful to  
condemn any to Death, but  
for those Crimes that were punished  
with Death by the Law of Mofes, or for those that appear equal to thefe, upon impartial  
Examination. Nor does it appear, that the Knowledge of the Divine Will, which  
alone can quiet the Confequence, can, in an Affair of fo high a Confequence as this is,  
be otherwise had, than from this Law only, which certainly has no where been  
entenced 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, unlefs in Crimes of the  
most flagrant Nature; for else it would be needless to have Courts of Justice.  
Therefore, when the Law acquires that Man who has killed a Thief, it may be  
understood to take off the Punishment, but not to give him  
'a real Right to the  
Act itself.

XV. From what has been said it appears, that in two Cases we may justify  
the single Combat: The first is, when the Aggressor permits the other Peron to  
defend himself, being otherwise determined to kill him if he does not fight. The  
other, when a King or Magistrate shall doom two Malefactors, both equally  
guilty of Death, to combat together. In this last Case, each of the Criminals  
can 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  
should determine the Choice.

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  
without incurring the Penalty specified in the Can-  
onons. See Conradus Ritterus, Differt. Juris  
Can. Lib. IV.  
Civil. & Canon. Lib. VI.  
Cap. XIII. as also the Authors above quoted,  
B. I. Cap. V.  
Note 2.

XIV. (1) See Puffendorf, B. VII. Chap. III,  

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 Ma-  
griftrates, it became more conliderable for Riches and Power, but less so for Virtues. See the Decretals,  
Lib. V. Tit. XII. De Homicidio Velator. Cap. X.  
XXXVI. Grotius.

This Passage of Jerom, which appears at  
the Beginning of the Letter here quoted, runs thus in the  
Original: Et potissim ad Christianam Prinzipes  
yenir [Ecclesia] Petition quidem & Divitio mai-  
or, sed virtutibus minor facit eft. That is,  
After the Church came into the Hands of Human  

5 Our Author speaks here of the Liberty with  
which Ecclesiastics have been indulged in the later  
Ages, of making War, and commanding Armies;  
whereas, according to the ancient Discipline, they  
could not even kill a Man in their own Defence,  
2 2 See Gregory of Tours, Lib. X. Cap. X.  
John of Salisbury, Poleric. Lib. I. Cap. IV.  
Peter of Blai, Epist. CXXIX. concerning such  
Laws as punished Peasants with Death for Hunting.  
Grotius.

3 It gives a real Right, in all Cases, where the  
Action is allowed by the Law of Nature, and the  
Rules of Charity well understood.

XV. (1) Some of our Author's Commentators on  
this Place fight with their own Shade, under-  
taking to refuse him at large, as if he meant to  
speak of Duties, properly so called; whereas it is  
evident, he treats only of what we term Recom-  
nendations, or Cases in which a Man is unexpectedly  
attacked, without any Appointment.

2 See my Digeste on the Nature of Laws,  
§ 20.
War and Peace.

Chap. I.

1 to publick Wars, with some Difference. For first, in a private War, the Right of Defence is as it were, only momentary, and ceases as soon as one can apply to a Judge: Whereas a publick War, arising only between those that acknowledge no common Judge, or when 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 revenging and punishing Injuries. Whence it is, that they may lawfully prevent an Infract which seems to threaten them, even at some considerable Distance; not directly, (for the Infracture of that which we have wrenched already) but indirectly, by punishing a Crime that is only begun: Of which we shall have Occasion to treat in another Place.

XXVII. 5. 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 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 Confederation 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 unjufl 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.

XXVIII. 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 Supposition 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 public Officers of Justice, who would apprehend him, by Order of the Magistrate, on a Pretence that his Punishment may be greater than his Crimes deserve.

2. But he who has offended another, ought first to offer him such a Satisfaction, as by the Judgment of any honest Man shall be thought sufficient; and if that be refused, he may in Conscience defend himself. Thus Hezekiah being threatened with a War by the King of Assyris, for not obeying the League that his Ancestors had made, acknowledged his Fault, and left it to that King to nominate what Reparation he should make him; which done, and being afterwards invaded with a powerful Army, he then trusted to the Justice of his Caufe, defended himself, and, by the Affiustice of the most high GOD, became Successful. So Pontius, the Samnite, having made a full Reconciliation to the Romans, for what had been unjustly taken from them, and delivered up him who was the Author of the War, said, 'Do not imagine that our Embassy has been fruitless: We refer this vis moris to the superfluous Custom of engaging in no military Expedition, without first consulting the Allies. It is surprising, that the last Editor of that Code hath laid nothing on this Subject, nor even referred the Reader to that Lawyer's Remark.

XXVIII. 5. Nor in him who himself gave the just Occasion for a War.

Chap. XXII. 1. Section 14, and xix.

2 Kings xix. 5. No

Bald. in Leg. 3. Dr. Rerum ali-

Chap. 11. 13 Cotii.

15 de Jufitia.

Chap. III. Num. 8.


Grotius

Chap. VI. 2. Kings xix. 7.


Adrian de Valois, in his Edition of this Author, reads nihil remittente vis moris, from an ancient MS. but the common Reading, which our Author follows, seems preferable. The Parallage is very well explained by James Godfrey; in the last Page of Rorc V. of his Commentary on the Theologian Code, where he

refers this vi moris to the superfluous Custom of engaging in no military Expedition, without first consulting the Allies. It is surprising, that the last Editor of that Code hath laid nothing on this Subject, nor even referred the Reader to that Lawyer's Remark.

2 Ubique censit Judicis. Our Author means in the Time of a Civil War.

3 See B. II. Chap. XX. § 8.

4 In the Place quoted § 39.

XVIII. 1. See B. II. Chap. XXII. § 5. and Pufendorf, B. II. Chap. V. § 6. and B. VIII. Chap. VI. § 5. Boeckler observes, that Albert Gentili, whom our Author has here in View, as appears by the marginal Quotation, is at the Bottom of the same Opinion with him.


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

O o

have
have thereby expiated the Violation of the Treaty, and prevented whatever we had Reafon to apprehend from the Wrath of Heaven. I am perswaded that the Gods, who were pleased that we should be reduced to the Necessity of refiring 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 Witsies and Guaranties 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 Perfon, that I rejeft on this Head. So when the Thebans 3 had offered to the Lacedemonians all that they could in Justice require, and they were yet for purfuing Matters further, Arifides said, that the good Caufe 4 paffed then from the Party of the latter to that of the former.

3. The Author here changes the Perfons, and attributes to the Thebans, what the Greek Orator lays of the Lacedemonians. Besides, Arifides doth not even lay that the Lacedemonians had offered the Thebans a raafonable Satisfaction; but only that the People laft 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 Diftruction of the vanquished. See Oret. Leuctrica, p. 98. Tom. II. Edit. Paul Steph. And Xenophon, Hyl. Græc. Lib. VI. Cap. V. § 33, &c. Edit. Own. 4 See what Zonaras lays (Tom. III.) of the Prince of Chalcorus (Appio) who had offered Argyropolis, the Roman Emperor, to remain quiet, and pay the Arrears of the Tribute due to him. Martin Chromer, in his History of Poland, Lib. XVII. relates something like this of those engaged in the Crufafe. (p. 393. Edit. Riga. 1555.) Philip de Commines, in the seventh Book of his Mémaries concerning the Swifs, who offered to make Charles the Bald Satisfaction for a Waggon-Load of Sheep-Skins, which had been taken from some Merchants of Grotius. Our Author has made a Miftake in the laft Instance. The Waggon was not feized by the Swifs, but taken by the Count de Remont from one of that Nation, as he paffed over that Nobleman's Lands, as Commines relates the Matter, B. V. p. 530. Edit. Genev. 1615. When that Writer adds, Confidering the Offers which had been made him; Thefe Words relate to what he had faid in the Be- ginning of the Book, p. 565, viz. that the Swifs perceiving the Duke of Burgundy fo near them, who was then returned from his Conquest of the Du- chy of Lorraine, difpatched two Embaies to him, with Instructions to offer him, among other Things, the Redemption of whatever they had taken from the Lord of Remont; who, as being the Duke's Vafal, defired he would come in Perfon to his Affiance. Thus the Seizure of the Waggon loaded with Sheep-Skins, gave Occasion to the War between the Swifs and the Count de Remont; and confecu- tively, that moft on the fame People by the Duke of Burgundy, partly under the aforesaid Pre- tence. Besides, our Author had read this Story not in the Original, but in the compendious Latin Ver- sion made by S. I. Æ. D. P. 66, 67. Edit. Web, 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 Miftake which I have pointed out.

C H A P. II.

Of Things which belong in common to all Men.

I. The Division

1. The Division of what is our own. It follows now, that in treating of thofe Caufes that juftify a War, we speak of Injuries already done; and firft of thofe that regard what is properly ours. There are Some Things which are ours by virtue of a Right common to all Men; and others which are fo 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 elfe belong to some particular Perfon. The former are either not fufceptible of Property, or elfe they are. For the better understanding of which, let us examine into the Original of Property, which our Lawyers do generally call Dominion or Demefne.

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,
Chap. II. WAR and PEACE.

25 Jaffin has it, were at first common, and all the World bad, as it were, but one Patriarchy. From hence it was, that every Man converted what he would to his own Ue, and confirmed whatever was to be confirmed; and such a Ue 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 illuated by that Simile of Cicero, * To] the Theatre is common for any Body that comes, yet the Place that every one fits in is properly his own. And this State of Things must have continued till now, had Men persisted in their primitive Simplicity, or lived together in perfect Friendship. A Confirmation of the first of these is the Account we have of some People of America, who by the extraordinary Simplicity of their Manners, have without the least Inconvenience observed the fame Method of Living for many Ages, and the latter appears by the Example of the * Effuses, of the primitive Christians at Jerusalem, and many who now live in religious Societies. That the first Men were created in a State of Simplicity, evidently appears from their Nakeness. They were rather ignorant of the Nature of Vice, than versed in the Knowledge of what was virtuous, as Jaffin tells us of the Scythians. The first Men, says Tacitus, being free * from vicious Inclinations, lived in Innocence, without committing any Crime or Dishonesty.

II. (1) Lib. XXIII. Cap. I. Num. 3. The Words immediately preceding these here quoted, are, *We do not know, what the Language of that People, (the Aborigines) was when they, during his Reign, no Man was a Slave to another, nor possessed any Thing as his private Property. Where we see the Historian is speaking of the Reign of Saturn. Thus some Remains of this ancient Custom of having all Things in common, were preferred in the Boecianian [Saturation] Feasts, as our Author here observes. And the Historian here already quoted, says the same in the Words immediately following, in Memory of whose Example, it is ordered, that, during the Saturnalia, every Man's Right being reduced to an Equality, Slaves shall eat promiscuously with their Masters. Num. 4.

2 De fini, Ben. & Mall. Lib. III. Cap. XX. SENECA also observes, that in the Amphitheatre, the Places referred for the Roman Knights, were common to the whole Equarian Order; but that which I occury becoms my own. De Benefic. Lib. VII. Cap. XII. Grotius.

3 Horace, speaking of the Scythians and the Græci, despexit, ad vivum vivi, Placens ad vivum, using the following Manner, that they lived in the Fields, and drew their moveable Huts with Waggons, whenever they changed Place, that they did not divide their Lands by Acres; that the Carn and Fruits which their Grounds produced, were free and common to all, that they stood no more than would suffice for our Year, and cheerfully succeeded one another in their annual Labour. Lib. III. Od. XXIV. ver. 9, &c. Grotius.

Neither this, nor some others produced by our Authors, are examples of a perfect Community. But his End is sufficiently answered, if Things were common to a certain Order, and were not so in that Manner in those Times, and among People, where life Simplicity was observed.


Our Author, in one of his Letters, (Part I. Epist. DLIII.) has laid down the Reasons with which he endeavours to support his Conjecture, that the Pythagoreans took the Effusion for their Model. But, whether this is true or false, it is nothing to the Purpose. It would be better to observe that Example, with others of the same Kind, are alleged with a Design of showing that such an innovation all Things in common, could not have lived without some Manners, had they not been disinterested, and full of Sentiments of mutual Friendship. So likewise, had Mankind continued in their primitive Innocence, as well as in their first Simplicity, Men would have been under no Obligation of establishing the Property of Goods. This, in my Opinion, is all our Author means; and the Commentators, who employ their Criticisms on this Part of his Work, only caval at him, as they do on several other Occasions, for want of entering into his Design.

5 Adam was a Type of Mankind. See Origens contra Gelf. To this Purpose are the following Words of Tertullian, What is reasonable ought to be considered as natural, and engraven in the Soul, from the Beginning of our Existance, 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 upon us? We are therefore to consider what is unreasonable, that is, Sin, as something posterior, and an Effect of the Seductions of the Serpent; so that this Sin, being first in Age, has never 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. XVII. Grotius).

Mr. Barberry [a] declares he doth not see what this obscure Passage is to the Purpose, which, says he, I have translated as well as I could. We are obliged to say the same with regard to our English Version of this Quotation from Tertullian, and several others from the same Writer, whose Style the Learned very well know, is neither clear nor natural. But our Annotator is of Opinion that all to be inferred from the Passage before us is, that Man was innocent when he came out of the Hands of the Creator, which is no great 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. Epift. XC. Having afterwards laid they were endowed neither with Justice, Prudence, Temperance, nor Particle, he adds, that their simple and unattached 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 corrupted or defiled with Care. (Antiq. Jud. Lib. I. Cap. II.) Grotius.

Action;
Of the Rights of

Book II.

Adieu; and therefore there was no need to keep them to their Duty through the Fear of Punishment. So Macrobins, 9 There was so much Simplicity amongst Man-
kind in the first Ages, that they were ignorant of Vice, and unacquainted with De-
ciet. This Simplicity is what was by a 10 wife few called αὐλίκη, Integrity, and by St. Paul, 11 δικαιοσύνη, which he opposes to 77 αὐλίκη, Subtilty and Ar-
tific. The Worship of GOD was their only Care, of which the 11 Tree of Life
was a Symbol; according to the Explication of the antient Jewish Doctors, con-
firmed by a Pasage in the Apocalypse. And they lived at their Eafe on what the
13 Earth, untillid, did naturally afford them.

2. But Men did not long continue in this pure and innocent State of Life, but
applied themselves to various Arts, whereas of the Symbol was the 14 Tree of Know-
ledge of Good and Evil, that is, of the Knowledge of Things which one may use
either well or ill: Which Phibo calls φαΰγειν μάρτυς, 15 a middle Prudence. This
Solomon had in View when he said, that GOD made Man upright, but that they
had fought out many Inventions, εὑρίσκον εἰς αὐλίκη, they became subtle, 16 as
Philo on that Pasage expresses himself. So Dion Prusseus, in his sixth Oration,
ἀλλὰ τὸν αὐλίκην, &c. 17 The Cuning of those who came after the first Men,
and their Sagacity in inventing Things 18 for the Use of Life, was not very adventa-
geous; because Men made use of their Wit and Ingenuity to procure themselves Plea-
ture, rather than to distinguish themselves by Acts of Valour and Justice. The

9 In saec. Scipion, Cap. X.
10 Wisdom of Solomon, Chap, ii. 23. Saint
Paul uses this Word in Ephes. vi. 24, and em-
ployes another of like Signification, αὐλίκης, Tit. ii. 7. Grotius.

Our Author gives a different Explication to
these Terms, in his Notes on the Old and New
Testament. By αὐλίκη, Ingratitude, or Incor-
ruptibility, he understands in the Book of Wisdom,
attributed to Solomon, the State of Immorality,
in which Man was created; and this Explanation
agrees best with what follows; for it is said imme-
diately after, that Death entered into the World by
the Eve of the Devil, ver. 24. According to the
fame Commentator αὐλίκης, and αὐλίκης, signify such a Probity or Integrity as is
Proof against all Temptations, not that waving 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 fame Idea
to the Word Simplicity; for he understands by this
Term, such a Largenes 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 repre-
sents Piety, the most excellent of Virtues; which
the Rabbins call the superior Virtue, and Aretinas
on the Apocalypse, εἰρηνικός, Divine Wisdom.
See Eusebius xii. 17, concerning the terrestrial
Paradise, and Chap. xivv. 25, &c. of the fame,
concerning the four Rivers in it. Grotius.

13 See a beautiful Pasage of Dicacrus on
this Subject, quoted by Varro, De Re Rustica,
which may be compared with what Porphyry
says after the fame Author, in his Treatise of All-
ishments from Animal Food. (Lib. IV. p. 342, &c.
Edit. Lugd. 1620.) Grotius.

In the Collection of antient Grecian Geographers,
published by Mr. Hudson, Tom. II. before the
Fragment of Dicacrus, we have some Words of St. Jerom,
in which the Pasage of that Author is
quoted so as more expressly to contain the Fact
here mentioned. Dicacrus, says that Fa-
ther, in his books of the Antiquities and Descriptions
of Greece, relates, that under Saturn, that is, in
the Golden Ages, when the Ground freely yielded plea-
tly of all Things, no one eat the Flesh of Animals;
but all Men lived on the spontaneous Productions of
Boff. 1537.

14 Josephus says, The Fruit of that Tree be-
Lib. I. Cap. 1.) Telemachus, as a Proof that he
was not then a Child, declares, that he knew every
Thing, both good and bad. Homer. (Odyss. XX.
ver. 369, 310.) Zeno defined Prudence, the
Knowledge of Good and Evil; and of Things in-
different. Diogenes Laertius. (Lib. VII. §
92. Edit. Amst.) And Plutarch, in his Treat-
ise against the Stoics, resounds thus, Where
would be the Damage if there was no Evil in the World;
and consequently, no Prudence; which is the Know-
ledge of Good and Evil; and another Virtue was
substituted in its Room, which should confit in the
Knowledge of Good only? De commun. Notitius.

15 Agreeing the History contained in the third
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 Na-
observe that in the same Treatise, he beholds 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 Animating and Instructive Ideas, like the former,
for engaging him to embrace Virtue and avoid Vice, p.
17. Hence it appears what the Jewish Philosopher
means by his middle Prudence, an Epiphiet of which
the Reason could not otherwise be comprehended.

16 Philo's Words are, But as they had now de-
egenerated into Corruptness, and neglected the Prac-
tice of Sanity and true Prudence, — GOD
browned them from Paradise, p. 35. where he speaks of
the Sin of our first Parents; which is nothing to the
present Purpofe.

17 1 Tim. iv. 11.

18 This is explained at large by Seneca, Epif.
xc. and in the Passages of Dicacrus produced by the Authors already quoted. (Note 13.)
Grotius.
most antient Arts were those of Agriculture, and Feeding Cattle; they were exerciced by the first Brothers, so that there was between them some Sort of Division of Goods. The Diversity of Inclinations immediately produced Jealousy, and afterwards Murder. At last good Men being likewise insensibly corrupted by Interest with the bad, a Kind of gigantick Life prevailed, that is, they used all Manner of Violence, like those whom the Greeks termed зреяк&ειвал, 20 People that would attempt any Thing. To this savage Sort of Life succeeded after the Deluge, an Attachment to Pleasures 83, to which the Ufe of Wine newly invented did contribute; and from thence proceeded also abominable Lusts.

3. But that which tended most to difunite Men, was a more noble Vice, I mean Ambition, 23 whereof the Tower of Babel is a Proof. They 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 Paffures; because the Extent of Grounds was as yet fo great in Proportion to the small Number of Men, that it was sufficient to anfwer the Occafions of many, without their incommoding one another. It was not then permitted, says Virgil, 24 to diftinguish Poffefions, and to fet Bounds to the Fields. But the Number of Men, as well as of Cattle, being very much increafted, it was thought proper at lift to affign a Portion of Lands to each Family; whereas before they were only divided by Nations. And as the Wells of Water, a Thing very neccffary in a dry Country, were insufficient to supply a Multitude, 25 every one appropriated to himfelf thofe he could seize on. This is what we learn from the Sacred History, and is agreeable to what both Poets and Philosophers have spoken of that early State of Things, when all was common, and of the Divifions that followed. The Testimonies of thefe Authors I have had Occafion to produce in another Place.

4. From hence we learn, upon what Account Men departed from the antient Community, firft of moveable, and then of immovable 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 nacked, 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 neceffary, which some employed for one Thing, and others for another. And there was no Possibility then of uing Things in common; firft, by Reafon of the Difrance of Places where each was fettled; and afterwards becaufe of the Deftitute of Equity and Love, whereby a juft Equality would not have been observed, either in their Labour, or in the Conufmation of their Fruits and Revenues.

5. Thus alfo we fee 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 abftein from it; and besides, several might have had a Mind to the fame Thing, at the fame Time; but it refulted from a 87 certain Compact and Agreement, either expressly,

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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, while savage Nature Men had put on. Natural. Quelh. III. Cap. XXX. Grotius. See Mr. Le Clerc's Commentary on Genes. vi. 4. where he explains the Word Nephilims, commonly translated Giants. 


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. Quel. Natur. III. 380. Grotius. 

22 That Philofopher says, in the fame 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 Queftion, the Origines Babylonici of the late Mr. Perizonius. 

24 Gargili. Lib. i. ver. 126. 

25 The Wells in Oafs were common to great Numbers of People, as we learn from Olympodorus, in a Fragment of his History, preferred by Phoelius. Grotius. 


27 There was no Need of a Contract for foundation.
I. The Property of Goods was introduced by Grotius, who did not everywhere leave what was sufficient for supplying the Necesaries of particular Persons, it doth not thence follow, that in the primitive State of Community, each Man might not lawfully seize on what Pertained to the Things poffeffed 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 unquestionable, and I have the Pleasure to find it employed by John Sylvaerius, an able Lawyer of Germany, who flourished in the last Age, in an academical Dissertation De Imperio Marris, (Cap. II. § 8.) which has lately fallen into my Hands. So that, how sufficient forever a Thing may be for supplying the Necesaries of the whole World, it may nevertheless be appropriated, as far as can be poffeffed. See what I have faid on this Subject, in my Notes on Pufendorf, B. IV. Chap. V. § 3. Second Edition. And on the Abridgment of The Duties of a Man and a Citizen, B. I. Chap. XII. § 4. I. Ed. Edition. 2. This is not true in every Respect, nor in Regard to all Parts of the Sea. See the learned Selden's More claunum, 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 palling on the High-Ways, but even from going into what Lands he pleased. For if the Air, considered as Air, cannot be poffeffed in Property, and yet no Means is left for enjoying the Benefit of it, without being poffeffed on the Surface of the Earth; the Surface of the Earth also must every where remain common; other wise this general Community of the Air is entirely useless. Besides, there are some Caves 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 (prospectibus, pro- tegendis) is annexed to the Building; which amounts to a Proof, that the Air is in itself considered as part of a Man's Property.

Benefit
Benefit of it: And therefore Fowling, 4 for Instance, is permitted, so far only as the Owner of the Land thinks fit.

2. The same may be afforded to 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 Poiseffion 5 obtains only in Things that are limited. Hence Thucydis calls a desert Country αόχθεπη 6 unbounded; and Titores, the Lands which the Athenians were poiseffed of, τάς ὅπερ διαφορετικὲς 7 limited and bounded by us; but Liquids having no Bounds of their own, ἡς 8 Ἀριστεὰ can never be 9 poiseffed, unless they are.

4. Such likewise is the Right of Habitation. Pomponius the Lawyer says, that if any one has raised a new Work, (or Building) either in a forcible or private Manner, on another Man's Ground, or to his Prejudice, the Heaven (or Air) must be measured, not the Ground. 7th Ed., Tit. XXII. I. § 5.) the Boundaries, and the Fruit they bear, belong to the Master of the neighbouring Field over which they hang. For, beside that the Decisions of the eminent Lawyers, concerning some Services, are founded on this, they go further, and grant, as our Authors, that when a Tree hangs over a neighbour's House, the Proprietor of that House may cut down the Tree, and appropriate it to himself, if the Master of the neighbouring Land does not cut it down at the Request of the other. Digest, Lib. XLIII. Tit. II. Pro Seio. Leg. LXXXIII. Grotius.

The former of these Laws confirms what I have said in the Glofe of the preceding Notes. It neither makes against, nor 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 Cafe mentioned in the other Law is it. This supposes a Tree, grown of itself, on the Confine of two Fields, or a large Stone hanging on part of both. N. B. But ere from Confine, Confine, was understood a Space of five or six Feet, which was to be left between two neighbouring Fields, and which belongs 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 poiseffed jointly, and in common, by the Proprietors of the said two Fields, or that, if they will not consent to poiseff them in common, either of them keeps the Wood, paying the other a Value of his Money: 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 consequent to natural Reafon. 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 Purpofe in the Law under Consideration, it must be supposed that the Branches of the Tree hang over one of the two Property, 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 Seldén says, with some other Interpreters, in his Marcligham, Lib. I. Cap. XXII. p. 155. Edid. Lond. 1676. In the Cafe here pro- posed, 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 if 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 Institutions, 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 Huberti Prefect. in Instit. Lib. II. Tit. I. § 5.) the Branches, and the Fruit they bear, belong to the Master of the neighbouring Field over which they hang. For, beside that the Decisions of the eminent Lawyers, concerning some Services, are founded on this, they go further, and grant, as our Authors, that when a Tree hangs over a neighbour's House, the Proprietor of that House may cut down the Tree, and appropriate it to himself, if the Master of the neighbouring Land does not cut it down at the Request of the other. Digest, Lib. XLIII. Tit. II. Pro Seio. Leg. LXXXIII. Grotius.

5. This for Reason: Horace, speaking of such Lands as have no Proprietor, calls them Lands not distinguished by Bounds: Amicitia juris (Lib. III. On. XXIV. v. 15.) Grotius.

6. Changing the People of Megara, with a phleging Ground that was facred, and not distinguished by Boundaries, αἰροίτως, 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. He confesses, to a Divine Power, and to some Divinity, and ought to have remained uncultivated, to serve as a Boundary. See DEMOSTHENES, Orat. De Repub. Ordinanda. p. 71. Edit. Basili. 1732. And, Harpocratin, under the Word 'ἀριστεά,' as also Pollux, Lib. I. § 10. with the Commentators on that Author.

7. In his Panegyric, p. 32. Edit. H. Steph. where the Word ἀριστεά may likewise be rendered offew, 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 Poiseffion. But a Man may poifeff a Thing, at least in part, which is inclosed in another, without poiseffing at the same Time what encloses it. Thus, that it is not possible to poiseff the whole Ocean, may not a Man become Master of some Part 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 poiseffed; as Seldén has shown at large, in his Marcligham, Lib. I. Cap. XXII. See also POSEIDONIUS, B. IV. Chap. V. § 2, 6c, with the Notes in the second Edition; and Mr. D. B. KERSKOEK'S Differtation de Dominio Maris, Cap. IX.
inclosed by something else, as Lakes and Ponds; and also Rivers are subject to Property, because confined within their Banks. But the Sea is not contained in the Earth, as being equal to it, if not greater, as the Antients believed, and therefore affirmed, that the Earth was contained in it, \textit{τὸν ἡλίκιον ὑπὸ τὴν ἔσσα}, &c. The Ocean encompassthes Earth, and, as a Band, girds and ties it in, are the Words of Apollonius in Philostratus. And as Sulpitius Apollinaris says in Galli-lius, \textit{What can be said to be without the Ocean, when the Sea does on all Sides environ the Earth?} 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 inclosed with the Circuit of its Waters, all Things which are shut up within its Borders are in the midst of it. So M. Acius, the Confal, in his Harangue to the Soldiers, in Livy, \textit{The Ocean,} says he, \textit{which incircles and confines the Globe.} So in Seneca's \textit{Advises,} the Ocean is fllled \textit{The World's Ligament,} and \textit{the Earth's Rampart.} So by Lucan, \textit{unda mundum coerceris; a Water that environ the World.} Nor is there any Room to suppose \(\text{I}^\text{i}\) 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 virtue of a Division, but by Right of First Possession, and they are not divided till after they become a Property.

IV. We now proceed to those Things which may become a Property, but are not so yet. Of this Kind are many defart and uncultivated Places, some Islands in the Sea, wild Beasts, Birds, and Fifth. But here are two Things to be remarked; one is, 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 posseffed in the Lump, any Thing remains unassigned to private Persons, it ought not therefore to be accounted vacant; for it still belongs to him who first took Possession of that Country, whether King or People; such as Rivers, Lakes, Ponds, Forefts, and uncultivated Mountains.

10 This was the Opinion of Iarchus, one of the Indian Sages, as is observed by Philostratus, \textit{Vit. Apoll. Tyrt. Lib. III. Cap. XI. (Edit. Morell, Cap. XXXVII. Edit. Lips. Olear.)} Grotius.

Soke. That Sage makes the Sea less or greater than the Earth in several Respects. He says, that \textit{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 encompasstes the Sea; but \textit{if we compare the Earth with the whole liquid Substance,} (that is, the Mafs of the Earth with the Mafs of Waters contained in the Ocean) \textit{the Earth is less, because it floats in the Water.} The learned Mr. Olearius, Author of the last Edition, underlines by \(\text{αὐὴρ ὁ θάλας,} \) the whole Ocean, or the grand Vortex of the Earth. But the Indian Philosopher sufficiently explains himself in the following Words, where \(\text{ὁ αὐὴρ, the Water, plainly signifies the same as ὁ θάλας.} \) But he distinguishes between \(\text{οἱ θάλασσαι.} \)

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 posseffed 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, \textit{B. IV. Chap. IV. § 4.} Note 4, and § 9. Note 3. Second Edition.

IV. (I) As the Echinades, \textit{which Alcmenas made his own by prior Occupancy, as we learn from Thucydides, Lib. II. Grotius.} Alcmenas did not feite on the Islands here mentio-\n

Chap. II.

War and Peace.

V. As to wild Beasts, Fish, and Birds, we must observe too, that whatever has Dominion over the Lands or Waters in which they are, may prohibit the taking of these Sorts of Animals, and so hinder any Person from acquiring them by taking them; and the same Law is obligatory on Foreigners. The Reason of which is this, that it is morally necessary for the Government of a People, that those who mingle with them, tho' but for a Time, as one does by entering their Territories, should conform to their Laws, as well as the Natives of the Country. Neither is it any Argument to the contrary, what we often read in the Fragment of the Roman Lawyers, that every Man has by the Law of Nature and Nations, a Privilege to catch such Sort of Animals; which is only true, when there is no Civil Law in being to forbid it: So that in this Case, as in many other Things, the Roman Laws left the Liberty of the primitive Times, without Prejudice to the Right which other Nations believed they had to dispose of them otherwise, as we see they have actually done. But when a Civil Law regulates Things otherwise, the Law of Nature itself commands us to observe it. For tho' the Civil Law can enjoin nothing which the Law of Nature forbids, nor forbid any Thing which that enjoins; yet it may restrain natural Liberty, and prohibit what was naturally lawful; and consequently, by its own Authority, may prevent and hinder that Property and Dominion which might otherwise be naturally obtained.

VI. 1. Let us now see whether Men may not have a Right to enjoy in common those Things that are already become the Properties of other Persons; which Question will at first seem strange, since the Establishment of Property seems to have extinguished all the Right that arose from the State of Community. But it is not so, for we are to consider the Intention of those who first introduced the Property of Goods. There is all the Reason in the World to suppose that they designed to devote 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 Cafe of an 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 Cakes seem to be excepted.

3. Hence it is, that at Sea, when there is a Scarcity of Provisions, what each Man has reseved in store, ought to be produced for common Use. So in Cakes of Fire. I may demolish my Neighbour's House, if I have no other Means of preserving my own; or if my Ship be entangled in the Cables of another Ship, or in the Nets of Fishermen, I may cut those Cables and Nets, if there is no other Way of being disengaged. All this is not introduced by the Civil Law; it only explains by such Regulations, the Maxims of natural Equity, and enforces them by its Authority.

4. Even amongst Divines it is a received Opinion, that whatever 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 allledge, that the Proprietor is obliged by the Rules of Charity to give of his Substance to those that want it; but on this, that the Property of Goods is

V. (1) See Pufendorf, B. IV. Chap. VI. § 4, 5, 7, with the Notes. As also Note 2. on the Abroadgment 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 Divinorum, § 12. See Chap. VIII. of this Book, §2, 22.

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

2 Digest. Lib. XIV. Tit. II. Ad Leg. Rhod. De Ytal. Leg. II. § 2.

3 Digest. Lib. XLVII. Tit. IX. De Incendia, &c. Leg. III. § 7.

4 Digest. Lib. IX. Tit. II. Ad Leg. Apud. 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 etiam Leg. VII. § 3, 4. where he adds the Cafe of pulling down a Houfe, to stop the Progress of a Fire. Grotius.

Q. g. supposed
Of the Rights of

Book II.

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 affirm. 5 Neccefsity, says Seneca the Father, that great Reource of human Pravity, 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 Catius passed over into Syria, another's Province, if Men had regarded written Laws; but these suppofed, into a Province new own 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 Interesf."

VII. But here come Precautions to be observed, that the Privileges of Neccefsity may not be too far extended. And if, that all other possible Means should be first used, by which such a Neccefsity may be avoided; either, for Instance, by applying to a Magistrate, to see how far he would relieve us, or by entreating the Owner to Supply us with what we stand in Need of. Plato 1 did not permit one Man to draw out of another's Well, till he had digged so far in his own Ground that there was no longer any Hopes or Expectation of Water. And Solon required, that a Man should first dig to the Depth of forty Cubits: Where Plutarch 2 adds, ομαθεων γαϊεν ζεβόν, &c. He thought it convenient to affift Mens Neccefsities, but not to in- dule their Sbort. And Xenophon, in his Anfwer to the Simopofes, ενα 5 ας ἀνθρωπος, &c. 3 Wherever we come, and have not the Freedom of a Market, whether in an Athenian or a Grecian Country, we take what we have Occafion for, not out of Injuflice but Neccefsity.

VII. But secondly, this is no Ways to be allowed, if the right Owner be preffed by the like Neccefsity; for all Things being equal, the 1 Poffeflor has the Advantage. He is no Fool, says Laebantius, 4 who the 't 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 abjures from doing an Injury which is a Sin, and to avoid this Sin is Wisdom. But what, said Cicero, 5 if a Wife Man be ready to perish with Hunger, must not be taken away Vsuals from another, tho' a perfectly uileful and insignificant Fellow? No, by no Means; for the Preservation of Life is not more uileful to us, than a Dispoftion of Mind which binders us from confulting our own Convenience at the Expenfe of another. And we read in Curtius, 6 He who will not part with his own, has still a better Caufc than be that demands what is another's.

IX. Thirdly, When my Neccefsities shall compel me to take any Thing from another Perfon, I certainly ought to make that Man Reffitution as soon as I am able to do it. There are some tho' of a contrary Opinion, and argue thus, that 'whoever makes ufe of his own Right only, is not obliged to Reffitution: Where-

5 He adds, that It suppoles that. Altons to which it forces us. Lib. IV. Contr. XXVII. The fame Author illustrates this Maxim by the Example of Goods thrown into the Sea to save the Ship, and that of Housel demolished to flop a Fire. Excerpt. Contrito. Lib. IV. Contr. IV. THEODORE PRI- SCIAN, an ancient Physician, makes Ufe of the Ex- ample oft mentioned, for proving the Neccefsity of deftroying a Child in the Birth, in Order to save the Mother's Life. In that Paffage he had an In- strument in View, called by the Grecians ημερο- ςτηκε, of which we have a Description in GA- LEN and CELSUS, (Cap. XXIX.) a Word which ought to be reftored in a Paffage of TERTU- LIAN, De Anim. GROTIUS, The Paffage of TERTULLIAN is in Chap. XXV. of that Treatise; where some read ερεμωςτηκεν, others ερεμωςτηκες. The Emendation propos'd by our Author, may be found in the Treatise of the Greek Tongue, Tom. I. p. 796. Where Hen- ry STEVENS tells us, the several had before him observed this was the true Reading.

7 Lib. VI. Cap. IV. § 11.


VIII. (1) See Puffendorf, B. II. Chap. VI. § 6. Nov. 3. Second Edition. 2 The Author in this Place has given us the Senie rather than the Words of LACTANTIVUS, which occur Lib. V. Cap. XVII. Num. 27. Edit. Collar.

3 De Offic. Lib. III. Cap. VI. This Paffage contains a Decision as extravagant in itself, as mis- applied by our Author. For the Roman Orator doth not suppoles the uileful Perfons in the fame neccefsive Condition with the wife Man.

4 Lib. VII. Cap. I. Num. 32.

IX. (1) This Difficulty is very well grounded, admiring our Author's Principles; but it vanishes when we lay it down as a Rule, as we ought to do, that Neccefsity only gives a Right to make Ufe of another Man's Goods, and doth not revive a Right to all Things in common. See Puffendorf, B. II. Chap. VI. § 6.
as the Truth of it is, this Right is not absolute, but limited to this, that Restitution shall be made when that Nececity’s over. For it is sufficient that it go to far and not further, to maintain the Laws of natural Equity against the Rigour of the Rights of a Proprietor.

X. Hence we may infer, how far he that is engaged in a just War may profit himself of any Place in a neutral Country; 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 reigning 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 Nececity; because whatsoever does but deviate the least from Nececity, is Injustice. The Grecians who were with Xenophon, when they had the most prevalent Occasion for Shipping, by Xenophanes Advice, seized such as paffed by; but so that the Cargo was preferred untouched for the Owners, and to the Scamien they not only gave Provisions, but paid them the Freight. The first Right therefore that remains of the antient Community, since Property was introduced, is this of Nececity.

XI. The next is that of innocent Profit; when I only seek my own Advantage, without damaging any Body else. *Why should we not,* says Cicero, 3 when we can do it without any Detriment to ourselves, let others have 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 a Man to light a Fire by ours. And we read in *Plutarch,* ut eam terepfi, &c. 4 *Tis an imperative Thing for who have eat sufficiently, to throw away the remaining Vietsuals; or for those who have bad Water enough, to flup up or hide the Spring; or for those who themselves have bad the Advantage of them, to defry the Sea or Land Marks; but we ought to leave them for the Use and Service of them, who, after us, shall want them.

XII. So a River, considered merely as 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 Stuices, and appropriate to themselves whatever that River produces. But if this River be considered 5 as a running Water, it is so far common, that any Body may drink or draw thereof. *What Man would refuse to let another light a Candle by his? Or who would guard the Waters of the Sea, to hinder others from taking of them?* says Ovid 6, who also brings in Latona thus speaking to the Lycians, *Why do you refuse me Water? The Use of Water is common. Where also he calls Water a 7 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 Laws 8 of Nations. So Virgill affected Water to be ouris patentem, open to all Men.

X. (1) This Question is discussed, and that with more Exactness, by Puffendorf, 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 mastered, upon being informed of their Design to revolt; so that the Example is not to the Question in hand.

3 See Puffendorf on these innocent Advantages, B. IV. Chap. III. § 3, 4.

4 This Paragone, tho’ distinguish’d in Italian Character, is not quoted exactly; and the learned Gronovius even finds a Barbarism in it, as it stands in our Author. The Roman Orator’s Words are, Unde ev exfars factis praelict [Emnas] se quippeque fandi deterruerit poet comandanti, &c. therefore, we presume: Ex quia juxta illa communia, non prohiberis aqua profuere: quia ab igne ignem capere, quid quis viderit; Conf, sumere dedemini dare, quia sunt initii utiles, qui accipiantur, datu non molestia. De Offic. Lib. I. Cap. XVI.

5 De Benef. Lib. IX. Cap. XXIX. The same philosopher affe’s likewise, *Who ever reckoned it a Favour (Beneficium) to letflow a Bit of Bread, or a small Piece of Meat on a poor Man?* ibid.

6 Symposium. Lib. VII. Quod. IV. § 11. (2) That is, considered as a Collection of Waters, flowing in a certain Bed. See the following Note.

7 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 Puffendorf, 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.

8 Art. ann. Lib. 2. ver. 93, 94.

9 Metempschos. Lib. VI. ver. 349.

10 Ibid. 350, 351.

11 See the following Chap. V. § 9. Note 5.

12 Anvi. VII. 230.
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 Edomites, and then to the Amorites, those 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 he made on the Amorites. They refused him, says S. Angilin. 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.

3. Thus too the Greeks under Clearchus, &c. We intend to go home peaceably, if in Body obstructed or molested 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 Aegialus's Quiffin, who returning out of Asia, and being come to Trans, asked them whether they would permit him to pass as an Enemy or a Friend. So Kylander to the Bactrians, whether they were willing that he should march through them with Pike erected or inclined. And the ancient Batarians, in Tacitus, declare to the Inhabitants of Bonne, If no one oppose us we will go peaceably along; but if Restraint is made, we will cut our Passage with our Swords. Cicero, the Athenian General, going to the Assistance of the Macedonians, led his Troops through the Territories of the Corinthians, without giving them Notice of it. The Corinthisians reproved him on that Account, and told him,

XIII. (4) Servius, on the Passage quoted from the Aenid, in the preceding Note, Legumque regum, hominum, etc. explaining the epithet immo- nent, observes, that the Shore on which Men land is not called immo- nent, because it hurts none, but because such a Demand doth no Man any Preju- dice. Caues Vindicatae nullae mora pofit. Gro- tus.

The Author corrects this Passage, without approving his Reader of the Alteration. All the Editions which I have seen, read caus vindicatae nullae poffit mora. 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 Pufenlordg, 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 Honour to grant it. It necessarily follows from the Right of Property, that the Proprietor may re- fuse 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 Inconvenience to himself; and if he even then refuses it, that he transgresses his Duty, he doth them no Wrong, properly so called; except they are in extreme Necessity, which is superior to all ordinary Rues. Thus far and no further extends the Rule, with which it is accompanied. The Establishment of Property is ac- companied.

2 Thus Hercules killed Amynor, King of Or- chomenus, who obstructed his Passage through his Dominions; as we learn from APOLLODORUS,
7 that When one wanted to go into a House, it was usual to knock at the Door, and to wait for Admission. Very well, replied he, and did you yourselves knock at the Door of the Cleonians and Megarenses? Did you not break it down, thinking that all ought to be open to the strongest? The middle Opinion then is the best, that the Liberty of Paffing ought first 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 confider of it, answered brilfly, Yes, let him consider of it, and in the mean Time we will pass through.

4. Neither can it be reasonably objected, that there may be Suspicion of Danger from the Paffing of a Multitude; for one Man's Right is not diminished by another Man's Fear; and much less fo, because there are Methods of providing against it; as, for Inflance, they may be divided into small Bodies, or be obliged to pass unarmed, as the Inhabitants of Cologne formerly required of the Germans; which Custom, as Strabon remarks, was antiently observed amongst the Athenians; or he that permits another to pass through his Dominions, may have Garrisons or Troops maintained at the Expence of him who demands this Paffage; or Hotlages 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 that paffes is engaged in a just War, a sufficient Reaon for refusing him Paffage. Nor is it any more an Excuse, that he may pafs some other Way; for this is what every Body may equally alledge, and fo this Right of Paffing would be entirely destroyed: But 'tis enough that the Paffage be required, without any Fraud or ill Design, by the nearest and moft convenient Way. If indeed he who desires thus to pafs, undertakes an unjust War, or if he brings People who are my Enemies along with him, I may deny him a Paffage; for in this Cafe 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 Paffing due to Perfons only, but also to Goods and Merchandize; for no Body has a Right to hinder one Nation from trading with another different Nation; it being for the Interest of Society in general, and no

8 Aristophanes introduces one saying, that when the Athenians went for Delphos, they defired Leave of the Boeotians to pass through their Country. Avlb. ver. 188, 189. On which the Scholiast observes, that at that Time they only defired a Paffage for an Army. The Venetians granted the Germans and French the fame Liberty, when those two People disputed the City of Marons. Paul. Patura, High. Venet. Lib. XI. The Germans, complaining, that their Enemies were allowed a Paffage, 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 fo far, but when they had to do with a declared Enemy. Ibid. The Pope had recourse to the fame Apology. I dom. Lib. XII. Grotius.
9 This is supposing the very Thing in Question.
10 We have an Example of this Kind in the Excerpta Legationum. And in Bembo, Hist. Ital. Sec. No some remarkable Treatises about Paffage, between Frederick Barbarossa, Emperor of Germany, and Isaac Angelus, Emperor of Constantinople, in Nicetas, Lib. II. De Viti. Iacarii, (Cap. IV. and VII.) In the German Empire, he who demands a Paffage, gives Security for repairing whatever Damage he may do. See Albert Krantzzius, Saxonic. Lib. X. and Mendoza, Belfic. The ancient Sulpicius, demanding a Paffage through the Roman Province, it was refused by Julius Caesar, who was apprehended, that a People like them, who bore no good Will to the Commonwealth, would hardly forbear committing some Disturbances. De Bell. Gall. Lib. I. (Cap. VII. VIII.) Grotius.

Our Author, or his Printer, 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 Paffage here produced.
12 Those who marched through that Country, delivered up their Arms, which were referved to them on their leaving it. Geograph. Lib. VIII. p. 548. Edit. Amst. (358. Par.)
13 But how just a Cause foever 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 Paffage, than to affift a Person when we are not strong enough to undertake his Defence.
14 This is once more begging the Question.
16 That is, either mediately or immediately. See my first Note on Pufendorf, B. III. Chap. III. § 6. That Paragraph, and the Notes on it, may serve to rectify our Author's Notions on this Subject.
Way detrimental to any Person; for if any one be disappointed of a Profit which he only expected but had no Title to, this ought not to be reputed an Injury. To the Tethystimonies we have elsewhere produced to this Purpofe, we shall subjoin one out of Philo, ωάρα δέ θαλασσί, &c. Under a good Government, Merchant Ships fail securely on every Sea, in Order to carry on Trade, whereby different Countries, from the natural Defire of Society, mutually communicate what each affords peculiar to itself. For Every never yet polish'd 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, ἀγαθὴν ὑπὸ τοῦ Θεοῦ, &c. 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 Friendfips by the Exchanges they make. To which agrees that of Libanius, &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 Affilience 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, in the Periſon of Thcfeus, reckons Navigation in the Number of thofe Things that human Rea-}on has found out for publick Advantage; the Expression is this, θεος τε καταλήματος, &c.

What Nature denies to one Country, is supplied from another, by Means of Navigation. So Florus, Take away Commerce, and you break the Bowd that ties Mankind together.

XIV. 1. But it is questioned, whether the Sovereign of the Country can impose a Duty on Goods that are transported either by Land, or upon a River, or some Part of the Sea, which may be called an Accessory to his Dominions. Now it is certain, that Equity does not permit the Exacting of Duty for Goods, which has no Manner of Relation to them, as it would be unjust to make Strangers, who only pass through a Country, pay a Poll-Tax which is laid on the Subjects to defray the Charges of the State.

2. But if one is obliged to be at any Charge, either expressly, and merely for securing the Transportation of Goods, or amongst other Things for that Use: Then


He takes Occafion to remark, that The Invention and Improvement of Navigation, are owing to a Neceffity 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 transmitting Provifions, and uniting diftant Nations. De Creatione (Mamni. I. 5.) A Thought borrowed from St. Basil, Hierom. IV. Theodorit elegantly calls the Sea the common Market of the World; and the Islands for many Stations in the Sea. De Provid. Lib. II. To all which let us add the following Words of St. Chrysostom. Can we sufficiently judge of our great Facility, of trading one with another? For, that the Length of the Way might not deter us from a mutual Commerce, GOD has given us a faster 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 funds before us, to those who are placed at a Distance from us, and in our Turn receive from them what funds within their Reach. Ad Stelichum. Grotius.

Our Author quoted the latter Passage from Servius with thofe Words, Commune Bonum erat pa-tere Commercium Marii, that is, the free Use of the Sea is a common Good. They are Seneca's, De Botf. Lib. I. Cap. VIII. 20 De Aqua & Iugi compar. p. 957. Tom. II. Edit. Wech. 21 Our Author has given no Hint for guessing out of what Part of Libanius thofe Words are taken.


2. This and other fuch Reasons only tend to render the Impofition of Duties more juf!. But even independent of that Consideration, fomathing may be demanded for the bare Permiilion of Faffage, which, strictly speaking, one was not obliged to grant. Every Proprietor, in Confluence of his Right of Property, is at full Liberty not to allow another the Use of his Property, but on certain Terms.
to recompense this, some Duty may be laid on those Foreign Commodities, provided it be not higher than the Reason for exacting it requires; for on that depends the Justice of Customs and Taxes: Thus Solomon received Tolls for Horses and Linnen, that passed over the Syrian Isthmus. So Pliny says, that Franks could be no otherwise transported than by the Gebanites, and therefore a Duty was paid to that King. So, as Strabo informs us, the People of Marseille were greatly enriched by a Canal, which Marius had made from the Rhone to the Sea, &e. exacting a Duty from all Ships that went up or down. The fame Writer informs us, that the Corinthians did by a very antient Custom impose Duties on all Goods that passed over from the Agean to the Ionian Sea, by Land, to avoid going about the Cape of Malea: The fame did the Romans require for the Paffing of the Rhone, and was likewise given for going over Bridges, as Seneca tells; and as to what relates to the paffing over Rivers, our Laws are all very particular.

3. But it is too frequent, that Impostions of this Nature are excessive, on which Account Strabo complains of the Phylarchus, (or Chief of divers Nations of Arabia) adding, &c. With such poor and brutish People as they are, it is difficult to regulate the Impofs on a Footing that is not grievous to the Merchants.

 XV. Persons also that pass either by Land or Water, may, on Account of their Health, or for any other just Caufe, make some Stay in the Country; this being likewise an innocent Utility. And therefore Illineus, in Virgil, when the Frigians were not permitted to reftrict themselves on the Coasts of Africa, prevailed to invoke the Gods to be Judges of the Injury. And the Complaint that was made by the Athenians, that the Athenians had refused them Entrance into their Harbours, was thought well grounded by the Grecians, as being, according to Plutarch, contrary to the Laws of Nations: So that the Lacedemonians looked on it as one of the most just Causes of War.

2. And consequently, any little Cottage or Hut may be built upon the Shore, tho' we grant that this Shore belongs to the People of the Place. For what Pomponius says, that Leave must be first asked, and an Order had of the Magistrate, before we build any Thing in the Sea, or on the Shore, relates only to such Structures as are permanent and lasting. To which Purpoſe is that of the Poet,

Contrācta Piseae æquora stintent
Jactis in Altum mibibus.

3. See the Laws of the Lombards, Lib. II. Tit. XXXI, and the Letter from the Bishops to King Lewis, which may be found among the Capitularies of Charles the Bald, Cap. XIV. Grotius.

4. Hist. Nat. Lib. XII. Cap. XIV. We have something of the fame Kind towards the Beginning of Leo of Africa's Voyage. Aristophanes in his Comedy of the Birds, (ver. 192, &c.) alludes to such Sorts of Impofls, when he propofes flutting the Paffage of the Air, that the Gods might be obliged to pay some Duty, for the Smoke arising from their Victims. Grotius.


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 Tarentians, who inhabited on this Side of the River, having sent a Deputation to those of Colonia, who lived on the other Side of that River, folliciting them to shake off the Roman Yoke, received for Answer, among other Things, that they were ready to com-
XVI. 

All the Greeks are driven out of their own Country by a Right to settle in any other, provided they submit to the Rules and Government of the Place.

XVII. All Right to unoccupied Places hereby to be understood.

XVIII. Having

The Fifo 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: 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, "King Latinus then become my Father-in-Law, shall still retain the sovereign Authority, both in War and in Peace. And Latinus himself, in Dionysus Haliarnassensis, pronounced the Caufe of Aeneas to be just, if having no other Habitation he were forced thither. Strabo, from Eratosthenes says, it belongs to Barbarians only to drive away Strangers: and the Spartans who did so, have not been commended on this Account. So in the Opinion of St. Ambrose, 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 Locedemolians, the Minyae; and the Cumaeans, some others who came over to them. But when the Minyae, after their Reception, demanded a Share in the Government, what Herodotus says of them is very just. They acted injuriously, and against all Right and Reason. And Valerius, that They boldly required a Favour with an Injury.

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, because whatever remains uncultivated, is not to be esteemed a Property, only so far as concerns Jurisdiction, which always continues the Right of the ancient People. And Servius remarks, that seven hundred Acres of bad unmanured Land were granted to the Trojans, by the original Latins: So we read in Dion Prufcius, οὐ χαλεκάω, &c. that They commit no Crime who cultivate and manage the unfulfilled Part of a Country. Thus the Anacharians formerly cried, that 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 rather pour in the Sea upon those who hindered others to settle on them. But those 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 left just what the Romans formerly inquired of the Galli Senones, What Right any one had to demand a Country from the lawfull Owners, and, in Cafe of Refusals, to threaten them with a War?

5 Horat. Lib. III. Od. I. ver. 33, 34.
6 XVI. (1) Sec Pufendorf, B. III. Chap. III. § 10.
9 That a People do not lay it to belonging to Barbarians only, to drive Strangers out of their Country; he only relates this hitherto, as a Custom common to all the barbarous Nations; that is all but the Greeks. Strabo, Gog. Lib. XVII. p. 1154. Edit. angl. (822, Paris).
11 De Offic. Lib. III. Cap. VII.
12 Lib. IV. Cap. CXLVI.
13 Lib. IV. Cap. VI. extern. Num. 3.
14 XVII. (1) I am not of our Author's Opinion in this Point; nor can I think the Reason here alleged hold: all the Land within the Companys of each respective Country is really occupied; tho' every Part of it is not cultivated, or affigned to any one: in particular; it all belongs to the Body of the People. The Author here reason on a falce 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 (Mores aperti) belong (in a general Way) 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 Invasions of so many barbarous People, who under Pretext 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.
15 Therefore we are rather to adhere to the Authority of Livius Sisenna and Cato, for almost all the ancient Writers agree in this Point. Cato, in his Origines, tells us, that the Trojans received from Latinus the Land king between Laurentum and the Trojan Camp. He likewise gives us the Measure of that Land, which he says was seven hundred Acres. On Aenid XI. 316.
16 Gnat. VII.
17 Gnat. VI. (1) Sec Annales. Lib. XIII. Cap. LV. Num. 4, 5.
18 Livy. Lib. V. Cap. XXXVI. Num. 5.
Chap. II.

WAR and PEACE.

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. The absolute Right extends 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 Content 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 calls, the cutting off from Men the Communication of the Goods of their common Mother, the refusing one the Fruits of the Earth that grow for all; the defoying 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.

X. 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 is prohibited, and yet even in such an Extremity as this, we cannot expel those Foreigners we have once admitted, but must, as St. Ambrose shews, be common Shariars in a common Calamity.

XX. But one has not the same Right 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 ancient Belgae prohibited the Importation of Wine, and other foreign Goods. So Strabo, speaking of the Nabataean Arabs, says, οὐκ εἰσάχθη αἷμα, &c. that Some Commodities may be imported there, and some not.

XXI. 1. I am of Opinion, that in the Right I just now spoke of, is also included, a Liberty to contract Matrimony amongst neighbouring Nations; when, for Instance, a People, confiling only of Men, having been baffled their own Country, is fet down in another. For the Celibacy be not entirely 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 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. We desire to contract Marriage with you, a Thing that is usually granted, not only to Neighbours, but even

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 Strang Country. See Pufendorff, B. III. Chap. III. § 31.

3 De Off. Lib. III. Cap. VII.

4 See a Passage in Plutarch's Life of Pericles, already quoted, (§ 14. Narr. 3.) Seneca, having mentioned two Veils of Virgins, where the Foes fays every Country doth not produce all Things, (Georg. 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 different 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. LXXX. at the Year 1580. Groves, etc.

XIX. (1) Cassiodore observes, that It is just that the Inhabitants of a Country, should be first provided with the Corn that grows in it: Var. Lib. I. Epist. XXXIV.


XX. (1) Confin Pufendorff, § 12. of the Chapter specified in the preceding Note.


XXI. (1) All the Inconveniences that would refult 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 betrying their Daughters on those only whom they approve of for Sons-in-Law. Besides, how difficult forever it may be for the Generality of Men to live without Wives, this is not one of those Cafes of extreme Necessity which gives us a Right to force others to grant us what we want. See Pufendorff, B. III. Chap. III. § 13.

2 Livy, Lib. I. Cap. IX. Num. 4.

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

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to Foreigners. And St. Augustin testifies, * that By the Right of War, the Victor might unjustly 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 *loves, that is, such as produce some particular § 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: * For if it be allowed that Foreigners may any where hunt, fish, fowl, gather Pearls, inherit by Will, sell their Goods, and even where there is no Scarcity of Women, contract Marriages, the fame 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. But what we have said of Permissions, is to be understood of such Acts as are allowed, as it were, by Virtue of natural Liberty, never taken away by any Law whatever; not of such as are permitted in Favour of certain People, 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 what Molina observes, with the Principles of Francis Victoria, tho' the former pretended to establish something contrary to them.

XXIV. I remember I have heard it questioned, * whether one Nation may contract with another, to purchase all the Commodities of a particular Kind, which the Produce of that Country only; and I think it may be lawful, provided the Buyer shall be ready to dispose of them to others, at a reasonable Rate; for it signifies nothing to other People, from whom they are supplied with what Nature has Occasion for. But in Matter of mere Profit, one may lawfully prevent another, especially if there be any particular Reason for it, as when a Nation has taken under their Protection the People with whom they make such a Contract, and are therefore obliged to be at an extraordinary Expense. This Sort of Monopoly, practised in the Manner, and with the Intention I observed, is no Ways repugnant to the Law of Nature, tho' the Civil Laws, out of Regard to the publick Advantage, do sometimes prohibit it.

* De Civ. Dii, Lib. II. Cap. XVII. where that Father gives his Opinion with Caution, * Et disputat justa bella, &c. Perhaps by same 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 Sabines 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 confident. § See Chap. V. § 15.

XXII. (1) But see Pufendorf, B. III. Chap. III. § 14.

XXII. (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 Virtue 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; ye, 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 consequent ly, 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 fo 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 Custom, or other Impolls, while they are demanded of others.

3 It is with good Reason doubted whether this Way of reconciling the two Writers be sufficient. See Pufendorf, B. III. Chap. III. § 9.

XXIV. (1) See above, § 13. Note 15.

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

War and Peace.

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CHAP. III.

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

I. The particular Right we have to a Thing, is either by original or derivative Acquisition. Original Acquisition, when Mankind were 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 be made only by first Occupancy.

II. Some may say, perhaps, that when the Proprietor of a Ground grants his Neighbour a Right of Servitude, or when a Creditor receives any Thing in Pledge, both the one and the other acquire a Sort of primitive Right. But if the Matter be thoroughly considered, we shall find that this Right is only new in Appearance, and that it is only a Modification of a Right already established; for it was virtually included in the Property of the Matter of the Ground, and of the Thing pledged.

III. To the Ways of Acquisition, Paulus the Lawyer adds this, which indeed Or, a Speculation very natural, viz. when we are the Caule 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 continue now 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 in another Place.

IV. 1. Our Bufines is then here, to treat of taking Possession by Right of prior Occupancy; which, since those early Times we just now mentioned, is the only natural and primitive Manner of Acquisition. Now, as to what belongs properly to the

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.

But, besides that when a Multitude have 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 settled 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.

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 delegating himself of Poffession, and making a Step toward Alienation, in Case he becomes insolvent.

III. (1) Digest. Lib. XII. Tit. II. De acquisitio vel omittendis pofsession. Leg. III. The whole Poffession runs thus, ‘‘There are as many Kinds of Poffessions as there are Means of acquiring what was not before our own; which may be done by Purchases, Gifts, Legacy, Donation, Inheritance, Fine, or Property; 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 lately, we have falso et naturalis, & originarius Modus. But in that published in 1672, and corrected by the Author, we read only naturalis & originarius Modus. I know not how that an was replaced in the Edition of 1642, from which it has been copied in the succeeding Editions to that printed in 1712, which preceded mine, and from which it was once more struck out. As I think that Word very ill placed here, I have ventured to follow the Edition of 1652, for the following Reasons. According to the other Edi-
properly to no Body, there are two Things which one may take Possession of, Jurisdiction, and the Right of Property, as it stands distinguished from Jurisdiction. Secunda has made that Distinction, *Kings*, says he, have Power over every Thing in their own Dominions; but yet every Man has his distinct Property. Dion Pronoicocris thus, *καὶ ἐπὶ καὶ πᾶσιν ἀλλ' οὕτω, εἰς* &c. 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, yet are they in themselves really distinct; and therefore Property may be transferred, not only to those of the same State, but even to *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, when the Lands afoigned

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, 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 Virtue of the Law of Nature. Secondly, The Author would express himself doubtfully, in regard to the second Part of his Proposition; now he enters into no Douht on that Head, as appears from the whole Tenour of the preceding Paragraph. 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 Passge Hill more perfected. For, not understanding the Elegance of the Particle on, he makes our Author speke as if he proposed to examine that Question in another Place: *Il s'ait donc question de parler ici de l'Occupation, et de voir oit ce n'est un moyen primatif & original. But it will be objected, that it is not probable that either the Author, or the Printers, could let this Fault e-}

fcape in the first Edition. As to the Printers, it is possible that the Author having written, naturales ac originalius, they put an instead of at. 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 anterior to that of 1632, might imagine he did great Matters by ret}-

iting the Text, to as to give it a very different Sense.

2 See Pufendorf, B. IV. Chap. VI. § 14. where he clears up the full Ideas which these Words of our Author are capable of giving.

3 Deiph. Lib. VII. Cap. IV. That Philo-}

sopher makes the fame Distinction a little after. Under the title of Kings, the Prince possesse all Things by Jurisdiction; but each Man has his distinct Property. Cap. V. Caesar possesse all Things; this Treasury only is his own private Property: All Things are jotted to his Jurisdiction; the each Man is Master of his own Patrimony. Cap. VI. Sym-}

machus tells the Emperors Theodosius and Aca-}

dian, that tho' they governed all Things, they were obliged to leave every Man in quiet Possession of his own Property. Lib. X. Epit. LIV. (p. 297. Edit. Lond. 1735.) PHIL. the Jew observs, that the Kings are Masters of all the Gods in their Dominions, without excepting the Possession of every private Person. They are only Patterns which they rent to their Governors, and other Officers acting under them, and from which they receive their yearly Revenue. De Plant. Noct. (p. 222. Edit. Paris.) Pliny the Younger, says, in Commendation of Trojan, that, in his reign, the Prince's Dominions were larger than his Patrimony. Paneg. (Cap. L. Num. 2. Edit. Cellar.)

4 Orat. XXXI. entitled Rhodiscia.

5 So we find that the Lands of Arcadia, and those of Attica, were formerly divided in such a Manner that the whole Jurisdiction, (now seg-}

mented) remained to one only of those between whom the Division was made. (APOLODORUS, Biblioth. Lib. III. Cap. IX. § 1. and Chap. XIV. § 6. Edit. Parif. Th. Gall.)

6 That is to say, 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, nor had the learned GRONOVius explained the Words of Stranger or Foreigners, settled in our Country without the Right of Citizens. He might have considered, which Foreigners, who live in the Country, are subject to the Jurisdiction of the State in the same Manner as the Natives; as our Author acknowledges in several Places. So that we are not to wonder if they cannot make the least Acquisitions there, without infringing the Right of the Sovereign, on whom they themselves depend. Whereas when a Foreigner, living in his own Country, acquires Lands in another, he is a Proprietor not personally subject to the Jurisdiction of the Lord of the Country where the Lands lie, and the Jurisdiction in that Cafe is merely local.

7 See also Ed. Gôi. The last Words of this Passge, as quoted by our Author, are, Sed Jurisdiction in agris, qui adignat sunt, posse eas renumit, ex quorum terrarum jumpt sunt. The Words, which are corrupted in the Manuscript and printed Copies, stand thus, Sed Jurisdiction in agris, qui adignat sunt, posse eos remunifit, ex quorum terrarum jumpt sunt. The Words, which are not to be said that of in agris, in the Place of in agris. The late Mr. VAUDER GOES, Counselor in the foreign Court of Holland, who published a beautiful Edition of the antient Writers, De Re Agraria, in 1674, reads eas agris. This Conjecture comes nearer to the Manuscripts; and the other forms a Sense not

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War and Peace.

It is amongst the Colonies of the Neighbouring Territories; but that those Territories retained the Jurisdiction over what had been taken from them. And Demobilizes, in his Oration de Hellenes, calls those Lands that were polleffed by the People of the Country, which belonged to those that belonged to Foreigners, inserted.

V. We have before observed, that in a Place already polleffed, so far as regards Jurisdiction, the Right of feizing upon and polleffing Things moveable, may be rendered void by the Civil Law, for this Right is indeed permitted by the Law of Nature, but not commanded that it should always be 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 although 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 Permiilion of the Civil Law of this, or that, or other People, which each of them may at any Time abolish if they think fit. And indeed there are many other Things of this Nature, which our Lawyers at the Division of Things, and of acquiring a Property in them.

VI. It is also to be observed, that if we have Regard to the Law of Nature alone, Property can only be his who has the Use of Reason. But the Law of Nations has so ordained it, for the common Good, that not only Infants but Madmen may both have and keep a Property in Things. Mankind representing them, if I may say so, whilst they are in that State; for human Laws may enjoin many Things that are no where commanded by the Law of Nature, but can enforce nothing that is contrary to it. And therefore this Sort of Property, which, by the unanimous Confent of all civilized Nations, was introduced in Favour of Infants, and other Persons that resemble them, is ad aedium secundum, as the School 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, thou be Lord of all, yet during his Minority differs nothing from a Servant. That is, as to the exercis of his Right of Property.

VII. Let us now finish what we began to say concerning the Sea. Rivers may be held in Property, tho' neither where they rise nor where they discharge themselves be within our Territory, but they join to both, or to the Sea. It is

from a Conceision of the Sovereign, either express or tacit, who may revoke it, when, and as often, as he pleases. See Puffendorf, as quoted in Note 1 on § 4 of Book III. 2 See Chap. VIII. of this Book, § 1.

VI. (1) See Puffendorf, 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 left 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. Barretrac adds, and Rivers. Because in the foregoing Chapter the Author treats of the Dominion of both the Sea and Rivers; and in this goes on with, and finishes the Examination of Questions relating to Rivers, and even begins with them. He thinks he may lawfully follow his Author's Thought, rather than his Expression; and imagines the two Words & flaminibus were omitted by the Printer.
Of the Rights of

Book II.

sufficient for us, that the larger Part of the Water, that is, the Sides, is that up in our Banks, 2 and that the River, in Respect of our Land, is itself small and insignificant.

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 Gulp, or above and below, as a Strait; provided it is not to 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, 3 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. 1. But it must be owned, that in all Parts of the Sea that were known in the Time of the Roman Empire, from the first Ages, even down to the Time of the Emperor Justinian, 'twas the Law of Nations, that no People whatever should claim a Property in the Sea; no, tho' it were no more than the Right of Fishing; neither are they to be regarded who think, that when by the Roman Laws the Sea is declared to be 1 common to all Men, it should be only understood to be the common Right of the Roman Citizens. For in the first Place, these Terms are in themselves so general, that they can no Ways admit of such a Restriction. For what the Latins meant by Omnium commune, common to all, Theophrastus calls, ὅλοις ἡμῖν ἐμφανήν, 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 Inscriptures, 5 There are some Things which are common 6 to all Men by the Law of Nature, and others which are only publick:

2 Neither of these is necessary, as appears from what we have said on the preceding Chapter.

VIII. (1) See PuFENDORF, B. IV. Chap. V. § 8.

IX. 1. Digest. Lib. I. Tit. VIII. De divisione rerum, &c. Leg. II. § 1. See also Inscript. Lib. II. Tit. I. § 1. Mr. De BUCkNER KRONER, in his Dissertation de Dominio Maris, Cap. IX. p. 77, &c. says, the Reason why the Roman Lawyers rank the Sea among Things that are common, is, because in their Time the greatest Part of the Sea was not occupied, or, perhaps, no Part of it, beyond the Space which Men can command from the Land.

2 Lib. II. Tit. I. § 1.

3 Digest. Lib. VIII. Tit. IV. Commnia praedivium, &c. Leg. XIII.

4 Digest. Lib. XLIII. Tit. VIII. No quid in loc. 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 mean the same Thing. Whence he concludes, that either TRIBONIUS forged a new Divi-division, for want of understanding MARCIAN, whose Words he copies; or that there is an Error in the Text; so that, according to the Conjecture of some learned Men, instead of Quodam naturali jure communi unt omnium, quondam publicum, we ought to read: Quodam naturali jure communi, quod omnium, quod cedens publico. 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 Mo-ments 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 Permisson 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 were to 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 Proprieter and the Sovereign from having a Right to demand in Pigour a free Use of a Land. But I do not comprehend how this 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 rides in my Grounds, certainly belongs to me, but I am obliged by the Law of Nature, to allow such as want it to drink of it, or draw Water out of it, when they can do it without incommoding any one else. 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, that they belong to the Proprietors of the adjacent Lands. See Chap. VIII. of this Book, § 8. Note 12.

6 Thus Michael ATTALIATES expresses himself,
Wak Bell.

The and the every as but the he followed the the as speaking Gro.
fome of belongs which Cap. See theofe Tit.
common that Tibullus decretum in be Grotius.
De becaufe The the Prator, paiTed the but when the Tit.
the original- is the fpoke made Regard For be
9. But the Law of Nature is not against a Prat- or Property in a Part of the Sea, which is as it were included in the Land.

4. Sullust, speaking of the Luxury of his Times, says, Several private Persons have built Mountains, and built in the Sea. (Bll. Carol. Cap. XIII. Edit. Webs.) Horace reproaches the Romans with brightening the Sea, and contaminating the Habitation of the Fishes, by the Motes they build. Lib. II. Od. XVIII. v. 20, 21. and Lib. III. Od. I. 33, 34. The fame Observation is made by SeneCa, in Excerpt. Centrov. Lib. V. Controv. V. PLINY tells us, that: The Earth was fuffered to be roughed over by the Waters, to make Wes for the Sea. Hist. Nat. Lib. II. Cap. LXIII. The Emperor Alexander Severus raised several magnificent Works at Bace, in Honour of his Relations, and Ponds of a prodigious Bignefs, by laying in the Sea. LAMPERIDUS, in his Life (Cap. XXVI) CASIO- nore in his Time admired those Ponds, as appears from Varior. Lib. IX. Cap. VI. THIRULUS represents the Fifthes thus feasured and terraced in the enclosed Spaces of the Sea, as laughing at Somni:

Claudii et indumenium male mire, levum at intera Neglectis ubera pifcis adivi minar.

Lib. II. Eleg. VI. 27, 28.

PLINY mentions this Sort of Fifh-Ponds, made out of

Sel. Some Things belong to all Men, as the Air, running Waters, the Sea, and the Sea-Shore. (Prag- matic. Tit. II.) Grotius.

7 Lib. II. Tit. I. § 2. In the Body of the Greek Law we have this Expression, The Coasts, or Shores, are in every Man's Power. BAILL. Elog. Lib. III. Tit. I. Cap. XLIII. See also Lib. LIII. Tit. VI. GRO-

9 Digest, Lib. XII. Tit. I. De adquirem. rerum Dominum, Leg. XIV.

10 Digest. Lib. XLIII. Tit. VIII. Ne gud in his public, &c. Leg. III.

11 Quotidies ad utilitatem affiniur. Mr. BAR- BEYRAC, in his Latin Edition, adds perpetuum, which he translates durable; being persuaded that his Author designed to write so, as the Context manifested, that the Oppofition being imperfect without that Word.

12 Digest. Lib. XII. Tit. I. De adquirem. rerum Dominum, Leg. I. The Term here used by Grotius, is Prator, and the common Reading in the Place quoted is decretum Pratorii. Some, as the learned GRONOVUS observes, read decretum Principis, which Correction is followed by Mr. NODDY, in his Commentary on the Digest. Lib. I. Tit. VII. p. 53. But Mr. DE BUKKERHORST, in his Dilettation De Domino Mori, Cap. IX. p. 81, expounds his Scepter, 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 Quotation. Mr. SCHULTING is likewise of Opinion that the Correction is unnec- essary. See his Einaratio prime partis Pandii.


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PLINY mentions this Sort of Fifh-Ponds, made out of
let into the Land of some private Person, as we find it done by \(^5\) Lucullus, and some others. So \(\text{Valerius Maximus}^\) records of C. Sergius Orata, that He made himself several private Seas, by enclosing the Waters with Bars or Boqons, 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 what Parts of the Sea that are before Houses built on the Shore of the \(\text{Tribacian Bosphorus}\), so that he permitted each Propriety to inclose with Damns that Space of Sea, and to appropriate it to himself.

2. Now if a certain Space of Sea may be, as it were, an Appurtenance to the Ground of a private Person, so far as it is shut up there, and so inconsiderable that it may be thought a Part of the Ground; and if this be not repugnant to the Law of Nature, why may not a Part of the Sea that is surrounded with the Land, belong to one or more Nations, who are in Possession of the Shores, when that Part of the Sea, compared with the Land, is not larger than a small Slip of the Sea, compared with the Ground of a private Person? Neither is it any Objection to say, that the Sea is not surrounded on all Sides with the Lands of one or more Nations. For notwithstanding that, it may be appropriated, as appears by the Example of a Corner of a River, or the Sea, that is brought up to some Gentleman's Seat.

3. But there are many Things tolerated by the Law of Nature, which the Law of Nations, by \(\^8\) common Convent, might prohibit and restrain; therefore, wherever this Law of Nations was in Force, and is not repealed by common Convent, 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.

XL. 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 \(\text{Papinianus}\^\) has decided, \(\^2\) in regard to an Edifice built on the Shore, and Fithing in the Turning of a public River.

XII. It of the Sea, \(\text{Hift. Nat. Lib. XXXI.}^\) See \(\text{Columella, De Re Rustic. Lib. VIII. Cap. X.}^\) where he observes, among other Things, that \(\text{The Luxury of the Wealthy has inclosed the very Seas and Neptune.}^\) \(\text{p. 377.}^\) \(\text{Hist. Comm. 1595.}^\) We find something to the fame Purpofe in St. Ambrose, \(\text{Hexaem. Lib. V. Cap. X.}^\) and in his Treatise of \(\text{Naboth, Cap. III.}^\) as also in several \(\text{Places of Martial, [viz. Lib. X. Epigr. XXX.}^\)

\(\text{Ver. 19.}^\) \(\text{et al.}^\) \(\text{Grotius.}^\)

5 \(\text{Varro}^\) tells us, that Lucullus having hallowed a Mountain near Naples, and let the Waters of the Sea into Reservoirs for Fish, which had a Sort of Flux and Refux; heated it would not yield to Neptune in the Point of Fising. \(\text{De Re Rustica, Lib. III. Cap. XVII.}^\) \(\text{p. 139.}^\) \(\text{Ed. 3.}^\) \(\text{H. Steph.}^\) \(\text{Plutarch}^\) speaks of that celebrated Roman's Country-Sente, round which he made the Sea pafs, and had large Fish Pond; and adds, that He built Apartments in the Sea. \(\text{Whereupon Tiberio, the Stoick, called him the Roman Xenodo.}^\) \(\text{Var. La-}\
call. \(\text{p. 518.}^\) \(\text{Tom. II. Ed. Welch.}^\) \(\text{Pliny}^\) ascribes that Exprefion to Pompey the Great. \(\text{Hift. Nat. Lib. IX. Cap. IV.}^\) \(\text{Velleius Patercu-}\
lores relates it in the fame Manner. \(\text{Hist. Lib. II. Cap. XXXIII.}^\) \(\text{Grotius.}^\)

6 \(\text{Digest. Lib. XLVII. Tit. X. De Injurinis, &c. Leg. XII.}^\) \(\text{§ 7}^\)

7 \(\text{Thucydi}^\) \(\text{See Leonis, Novell. LVII. CII.}^\)

III. CIV. \(\text{Michael Attalius, Pregnat. Tit. XCV.}^\) \(\text{Harmenopus, Procur. Jav. Lib. II. Tit. I.}^\) \(\text{§ 67 \& pro\)
Chap. III. War and Peace.

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 'such a Passage, even through another's Country, cannot justly be hindered, 'tis commonly less necessary, and more dangerous.

XIII. But it was more easy to take Possession of the Jurisdiction only, 'over some Part of the Sea, without any Right of Property: Nor do I think, that that Law give it a different Sense. The Reader may see C捷as on the Law under Consideration, p. 1165, 1166. Tom. I. Opp. Edit. Fabratt. and Mr. De Steynshoek's Differtation, De Dominis Mai- 

r, Cap. IX. p. 85. We have something on the same Subject, in a Differtation written by Mr. De Toullie, De Lutisigii Pigmien, &c. Roubin mori Facultatis § 47. to which I refer the Reader with Plesure.

XII. (1) But we have no Right, in Regard, to pretend that any one should let us pass over his Lands, as I have dwelt on the foregoing Subject. The Authors of kings, despotic Kings, say they have no Reazon to build of building made therefore Masters of all the Rivers, and even of Seas infinite in Number, and immense in Extent. (De Planc. Noe, p. 233. Edit. Forj.) Lvy 

co p. 31. This introduces Chaldean foretelling the Romans should enjoy the Empire of both Sea and Land. (In Allusion to which, VIRGIL, to fatter Augustus, tells him) Tethys should give all her Waters to purchase him for her Son-in-Law, (Cap. Lib. I. vii. 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. (Mathe. Lib. VI. 

Cap. I.) NONNUS speaks of Beroa, (or Beruthus, a City of Phoenicia) as being possessed of the Empire of the Sea. (Dionysius. Lib. XLIII. p. 1166. Edit. 

Web.) QUINTUS Curtius says, that Tyre was a long Time Miftrous, not only of the Neighbouring Sea, but of all the Seas where her Ships had failed. (Lib. IV. Cap. IV. Num. 19.) Hence arise the prophecies of Tyre and Tyrian Sea, SEPTUS under the Word Tyre. The 

Athennians and Lacedemonians, as ISocrates 

observes, bad in their Turns the Empire of the Sea, so that as each of them prevailed, they held moft of the Citys (or Greek) in Subjection. (Panathen. p. 243. Edit. H. Step.) DEMOSTHENES tells the Lacedemonians formerly commanded all the Sea, and all the Land of (Greece). PHILIP. III. (p. 49. Edit. 

Boflh. 1572.) See also his Oration on the Creum, p. 726. The Author of the Life of Timonathes, (CORNELIUS NERO) 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. Collet.) The Author of the Oration con-

cerning the Island of Manna Tyre which appears a-

mong the Works of Demosthenef, 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 Dominium of the Sea without him. (p. 51.) 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. Sponhem.) JO- 

SEPHUS, the Son of Geras, makes Antiochus Epiphanes, one of Alexander's Successors, who, Are not the Earth and the Sea mines? (Lib. III. Cap. XII. Edit. Munfier.) Philemphon Philadelphia, another of his Successors, is commanded 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, enclofed by the Shores of Africa, confined that the Ro-

mans, since such was the Pleasure of the Gods, should command elsewhere, both by Sea and Land. LIVY, (Lib XXX. Cap XXX. Num 34) CLAUDIAN 

represents the other Scipio, as subjedting the Spanish Ocean to the Laws of Rome, (De fecundo Conful. 

Silicon. Pref. ver. 7, 8.) Hence it is that the Roman Authors, as SALUST, FLORUS, POMPONI 

US MELA. G. frequently call the inward Sea 

our Sea. (See notes. First part. Tom. XX. Notes. FLORUS, Lib. III. Cap. VI. Numbr. 9. 

POMPONIUS MELA, Lib. I. Cap. I. Num. 34. Edit. Waff. 1700.) But DIONYSIUS HALICAR-

NASIENSIS goes still further, and pretends that the Romans were Masters not only of all the Sea on the 

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 CASIUS says, they rejected ever about the whole Earth and Sea. 

[GRUTUS perhaps quotes this Historian by Heart, 

instead of the Orato Themeritus, who, speaking of 

Thebact's the Emperor, says, What would you say if 

one who commands about the whole Earth and Sea? ORT. V.] APPIAN, in his Preface, describing the Grandeur of the Roman Empire, comprehends in it 

the two Sea, the Provinces, the Hellions, the Ge- 

Pomphyllus, and Egyption Seas. A Decree of the 

Senate gave Pompey a Power of commanding all 

the Sea on this Side of Hercules's Pillars. APPIAN, 


introduces Jupiter foretelling, that even the Sea should obey Augustus. Metam. Lib. XV. ver. 831. An 

ancient Inscription in Honour of that Emperor, tells 

us, He ftut the Temple of Jufus, after he had estab- 

lished Peace both by Sea and Land. (Lib. I. p. 

194. Numbr. 4.) See also SUETONIUS, in his Life. (Cap. XXIX.) That Historian eli-

where speaks of two Fleets which Augustus had, one at Milenum, the other at Ravenna, for guarding the 

upper and the lower Sea. (Cap. XLIX.) VALE-

RIUS MAXIMUS tells Tibullus, that he had been 

made Master of the Earth and Sea, by the joint 

Conjunct of Gods and Men. (Prefat. p. 2.) PHIL 

Ox the few observs, that the fame Emperor held the Empire of the Earth and Sea twenty-three Years. (De Legat, ad Calum. p. 1012. Edit. Parf.) He 

attributes the like Extent of Dominions to Catullus, 

Succesor to Tibullus. (Isid. p. 993.) JOSEPHUS, the 

Jewish Historian, calls Tarsaphion Land of the 

Earth and Sea. (De Bell. Jud. Lib. III. Cap. XXVII.) 

ARESTIDES says the fame of Marcus Antoninus in 

several Places. (See, for Example, Grat. IX. p. 

119, Tom. I.) PROCOPIUS relates, that there were 

some Statues of the Emperor, representing him 

holding the World in one Hand, in Order to 

signify that the whole Earth and Sea were fubject 

him. (De Edific. Julianin. Cap. II. de Augustu.) 

Cosmatine Monarachus, Emperor of the East, is 

felled Land and Master of the Earth and Sea. (JO-

ANNES, Epifcop. in Eubati. p. 51.) The Egean 

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Of the Rights of

of Nations, of which we have spoken, did any Ways oppose or contradict it. The Arians formerly complained of the Athenians, that they suffered the Spartans, who were their Enemies, to pass unmolested through their Seas, looking upon this as a Breach of the Treaty that was betwixt them, in which it was stipulated that neither People should permit the Enemies of the other to pass, \\

The Sea roll under thy Scepter. So Dion Phusenissus, in his second Oration to the People of Tarfus, among the many Privileges that were granted by Augustus to that City, mentions, Ἰδονίων τοὺς πληροφορίας τῆς Σαλαμίνος τῆς καὶ άλλας ἡ Ἰδερία τῆς Ρίδου τοῦ Ρίδου τοῖς τὴν μαύραν πάντας, Every Sea that belongs to the Romans. And Themistius speaking of a Roman Emperor, τὸν γὰρ ἢ Σαλαμίνος ὑπεύχαν τῶν, Having both Land and Sea subject to him. So Oppianus 5 to the Emperor, \\


Almost all these Authorities are produced by Selden, in his Mare clavium, who sets down a graýt many more; to which several others might still be added, as appears by the Simple given in Mr. De Bvcrckshoff's Differtation De dominio in mari. H. V. But the last above-named, and mentioned with Reason rejects our Author's Distinction between the Jurisdiction and the Property of the Sea. He obsevers (Cap. IV. p. 26, &c.) that till it is proved by good Reasons, (those al-

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 a Fleet, which is a Sea-Army, is kept in any Part of the Sea: In regard to Territory, as when those that fall on the Coasts of a Country may be compelled from the Land, for then it is just the same as if they were actually upon the Land.

XIV. Neither is it contrary to the Law of Nature, or that of Nations, that those who shall take upon them the Burden and Charge of securing and affilling Navigation, either by erecting or maintaining Light-Houses, or by affixing Sea-Marks, to give Notice of Rocks and Sands, should impose a reasonable Tax upon those who fail at that Way. Such was that which the Romanis levied upon the Red Sea, to defray the Charge of a Fleet against the Excursions of Pirates; and that Duty which the Byzanitines demanded in the Euxin Sea; and that which the Athenians long before imposed on the same Sea, when in Possession of Cyzicus, both which are mentioned by Polybius. And that, which Democles, in his Oration against Lepides, shews, the same Athenians required in the Hellespont; and which Procopius says, in his secret History, that the Roman Emperors exacted in his Time,

3. Herodian speaks of this Impoit which the Byzantines demanded, in his History of the Emperor Severus. (Lib. III. Cap. I. Num. III. Edit. Beccer.) Procopius, both in his Publick and Secret History, (Cap. XXV.) mentions the ancient Impoit laid on the Hellespont; as also, the new one established at the Entrance of the Euxin Sea, and in the Straights of Byzantium. Theophanes tells us, that the Byzantines Impoit was paid in the Place where the Church of Blackens now stands; and that of the Hellespont at Abydos. Agathias, Lib. V. calls the later an Impoit of a Tenth, as mentioned by Procopius. But it was afterwards reduced by the Emperor Irene. Immanuel Comenius gives us an Account of the Monasteries maritime Revenues, in his Monasticon, as we are assured by Théodore Balasimon, in Gencil. Collected, Can. IV. and Can. XII. Synod. Grotius.

In B. V. of his History, Chap. XLIV.

1. Philostaurus, whom our Author here quotes in the Margin, speaks only of King Erythres, who, he says, was Master of the Red Sea. Vit. Apollon. Tyron. Lib. III. Cap. XXXV. Edit. Lig. Oleari.

2. In all Editions of this Work, we have Strabo, Lib. XVII. and Pliny, Hift. Nat. Lib. XIX. Cap. IV. in the Margin. The first Page is 1, H. 9, but we can find nothing like the second. Our Author certainly had his Eye on those Pages of Pliny which he had quoted in the preceding Note.
Time, that no Median Ship of War should fail between the Cyanea and the Chelidonian Island, and between the Cyanea and Phoejinis 3 after the Battle at Salamin.

In the one Year's Trace of the Peloponnesian War* it was ripulated, that the Laeceromans should not send to Sea any Ships of War, or Ships of Burden above twenty Tun. And in the first Treaty which the 6 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 fail beyond the Promontory Paltraum; 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, * that the Romans should neither exercise Piracy, nor drive a Trade, beyond the Promontorium pulbrahim, Maffia, and Tarfjicus.

In a Treaty of Peace with the Ilyrians, the Romans required, that they should not pass beyond Ljfrus with more than two Frigates, and those unarmed. In the Peace with Antiocbus, that he should not fail on this Side the Promontories of Colchecdus and Sarpedon, ali with such Ships as should carry Tribute, Ambassadors, or Hoftages of War.

RUS SICILUS, Lib. XI. (Cap. XLI.) ISOCRATES takes Notice of this Treaty in his Panathenaeus. (p. 244. Edit. H. Steph.) GROSIIUS.

This Equi curritis, ipsum deoimus, is a Day's Journey of a Horse; as appears from a Pallage of Aristides, quoted by our Author in the Margin. The Words are τις ἐπεί καὶ κυρίων ὡς. Orat. Panath. p. 294. Tom. I. Ed. Paul. Steph. See also his Oration in praise of Rome, p. 349. where we read τις ἐπεί καὶ κυρίων ὡς. ἔχει τις ἐκ τῶν ἐν Σαλαμίν. I may add the Authority of a much more ancient Greek Orator, viz. Demosthenes, who, speaking of Callias, depired by the Athenians for concluding that famous Treaty, utes the Terms τις ἐπεί καὶ κυρίων ὡς. ὥστε τῇ διὰ της ὁμολογίας. Orat. de fidel. legit. p. 287. Ed. Bafil. 1572. I am much miftaken if Plutarch had not this very Pallage in View. Our Author is miftaken 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 Stadia was a hundred and twenty-five Paces. Plutarch himself, as JAMES PAUMIER, de GRATIFANII, obervers, expalins what was then understood by a Day's Journey of a Horse, when, towards the Close of Cicero's Life, he says, that while that General had the Command, no Venian Carrier, or Horse dared come within four hundred Stadia, (or sixteen Leages and two Thirds) of the Sea, p. 491. I take the Liberty on this Occasion of ombating of a Mistake in a very useful Trefale of Mr. Eisenchmidt, De Pounder. &c. printed at Strafburg, in 1708, where he (Sift. III. Cap. III. p. 113.) conatins intu-PCIH 7= 7 with what Plutarch elsewhere calls τις ἐπεί καὶ κυρίων ὡς, Nic. Sal. 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 evident cannot be a Day's Journey.

3 This new Treaty is a chimerical Treaty, as the learned Gronovius remarks. There was none made after the Battle of Salamin, which was soon followed by those of Platea and Myacle. Besides, it appears from the Thing itself, that there is no Difference between those two pretended Articles of Peace at the cholidonian Islands and the three Islands situated in the Pamphylia Sea, over-again the City of Phoejinis, fo that it is exactly the same Space of Sea. I do not understand what induced our Author thus to multiply Being without Necessity, for in the first Edition we read only, Ne pas

novi Medici Cyanea nova portaret.

4 THUCYDIDIS Lib. IV. Cap. CVIII. 5 POLYBIUS, Lib. III. Cap. XXII. 6 SERVIIUS, on Annid. IV. (628.) obervers, that By this Treaty, neither the Romans were allowed to land on the Carthaginian Gaffis, nor the Carthaginians on ship of the Romans. The People left mentioned, made a like Treaty with the Tarminis, 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 fishing all foreign Ships which they found sailing toward Sardinia, or Hercules' Pillars. Geogr. Lib. XVII. p. 115. Edit. Angl. (802. Par.) GROSIIUS.

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 Previsuiss, or rest 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 Lib. IV. Lib. V. Lib. VI. Lib. XI. An Article of the Treaty of Peace with Antiocbus obliged that Prince to Have only twelve Ships of War, for keeping his Subjects in Order. APPIAN, De Bell. Syric. (p. 181. Edit. Angl. 112. H. Steph.) By an Agreement between the Sultan of Egypt and the Gracious, the former was allowed to send two Ships beyond the Bifphorus every Year. NICHE GroRIOUS, Lib. IV. The Venetians pretend, that, by Veurse of fveral Treaties, no Ship of War ought to enter their Gulf. See Mr. DE THOU, Lib. LXXX. at A. C. 1584. (p. 200. Edit. Francisci.) GROSIIUS.

Our Author, in all the Editions of this Work, has witten Maffia, instead of Mafiidi, (Mäzsa) as also Ljfrus, instead of Ljfrum. POLYBIUS has Εϊον νοὸν Ταύτα, Lib. II. Cap. XII. This Article concerning the Treaty concluded with the Ilyrians, is taken from thence, though our Author quotes only APPIAN OF Alexandrie, in his Margin, who relates the Matter somewhat different. Besides, by the By, Maffja and Tarjicus are omitted in C ELLARIUS's ancient Geography; an Omission which may be supplied by comparing BOCHART, Phalig. Lib. III. Cap. VII. 8 LIVY, Lib. XXXVII. Cap. XXXVIII. Num. 9.
2. But all this does not prove that those, who thus limited the Navigation of any other People, had taken Possession of the Sea, or of the Right to fail there. For Nations, as well as private Persons, may 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, in the Case of an Estate fold, on Condition that the Purchaser should not fish for Tenney, to the Prejudice of the Seller: That indeed the Sea cannot be rendered subject to a Service; but yet Honestly requires that one should submit to the Clause of the Contract: And therefore the Purchaser, and those that succeed to his Rights, are perfectly obliged to observe such a Clause.

XVI. 1. It is often disputed amongst neighbouring People, whether the Bounds of the Jurisdiction be not altered as often as the River that runs betwixt them changes its Course; and whether the Addition that the River thus makes does not accrue to them who are on that Side where the Addition is made? Which Controversy must be determined from the Nature and Manner of the Acquisition. Authors who have writ on The Boundaries of Lands, inform us, there are three Sorts of Lands; one Sort is divided and allotted, which Florenceinus the Lawyer calls limited; because it is included by Limits made by the Hands of Man: Another is allotted in Gros, or comprized within some certain and determinate Measure, as Hundreds, suppoole, and Acres: And a third is arcellinuous, called of Fallities and Aburdurrities. It is certain, however, that the Lands under Confederation 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 Purpoe, who, in my Opinion, was not ignorant that the interior Extent was divided by Limits, as well as the exterior.

4. There were such as were given in the Whole to any one City or People, without Division, 9 so that they belonged to the Publick, not to any one in particular. Florenceinus, p. 38. Thus the Im- polts were paid out of Lands belonging to the Pub- lick; not out of the Property of each private Per- son. See Mr. Goes's Notes, p. 153, 158.

5 Per Centurias et Jugeras. An Acre, Jugera, was a Measure of 120 Feet in Breadth, and 40 in Length. Centuria contained 200, or 575, such Feet; and was called Centuria, because it was the Portion of a hundred Perious; for no one had left 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 belong to the Author's measure only by the Extremities. Here again, I find our Author has been misled by Aggenus Ursicinus's Commentary on Florenceinus; 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 the Lands under Confederation, were not divided and interspaced 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 Florenceinus, who says, that In many Places the Misfortunes, the mead they mead such Lands by their Extremities, formed the Plan of them, as if they were limited. p. 38. But whatever our Author's Mislake may be, it is sufficient for his Purpoe, that the two first Sorts of Lands, which he distinguishes, are opposite to the last, in having first Boundaries. Mr. Goes owns that the Emperor Antoninus Plus, who by a Concedition, mentioned in the Digest. De adquirendo rerum Dominios. Lib. XLI. Tit. I. Leg. XVI, returned to the Allueus to the Proprietors of limited Lands, would have refused them likewise to a People, in Regard to such Lands as had been given them in the
called fo, as Varro observes, because it has (Fines arcardis Holfikis idemus) Boundaries fit to keep the Enemy out; that is, it has 7 natural Limits; such as Rivers and Mountains. And these are what Aggenus Urbicus didis Occupatory, because they are generally such Lands as are occupied or possesfed, either as being vacant, or else by the Power of the Sword. In the two first Infances, tho' the River should change its Courfe, yet is there nothing 9 of the Territory changed: And what is added by Alllecion, belongs to the prior Occupant. 2. But in arcifontian Lands, the River, by gradually altering its Courfe, does also alter the Borders of the Territory; and whatever the River adds on one Side, shall be under his Jurifdiction 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 Jurifdictions. Tacitus faid 11, That the Rhine began there to have a fixed Channel, which was proper to serve for a Boundary. And Didiodorus Siculus 12, relating the Controversy that was between the Inhabitants of Egypta and Solities, fax, πάντα τὰ χῶναν ἑξιζύξεις, The River bounding the Country, And Xenophon 13 calls such a River simply, τὸ ἱερνόν, The Bounder.

3. The Antients report, that the River Aeloucis, keeping no constant fiddy Courfe, but one While dividing itself into several Branches, another While turning and winding about, (which gave Rife to the fabulous Story of its being changed in-

the Whole; his Reason is, Because this Land (as signed in groto) has its certain and determinate Extremities. — And, says he, is it to the Purpofe, that one is divided by interior Limits and not the other, as long as there is no Difference in the Exterior? No, 198. I shall however obferve another Miftake of our Author, which has escaped the Cenfurc of his Commentators. It is in a fhort Note on this Place, where, in Order to give his Readers an Example of Lands enclosed within a certain Meafure, he refers them to Servius, on the ninth Elegy of Virgil. Now it is certain, the Lands there mentioned were limited, fince the Poet is speaking of such as were taken from the Montains, to make up for the Defect of the Territories of Cremona, which Augufi divided among his Soldiers. See that ancient Commentator on Ver. 7, and 28. 6 Frontinus, p. 38. But Siculo f Lucius tells us, then Lands were called Arcifontes, (or Arcifini) because every Man appropriated tohimfelf as much Grond as he hoped fhoild be able to cultivate, and that kept off his Neighbours, (arcendis vicinos) p. 3. The Etymology, given by Gronovius, feems to me more natural, and comes to the fame in the Main. He derives it ab arcendis fruibus; because fuch Lands had no Boundaries first and determined by any Meafure. This is in my Opinion, the very Idea which our Author would give us of thefe Agri arcardis; and if he speaks of natural Boundaries, it is because Lands which have fuch Boundaries, are not usually mefured. As Mr. Goes obferves, after Frontinus, the Boundaries of the Agri arcardi were fometimes made by the Hands of Men, and the Difputes which afterwards arose among Neighbours, made it neceffary to limit the Extent of them by some Meafure. But it is fufficient, that originally fuch Lands were in themfelves unlimited. 7 Tacitus obferves, that Germany was divided from the Sarmatic and the Daician, eithcr by their mutual Fear, or by Mountains. De morib. Germ. Cap. I. Num. 1. PLINY, speaking of the Alps, fays, we carry away what was defigned as Boundaries between different Nations. Hift. Nat. Lib. XXXVI. (Cap. I.) Grotius. I am very much miffaken, if the first Word in the Pallage of PLINY, eutanus, is not corrupted, but may be eafily reftored. That Hijtorian 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 fhould be read eutanins, &c. we tear up, &c. Every one fees how easily the Transcribers might write one of these Words instead of the other. I own the Word eutanin may form a good Sene in this Place; but the other is without Doubt more to the Purpofe: And besides, it prevents a Repetition in the following Words, The Tops of the Mountains are carried (porientum) from Place to Place, &c. To which it may be added, that no Term is more proper for exprefling the Removal of Boundaries than eutanin, or revellens, as HORACE speaks,

Quid quod uque proximus
Reultis agri terminus —

Lib. II. Od. XVIII. v. 24.

9 Page 45: Edit. Gos. 9

Because their Extent and Bounds are fixed and determined. See Pufendorp, 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 Tupembe, (now called Bielaffa.) Grotius.

11 De morib. Germ. (Cap. XXXII. Num. 1) Spariat, in his Life of the Emperor Hadrian, (Cap. XII.) tells us, that Prince planted great Palls joined together, like a Sort of Wall, in several Places, (on the Boundaries of the Roman Empire) where there were no Rivers for feparating them from the Barbarians. Constantine, Parphogenesius, calls the River Phols συμφόρης, as ferving for a Boundary. Cap. XIV. Grotius.

12 Lib. XII. Cap. LXXXII. p. 328. Edit. H. Steph. 13 He there speaks of a River, without naming it, which difcharged itself into another, not named. The former divided the Country of the Macra-

tians, from that of the Syoticians. De Exped. Cyri. Lib. IV. Cap. VIII. § 1. Edit. Osam. N. 2. The Word, by which the River is diftinguished, by the Hijtorian, is ἐτανωμόν, which may have been its proper Name, on the Account of its ferving as a Boundary.

14
to a Bull and a Serpent) was the Occasion of frequent Wars between the Etrurians and Acciuvians about the adjacent Land, 'till Hercules confined it within Banks; and for the important Service, obtained in Marriage the Daughter of Omicteus, King of the Etrurians.

XVII. 1. But this will only take Place where the River has not changed its Channel; for a River that separates two Jurisdicitions, is not to be considered bare-ly 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 ancient 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 Wa ters another Way, it is no more the same, but a new River. So in Cáfe 2 a River should force its Way through some unusual Passage, and entirely forfike 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 Jurisdicitions; 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.

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 dittin- guish Jurisdicitions, 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 certain Mea sure; and when it falls out so, it is not so much in Consequence of the original Acquisition, as by Vertue of another Concession.

XVIII. But tho', as I said, in Cáfe of any Doubt, the Jurisdicitions on each Side reach to the Middle of the River that runs betwixt them, it may be, and in some Places it has actually happened, that the River wholly belongs to one Par ty; either because the other Nation had not got Possession of the other Bank, 'till later, and when their Neighbours were 4 already in Possession of the whole River, or else because Matters were so stipulated by some Treaty.

XIX. 1. Nor is it underwerving our Observation, that the Acquisition of such Things as have had an Owner once, 5 but are now without one, either because they are abandoned, or because the Owners themselves 6 are dead and gone, is to be judged an original Acquisition: For in such a Cáfe they return to the State in which all Things were at first.

2. But it is likewise to be observed, that the original Acquisition of a Country is sometimes made by a People, or a Prince, in such a Manner, that not only the Jurisdiction and Sovereignty, which comprehends that eminent Right we have elsewhere 3 spoken of, but also the full and compleat Property is at first, in general, vested in that People or Prince; and that afterwards a particular Distribution is made amongst private Persons, but so that their Property should still depend upon that prior Property; if not, as 4 the Right of a Vassal upon the Right of his

XVII. (1) See a Law in the Digest, referred to in the Margin, which shall be produced, in Note 5, on § 5, of Chap. IX, of this Book.


Darius called the Tigris and Euphrates the two great Bوارع of his Kingdom. Q. Curtius, Lib. IV. Cap. XIV. Num. 10.

XVIII. (1) Thus the Romane, as Gronovius 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 Neris Lusitania, on them. See Salmasius, on Vopiscus, Vit. Benef. 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 Gronovius quotes in this Place. I. milcar, General of the Carthaginians, having left his Army in Sicily, by the Plague that raged in that Island, confides himself, after his Return to Car thage, by observing, that The Enemy had plundered his Camp, not in Quality of Conquerors, but as Per sonus who joined on such Gods as, by the Death of the Owners, belonged to the first Occupant. Lib. XIX. Cap. III. Num. 6.


4. See Note 4. on Pufendorf, B. IV. Chap. VIII. § 12.
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Lord; or the Right of a Tenant, upon the Right of him who owns the Farm; however, by some lighter Sort of Dependence, as there are many Kinds of Right to a Thing, among which is the Right of him who upon a certain Condition expects a Feoffment of Trust. Thus Seneca, 3 *Tis no Argument at all, that because you may not dispossess, confine, spoil, or mend, 'tis therefore not yours; for that too is yours, which is conditionally such. So Dion Phrysenes, 9 μεν μάλα γεω τινάς, &c. There are many Ways; and those very different, by which Things are said to belong to one; so that sometimes be to whom they belong can neither fell nor dispossess of them as be pleases. And in Strabo 10 we meet with, οὐδέποτε δὲ μὴ πώς τε ἔκτισθην, He was Master of it, excepting the Power of selling it. Now an Example of what we have been speaking of, Tacitus gives us in the Germans, They take Possession in common of as much Land as they are able to cultivate all together, and afterwards they divide it according to every Man's Condition.

3. When the Property of private Persons depends on the general Property of the State, in the Manner I have just mentioned, that which has no particular Owner does not therefore belong to the first Occupant, but returns to 11 the whole Society

5 See Pufendorf, B. IV. Chap. VIII. § 3.

6 *Tis in rem, or rather, in re, as we commonly do in Opposition to *Tis ad rem; A Diffinition used by the scholastic 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. Noody'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 ancient Law. See Mr. Schultzing's excellent Notes on the Jurisprud. Ante-Justins. p. 428.

7 Digest. Lib. II. Cap. XXIII. De Fidei committendi hereditateus, § 2. Our Author is censured for placing this Right, as he underlines it, contrary to the scholastic Notions, among Rights over a Thing. It is observed against him, that, according to the Civil Law, a Legacy bequeathed under a 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 obiïitiat. & aliisib. Leg. XIIII. And Cujsas's publick Lectures on that Law, Tom. VIII. Op. Edit. Fabret. p. 420.) and if he dies before the Condition is performed, he even transmits no Hope to his Successors. Much more ought the fame to hold good in Regard to an Heir in Fruit, 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 amiss himself with vain Hopes. All this is true, according to the Roman Law; but, when we consider the Simplicity of natural Law, 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 dispossess the Goods according to his own Fancy, till the Condition falls entirely.

3 De Benef. Lib. VII. Cap. XII. The Philosopher had said, a little before, that Some Things belong to same Person, under a certain Condition. Grotius.

Our Author quotes the last Passage, as if taken from B. VIII. Chap. XII. of the Tacit. De Bef-
A Great Difficulty arises here, concerning the Right of Prescription. For I. Where a Thing is done in Possession, and has been continued for a long Time, it is difficult to get rid of it. But it seems that the Author intends to comprehend the Possession of Things which have been acquired in that manner.

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 rack abandonment. According to the ancient Roman Law, however, there was this principal Difference between Ufucaption and Prescription, that whoever acquired a Thing by Right of Ufucaption, 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 Januus a Cotta, on the Title of the Inhabitants of the Ufucaptionists, &c. Lib. II. Tit. VI. The Reader may likewise find several Things on this Subject in Pufendorf, R. IV. Chap. XII. § 1. 56.

2. Cicerò observing that in ancient Times, the Romans gave the Appellation of Enemy (Hoffis) to the Person, in his Days called a Foreigner, (Peregrinus) confirms this Remark, by a Law of the Twelve Tables, which says, Propriety is preferred eternally against a foreign Possessor. Actibus Heft. autem aetrarum. De Offic. Lib. I. Cap. XII. Grotius.

2. That is, supposing the Right of Prescription founded only on the Will of the Legislators, and that there is nothing in the Law of Nature and Nations to authorize it. Besides, even tho' it had some Foundation in the Principles of a Law common to all Men, and all People; the precise Determination of the Time allowed for Prescription, which is not the same in different Countries, serves as a Rule only to the Subjects of the same Nation.

Y y

4. Thing
II. But even among those long Possessions in frequenterly by Act of a Right.


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 Difference, tending to prove that Prescription does not take Place between Sovereign Princes, reasons thus, "That, 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 ancient Pretenstions. Some of them have retained the Titles of their pretended Kings, and Lordships, others the Arms, and a third Sort both the Arms and Titles of these 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. Werhlop, Professor at Helmont, (of whom I have spoken in my third Note on Puffendorf, B. IV. Chap. XII. § 11. second Edition) answers judicially, 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 Prosecution 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, that hence, that they are prejudiced of the contrary; because, otherwise, there would be no Necessity of their being so eager in interrupting, as much as in them lies, the Tenant's Possession of Fact. Secondly, It frequently happens, that Custom and Vanity have a great Share in this Case of retaining the Titles or Arms of a Kingdom, when they have abandoned the Possession of it. So that this Act cannot be supposed to interrupt the Possession, or in any Manner prejudice the Right of the Possessor, when there are other Acts and Circumstances sufficient for grounding a Premption of abandoning such Right. Prodromi Graecorum Dign. de Precept. inter Graecas libera, Gr. § 47.


Our Author quotes the next Pasage, as belonging to Isocrates, Orat. ad Philipum. But it is taken from Dionysius of Halicarnassius, 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 Ornege, Duke of Nevers, reasoned on the same Principle. See Mr. De Trott, Lib. LIX. at the Year 1754. Grotius.

3. Livy, Lib. XXXII. Cap. X. Num. 4.


5. This is where the Historian speaks of Arbachan, King of the Parthians, who attempted to invade the Possessions and Conquests of Cyrus and Alexander. Annal. Lib. VI. Cap. XXXII. Num. 3. It is what the Greeks called, by Way of Allusion to a Fact in the History of Athens, τα χωριόν, to seek for that which was before Evclides. A proverbial Way of Speaking, made use of, among other Writers, by Nicetias, in the Life of Alex Socrates, Brother of Iean Angelus, where he speaks of the Emperor Henry, Son to Frederick, τα χωριόν τα τη την ἑκάστης χωριός.
Chap. IV. | War and Peace.

War Cap. may This excellent 4 What for Defign i. will XLII. 
See De come 
ation be- faid, Poffeffion as Traveller, Thus Note effe£ted Magiftrate Leg. 80 But De he that liable i. fuppofed would his alfo Tit. The Grotius. Ad HI- 2 but. for when 18. unlefs Mv6.xoiq’ Tit. disfaU See be As SlifuOerc; Lavi’ If 

3. He was not oft enamed to go and feel for that which was before Euclides. This Euclides was Opinions at Athens, soon after that Office was introduced. Our Author might have flen the Ufe of this Proverbe from more an- tient Writers; fuch as Lucan in Cataph, Tom. I. p. 426. and in Hermeftus, p. 563. Edit. Anglet. The learned Casaubon, in his Remarks on A- thorities, Lib. I. 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 His- torian 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 utfurped by several Perfons, observes, that this could not be utfurped without the Rain of the Poffeffors, who were part of the People, and poffeffed those lands by a Sort of hereditary Title, as having been left them by their Ancefors. Lib. III. Cap. XII. (Num. 9, 10.) Grotius.

3 Even tho’ he did it not with a Defign of de- ceiving; for every one ought to think of what he says. See Chap. XVI. of this Book, § 1.

This will be treated of Chap. XX. § 18. of this Book.

Even tho’ he did it not with a Defign of de- ceiving; for every one ought to think of what he says. See Chap. XVI. of this Book, § 1.

4. (1) Thus, when Men throw their Goods into the Sea, with a View of saving the Ship, they do defign to abandon the Poffeffors of them; on the con- trary, they will take them up, if they find them, or look for them, if they can’t where they lie. 

in which Cafe they act like a Traveller, who knows when he cannot carry on the Highway, intending to return with Affurances for carrying it off: This is the Decision of the Roman Lawyers, quoted by our Author in his Margin. Digist. Lib. XIV. Tit. II. Al Leg. Rhod. de jactu. — Leg. VIII. See alfo Lib. XLII. Tit. I. De adquir. rectum Dominio. Leg. IX. § 8. and Lib. XLVII. Tit. II. — De Par- tite, Leg. XLIII. § 11.

2 Digist. Lib. XIV. Tit. II. De Paritious & Leg. II. Principis. & § 1. See Puffendorf, B. III. Chap. VI. § 2. Note. 7. second Edition. But when there is any manifefl Reason, which shows, that the Note is not given up, or cancelled, with a Defign of releafing from the Debt, the Prefump- tion ceafes. Lib. XXII. Tit. III. De probatio. & praepunctumhus, Leg. XXIV. See Mr. Nodd’s excellent Treatise De Paritics & Tra(injactamen, Cap. II. p. 651, 652. Op. 3 Digist. Lib. XXIX. Tit. II. De adquir. ut ammitendi. hæredit. Leg. XV.

4 In a Law of the Digest, quoted by our Au- thor in his Margin, it is faid, that if a Minor acts as a Magiftrate, his Jurifdiction is not to be dis- allowed. —— So that, if a Minor, being Præter or Confult, pronounces Sentence, it will be valid, be- cause the Prince, who gave him the Paff, decreed that he fhould do every Act belonging to it. Lib. XII. Tit. I. De re judicat. Leg. LVII. See alfo Lib. I. Tit. XIV. De Officis Praetor. Leg. III. and James Godefroy’s Commentary on it, in his miscellaneous Differences.
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 Con-
jecture, whereby every one is supposed to intend that which he has sufficiently
given to understand. We may very well admit in this Sense what Ulpius the Law-
yer has asserted, § that Acceptation (or a verbal Discharge of a Debt) is founded
on the Law of Nations.

V. 1. Now, morally speaking, under the general Name of Adition are likewise
comprehended Omitions, confidered with the requisite Circumstances. Thus a
Man by his Silence, in Cafe he is upon the Spot, and knows what is doing, is
supposed to give his Consent to what is then done; which the Meijack Law does
also allow, Numb. xxx. 4, 5, and 11, 12; unless it appears that he was awed into
Silence, or any other Way hindered from Speaking. On this Foundation it is
that one reckons for loft, what the Perfon to whom it belongs has no Hopes of
recovering. Ulpius says, that Hogs carried off by a Wolf, or Things loft by
Shipwreck, caufe to be ours, not immediately; but when there is no Way of recov-
ering them, a that is, when there is no Room to believe that the Proprie-tor
considers them as his own; when there is not the least Sign that he intends to pre-
serve any Pretention to them. For if he should fend People to look for them, and
promise a Reward to the Finder, the Cafe would be quite altered. This again,
shoud 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
defigned to part with it altogether, and looked upon it no longer as his Property; un-
less there was any other Reafon, that manifestly hindered him from making
Oppofition. In this Sense Ulpius said, that a House is looked upon to be aban-
doned, on Account of the long Silence of the Proprietor. § You are in the
Wrong, (said the Emperor Antoninus Pius, in his Refcript) to demand the Interes-
t of your Money for the Time pafst. The long Space of Time which you have suffered to
expire, without demanding it, fhews that you have excufed your Debtor for it; be-
because it was to do him a Kindnefs, that you did not think fit to demand it of him.

2. There is nothing very like this in the Etablifhment of a Cufom. For
this too (letting aside the Civil Law, which regulates the Time and Manner of it)
may be introduced by the Subjects, if the Sovereign tolerates and connives at it.

3 DIGEST. Lib. XXIII. Tit. II. De damnum
infectis. Leg. XV. § 21.

3 DIGEST. Lib. XLVI. Tit. IV. De acceptation.
Leg. VIII. Only the Formalities of Acceptation,
belonged to the Civil Law. See Puffendorf, B.
V. Chap. XI. § 7, and Mr. Noodt, De Politia
et Transfagia. Cap. VIII. p. 671. as also his Pro-
habilia justice. Lib. I. Cap. II. in fine.

V. (1) DIGEST. Lib. XLI. Tit. I. De admir.
orum Dominis. Leg. XLIV. See Chap. VIII.
of this Book, § 3.

2 This Explication has been criticiied by the late Mr. Huber, in his Commentary on the Title of the Infitutes, De rerum Definitionis, &c. § 37. The Lawyer Ulpius, says he, does not speak of a
Man's having or not having Hopes of recovering what he has loft. He means only, that Things
thrown into the Sea, or carried off by fome wild Beast, do not ceafe 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 poiffible we may recover it; tho'
in that Cafe we cannot venture to flatter ourselves with fuch a Proff. As to the Question in ifelf, I
own it does not follow, from the ife Confinanciali-
tion 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 can-
not well be premiied, so as to secure the Right of
him who has found the Thing loft; but when there
is all the Reafon to believe the former Mafter will
never euer be known, nor have any Knowledge
what is become of his Goods.

4 Thomas I. 2. Qs. 97. Art. 3.
Chap. IV.  War and Peace.

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 suppoze the Content of the Prince.

3. But before we can reasonably presume from a Man's Silence, that he has relinquished his Right, two Things are necessary. One is, that he should know that another poiffeds what belongs to him: And the other, that he should be voluntarily silent, tho' he has full Liberty to speak. For when one forbears to act through mere Ignorance, it can have no Effect: And if there appears any other Reason that hindered him from acting, the Conjecture drawn from Silence can have no Place.

VI. Amongst several other Conjectures, that serve to verify the two Conditions just mentioned, the Length of Time is of great Weight to shew that the Silence of a Proprietor is accompanied with both. 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 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 impreffed, will wear off in Time, which offers him so many Opportunities of providing for his Security, either by his own Care, or by the Affifiance of his Friends; he may even fly out of the Reach of the Person feared; so that, at leaft, he may profess his Right, or, which is better, appeal to proper Judges or Arbitrators.

VII. But because 'a Space of Time, which exceeds the Memory of Man, is in a moral Sense taken for Infinite, therefore a Silence of so long a Continuance will ever be sufficient for a Conjecture, unless very good Reafons be alleged 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 the fame if he pleases, order the Revival of the Law for the Time to come, by the fame Right which he has to make entirely new Laws; but as to what has paffed 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 itfelf. In Process of Time it appeared that they contented themselves with choosing Men of the Province; and the Senators arreffted in Vertue of the old Law, to divifet all the Senators of their Charge, who were not Natives of the City where they enjoyed that Dignity. Pliny, who was Pro-Conful of Bithynia, conuifled the Emperor Trajan on that Affair, who anfwered, The Authority of the Law, and the long Practice adhered against Law, might carry you different Ways. It is my Paffion to accommodate the Matter thus; that we make no Innovation in Regard to what is paffed, but that the Propofal chojen from every City remain in Poffeffion of their Dignity, and that for the fufpeffion of the Empirical Law you proceed; the Force of which if we fhould attempt to revive by a retractive Effect, much Conjeftion must necessarily enufe. Lib. X. Epift. CXVI. See also a Diflertation of Mr. Thomasius, De Morum carum Jure Scriptura sententiae. § 52. &c. and Mr. SCHULTZ'S Diflertation on the first Part of the Dit- tury. Lib. I. Tit. III. § 25, 21, as likewise the Interpretation Turi, by Mr. Averani, Lib. II. Cap. 1.


VI. (1) I have fhewn in the second Edition of my PUFFENDORF, B. IV. Chap. XI. § 8. Note 3. that, without all these Prefumptions, which are most commonly not well founded, the Right of Prefcription may be drawn from the Nature and End of Property itlef, by Principles which fuppofe rather that the former Matter ought to be thought, than what he really does. 2 See the Chapter of PUFFENDORF, laft quoted, § 4. Note 6, and § 9.

VII. (1) Thus by the Roman Laws, such a Time is fufficient for eftablifhing a Right of Service; as, for Example, that of carrying Water through another Man's Grounds. Digest. Lib. XI. Tit. XX. De aquid quitid. &c. Artif. III. § 4. See ANDREWS KNIGHT, De iure Territorii. THEODORE REINING, Lib. I. Chap. V. Cap. II. Num. 5. OLDENDORF, Coff. III. Art. 2. GROTIUS.

This Time is called Immemorial, not because there can be no Monument by which it may appear that the Poffeffion was not originally acquired by a juft Title; (for no Time is fo long that fome Writing concerning it may not remain; and thus the Length of Time would not give Place to the bel grounded Prefcription) but because there is no Man living who remembers a Thing belonged to any other than the Poffeffor, and thofe from whom he inherited it, or has heard it faid by thoſe of his Time; while no other Title appears, that gives Room for difpofing the Right of the Poffeffor. Thus this Time may fometimes be pretty fhort, as after a bloody War, which has swept away great Part of the Inhabitants of a Country. See the late Mr. WEERDHOFF'S Diflertation, by me quoted, § 18, &c. as also the Jus Centurionium of Mr. Co- Ceius, jan. Tom. II. p. 487, &c. 2 This is obferved by BALBUS, De praefcriptio- natione; and COVARO DIVIUS on the fame Subject; as alfo REINING, Dict. Lib. I. Caf. V. Cap. XI. Num. 40. Concerning Time immemorial, fee the learned ANT. FAUCE, Confid. pro Ducatu Matthi- ferum. GROTIUS.
Of the Rights of

Book II.

Meches. 1 Conf. 90. Engil. in Ill. add. 1 v. c. 50.

exactly with an hundred Years, tho' they do not often very much differ; because
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
, when theylew 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. 1. It may be objected, that since all Men love themselves, and are fond of
what is their own, 'tis not to be supposed that they will be inclined to throw it
away; wherefore a mere Forbearance of Acting, tho' for ever so long a Time,
cannot be a sufficient Ground for such a Conjecture. But on the other Hand,
since we ought to judge charitably of all Mankind, ' 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 Dereckition.

9. As for Crowns, tho' they are commonly so highly valued, yet must we know
too, that they are great and weighty Burdens, and which, if not worn well,
expose the Prince to the Wrath and Retentment of GOD; and, as it would be
great Inhumanity to wait 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 deferving 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
mightly applauded the Saying of Antiochus, who returned the Romans Thanks 4,
for eating him of too large and troublesome a Province, by contracting his Do-

3 This is what JUSTINIAN calls Ανεκτος µοικ
εις της βασιλειας. In his fifth Edit., published among
the Notes on Procopius' Secret History. "Gro-

tius." 4 For a Generation, that is, is a Space of thirty
Years, τραμαφια, as PORPHYRY observes, in his
Questions on Homer. (p. 99. Edit. Barks.) Herodian,
speaking of the Secular Games, includes three Generations in one Age; (Lib. III.
Cap. VIII. Edit. Boccl.) PHILO the Jew says, there were ten Kings in Egypt, in the Space of
three hundred Years. De Legat. and PLUTARCH
that there were fourteen at Lacedemon in five hun-
Wch.) JUSTINIAN refutes Permission for bringing
a case against a Minor to a Trial, because four Ge-
rations had passed since the Fact in Question.
Novell. CXLIX. (Cap. II.) Grotius.

There is some small Variation in the Number of
Years, which the ancient People of the East, and
the Greeks, included in a Generation; but com-
monly they kept pretty near to thirty Years, and
made an Addition of three or four Months, in Or-
der to bring the three Generations exactly to a
hundred Years. See Mr. Le Clerc, on Guellai
v. 1. and v. 16. as also the Origenes Apianee,
by the late Mr. Perizonius, Cap. XI. p. 175.
Ct. and BOELLER'S Notes on the Pageage of He-
rodian, quoted by our Author. I do not find in
Philo, what is here produced as from his Treatise,
De Logastin, 5 Livy, Lib. XXXIV. Cap. LVIII. Num.
10.

VIII. (1) It has been very jutly 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 Poffelior bond Fide, as I have
flew on Penfendor, B. IV. Cap. XII. § 5. Note 9. second Edition. So that the Prefumption,
or Kind of Abolition, mentioned by our Author,
is by no Means necessary, since after the Expi-
ration of the Term of Prefcription, the Poffef-
sor, having acquired a real Right, is guilty of no
Crime.

2 The fame is to be said of this Aniver, as of
the foregoing. Besides, it is more proper for con-
fiding a Prince, who has lost his Dominions, with-
out 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
Fendorf, 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 Litus. I imagine
he meant the former, where the Philosopher frequent-
ly employs the Comparizon of a Pilot and Sailors,
with the Government of a State; but without ap-
plying it to the Subject before us. All I can find
there, which has any Relation to it, is what Pla-
to 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 its, as they
now do to get it into their Hands. p. 347. Tom. II.
Edit. H. Bift. But in the sixth Book of the same
Treatise, p. 438. we find a Comparizon nearly
resembling this, which is too long to be inferred here.

4 Valerius Maximus, Lib. IV. Cap. I.
Num. 9. extem. See Cicero's Oration pro Deji-
tarn, Cap. XIII.

5 Jnnoab, the Son of Saul, seems to have
had the same Sentiments. Grotius.

Our Author, without Doubt, alludes to what
Jnnoab said to David, in the Defart of Zeph,
1 Samuel xiii. 17. Fear not, for the Hand of
Saul, my Father, shall not find thee; and thou shoul
be King ever after, and I shall be next unto thee.
Here I cannot forbear taking Notice of the ege-
rgous, and laudable, to say no worse, of the Commen-
tator Boeller, who has the Affiance to treat
this short Remark of our Author as injurious
and profane. It is not only to give on what so harth and
minions. Among several bright Passages in Lucan, this is none of the least beautiful.

Tantum Novorum

Proventu fectorum quaerat ueter imperat Urbi?

Vix tanti fierat Civilla Bella movere

Ut Neuter.

Must such a Number of new and unheard of Crimes be committed, to decide which of these two (Cesare 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 conduct to that End are to be reckoned favourable. For if Aratus Sicenius' thought it hard for private People to lose those Politicks which they had enjoyed for fifty Years, how much more reasonable is that of Augustus, who pronounced him a good Man, and a worthy Citizen, who is not for making any Alteration in the present State of publick Affairs; and who, as Alcibiades says in Thucydides, ποιόν ἔξωθεν τις θεολόγως, τότε συνάρχεται, prefers the same Form of Government as was delivered down to him; which Socrates terms, τὸ λαϊκὸν πολέμου διάσφαλον, 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 pleas'd with the present State of the Publick.

4. Tho' what we have urged were not sufficient to answer the Objection, of every one being deviser of preferring 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.

and uncharitable a Censure is grounded, since Grorius 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 choleric Grammarian, that Jonathan is cleared of all injurious Suspicions of Cowardice, and of all other Things 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 be, 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 pleasan't to find Boecius afterwards owning, as a Favour done to our Author, that he might mean that Jonathan to Sentiments of Renunciation to the Divine Will joined Sentiments of Modesty, founded on the Difficulty of supposing it to be a great Weight as the Government of a Kingdom.

6 Phot. Lib. II. ver. 60, &c.

7 (Cicero, De Offic. Lib. II. Cap. XXXII.) Thus at Athens, when the Peace was concluded, Thucydides left the Politicks as he found them.

Grotius.

I know not where out Author found what he says of Thucydides. 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 in the Troubles, and that all Spirit of Animosity should be laid aside. This is all that is reported by Xenophon, Hist.

Grec. Lib. II. in fine. Diiodorus Sicul. Lib. XIV. Cap. XXXIV. Aristides, Orat. de juid. Lag. p. 271. Edit. Bafii. 1572. Justin. Lib. V. Cap. X. Num. 10. Var. Max. Lib. IV. Cap. I. Num. 4. extra, &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 Bonogr. in a Note on the Peace of Justinian, which I have quoted, produces the Pausage of Thucydides, as an Example like what Thucydides did.

8 This Saying is recorded by Macrobius, with several others of the same Emperor, and the learned Gronovius has not failed of pointing out the Place. Saturn. Lib. II. Cap. IV. p. 354. 355. Edit. Jacob Gronv.

9 Thucydides, (Lib. VI. Cap. LXXIX. Ed. Oxon. Iocrateres, Orat. in Calpimach. Cicero, De Leg. Agrar. contra Gall. (Orat. III. Cap. II.) Livy, Lib. XXXV. This left Politick does not contain exactly the Thought which our Author attributes to Livy. The Historian there relates historically, that while the Etolians were thinking of revoltong from their Alliance with the Romans, and engaging the other States of Greece to do the same, it appeared that the hospitable Part of the principal Men of each State were in the Interest of the Romans, and were pleas'd with the present State of Things. Cap. XXXIV. Num. 3.

IX. And
IX. It appears, that accident to any Confinement of all personal or movials of Possession transfers and confiitutes a Property.

IX. And perhaps it may, with a great Deal of Probability, be faid, that this is an Affair not founded on bare Premption only, but on an arbitrary Law of Nations, whereby it was established, that Possession, Time out of Mind, without Interruption or Appeal, should absolutely tranfter a Property; for it's reasonable to fuppofe, that Men might agree to that, which would fo much contribute to the common Peace of Mankind. It must be obferved that I fay, A Possession, without Interruption; that is, as Subpofition in Leve speaks, has been held by one and the fame perpetual Tenor of Right, without any Interruption whatever. Or, as the fame 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 juftly alluded that Exception in Difpute which they had about some Lands with the Carthaginians, to whom they replied, That according to Times and Occafions, fometimes they, and fometimes the Kings of Numidia, appropriated to themselves those Lands; and that they had always been in the Hands of the Stronger.

X. Whether the Laws not yet born, may or not, in this Manner, be derived of their Right.

1. But here another very intricate Question arises. Whether those who are not yet born, can by fuch a tacit Dereliction or Forfaking, lose their Right? If we fay that they cannot, what has been already advanced will not much contribute to the quiet Enjoyment of Crowns and private Possifions, since most Kingdoms and private Estates are of fuch a Nature, that they ought to pass to Pofterity. And if we aflirm that they can, it looks a little strange, how Silence fhould prejudice thofe who were not capable of Speaking, because not yet in Being: or how what one fhou'd be a Detriment and disadvantage to another.

2. In Order to clear up this Difficulty, it muft be obferved, that he who is not yet born, can have no Right, as that Subftance which is not yet in Being has no Accidents. Wherefore if the People (from whose Right the Right of Government is derived) fhou'd think fit to alter that Will, they cannot be conceived to injure thofe 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, fo may they alfo be fuppofed, in certain Cases, to have tacitly changed it. If then it be granted, that the Will of the People is altered, whilst thofe who might be expected to come hereafter have no Right; and the Parents too, from whom thofe may defend, who might have had a Right in their Time to the Succeffion, have renounced that Right; I fee no Reafon why another may not take Possession of it, as of a Thing relinquitshed and abandoned.

3. What we are talking of is from the Law of Nature; for in the Civil Law I am fensible, that as other Suppoftions, fo this alfo may be introduced and fancied, that The Law perfufes thofe who are not yet in Being; and by this Means pro-

XI. (1) Nicopehors Gregoras reports, that the Greek Emperors had given the City of Plocea to the Ancestors of Catullus, on Condition that each Succesfor fhould give a Declaration in Writing, that he held that City only in Quality of Administrator, and Length of Time fhould exclude the Imperial Right. Grotius.

2 This arbitrary Law of Nations, is as little necessary as hard to prove. The Whole comes to this, that this Prefcription being authorized by the Opinion and Custom of the Generality of Nations, it is a favourable Prefumption, which gives Room to believe this Right is founded on some evident Principle of natural Laws.


When he who would have tranferred his Right to his Deceafants, then unborn, renounces it either expressly or tacitly, and the People knowing and feeing this, do not oppofe it, tho' in their Power; in that Cafe they are raionably fuppofed to content to the Renunciation, and confequently, to change their Mind.

3 History furnifhes us with feveral Infiances of fuch Renunciations. See a remarkable one in the Perfom of Lewis IX. King of France, who renounced for himself and his Children, all the Right he might have to the Kingdom of Cyflife, by his Mother Blanche. Mariana, Hisf. Hispan. Lib. XIII. Cap. XVIII. Grotius.


4 This is done by Civil Law, in Regard to an Inheritance, for which no one yet pretends himself. Grotius.

According to the nice Principles of the Roman Law, an Inheritance of which no one has yet taken Possession, is fuppofed to repreffent the Deceafed, and to continue his Right of Property, fo that it paffes from it to the Heir; for which Reafon it is sometimes called the Mifeftis of the Estate, as if it were a red Perfon. Digest. Lib. XI. Tit. I. De ad interim resum Dominus. Leg. XXXIV, and Lib. XLIII. Tit. XXIV. 2 Leg in uti eleum. Lib. XIII. § 5. See Anthony Fauré, Conflexi. Jur. Civ. Lib. XIV. Cap. 20, and De Errorib. prae- munit. Dec. III. Err. 3.
vants 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 Publick. Therefore it is generally thought, that the Rights which are devolved, not by Succession to the Rights of the last Possessor, but by virtue of the primitive Inheritance, may be acquired after a sufficient Space of Time and this that able Lawyer COAVRUS, supported by substantial Reasons, extends to the Rights of Majorage, 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 fo, that those who shall hereafter be, and should have been entitled to it, may have a personal Action against them who lost it by their Neglect, or against their Heirs.

XI. It is plain from what has been said, that one King may acquire a Right of Sovereignty, to the Prejudice of another King, and one free People to the Prejudice of another free People, as by an express Consent, so also by a Dereliction, and that taking of Possession which follows it, or which receives some new Force and Virtue from it. For tho' it be an allowed Maxim, that What is originally invalid, can never be made valid by a retrospective Effect; yet does it admit of this Exception, unless some new Cause, capable of itself to create a Right, shall intervene. Thus the 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, 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.

Which requires that Possessions should not be disturbed on slight Occasions.

6 That is, when the Succeeder has been regulated from the Beginning, so that every one of those, who succeed in their Order, holds his Right, not from his Predecessor, who could not not bow 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.

If any one to whom the Fief devolved, not having Children, yields his Right, in what Manner ever, to another, who ought not to succeed till after him and his Children shall be born to the former, after the Time of the Preemption expires, are not admitted to demand the Succeeder. The Case is the same when the Children are born before the Time of Preemption 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 Preemption of thirty Years, termed Prescriptio longissimi temporis; for our Author means that, those whose Opinion he produces, owning, as well as others, that the ordinary Preemption of ten Years, in regard to Persons present, and of twenty Years in regard to the absent, is not sufficient in this Case. See CIVIL, on FEUD. Lib. IV. Tit. XIV. Quando aequatus ad Feudum submittatur, &c. (II. 26. § 5 Edit. Vol.) and Tit. XLIII. De Capitulis Conradi Regis, &c. (II. 42. Vol.) as also ANDREW GALL. Oberfl. Pratic. Lib. II. Obf. 159.

8 Majorage. It is a Right established in Spain, by Verres on which the Eldest of the Family alone inherits Counties, Manors, Right of Feoffment, 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 Preemption there specified. See FERNANDO VASQUEZ, a Spanish Writer, De Successionibus, 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 the Left 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 Predecessor of the Estate subject to a Feoffment of Trust, continued in peaceable Possession of it to the Time of the Preemption. A Law of the Code is objected on this Occasion, Lib. VI. Tit. XLIII. Communita de Legatis, &c. Leg. II. § 3, from which it is inferred, that a Possessor, whether a Foreigner, or one whole Right to a Feoffment of Trust is yet to come, cannot prescribe to the Precedence of the Person, 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, DeErratis Pragmat. Decad. LXXXVIII. Err. 5, &c.

XI. (1) DIGEST. Lib. I. Tit. XVII. De diversis Reg. Jur. Leg. XXIX. See JAMES GODFROY's Comment on that Law; and PUTTFORD, B. III. Chap. VI. § 14.

2 Concerning all this see HUBER, De Jure Civitatis, Lib. I. Sect. III. Cap. IX.

3 See VASQUEZ, Contrav. Ilius Lib. I. Cap. XXIII. § 3. Lib. II. Cap. LXXXII. § 8, &c. as also PANORMITAN, Lib. I. Conf. LXXXII. and PERGRINIUS, De Juris Fisci, Lib. VI. Cap. VIII. § 10. GROTIUS.

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XII. 1. It
XII. Whether the Civil Laws of Ufucaption or Prescription, and Precedent, oblige him who has the superior Right, to alter his Subject to Laws, or to a Man subject to Laws, and a Power, at least a tacit one, required in the Legislator. No Man can lay himself under the Obligation of a Law, that is, to which he may be subject, as coming from a Superior. Upon which Account it is, that Legislators have a Right to change their own Laws. A Man indeed may be subject to his own Laws, indirectly, and by Reflexion, as he is a Member of 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, § 2, 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 Concurrency of the Will; because it is not to be supposed, that Legislators are willing to include themselves, unless where both the Matter 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 essentia 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 les: Wherefore too, the Civil Law that does not authorize the Acquisitions made by a Space of Time, does no Ways regard the supreme Power. It is true indeed, the People, when they first infringe a Power with this Power, may, if they please, declare the Manner and Time in which the Right of Sovereignty, if so long neglected, should be forfeited; which Determination of the People ought not to be violated, even by the Prince, tho' invested with the supreme Authority; because it does not respect the Sovereignty itself, but only the Manner of holding it: Which Distinction we have spoken of somewhere else.

XIII. But as for those Things that are neither essentia to the supreme Power, nor natural Properties of it, but may be naturally separated from it, or at least be communicated,

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 fearing 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 Gronovius's Criticin 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, in Note 4. on PP. 26. Boden, Chap. VI. § 4.

communicated to others, they entirely depend on the Civil Laws of every People that regulate Ufecription 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 Virtue of a natural Right, to which Sovereignty is subject.

XIV. 2. 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, either by Force, or by Prescription; 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, Man 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, as the Time when they establisht the Sovereignty, or afterwards, that they may confer a Right which does not for the future depend on their Will. King Agrippa in Josephus, in his Speech to the Jews, who for their preposterous Delire of recovering their Liberty, were filled with Zeal, tells them, 'It is now too late to aim at Liberty. It was formerly your Duty to have fought for the Defence of it. It is hard to expel one's Self to Liberty, and Resistance in Order to prevent it is lawful. But let us, who, once vanquished, revolt, not be to be called a Lover of Liberty, but an infatuated rebellious Slave. And Josephus himself, to the same Folks, 'It is glorious to engage and draw in the Cause of Liberty,' but this should have been done long ago. For when People have been once overpowered, and have for a great While submitted, to shake off the Yoke then, is to act

mainly'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. Tho- masius rejects this Difficultion, 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 their 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, 'Quaest fcripta Regalia, in which we have an Enumeration of several Sorts of Rights of Sovereignty annexed to the Royal Feifs. 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 Difficultion of Regalia majora and minora, understanding by the latter, those specified in the Title; and by the former those there omitted. Now a Vaill being possessed of the useful Domain of the Fief, and it being in his Power to acquire the Fief itself, or by Precedent, to the Prejudice of his Lord; the Lawyers, who, almost till Gros- tius's Time, very often confounded Vaillals with Subjects, Lid therefore, that the Regalia minora might be alienated, and acquired by Precedent. The old Kings of the Franks, from whom came the Laws of Customs of Feodal Right, attributed to the Lombards, found by Experience, tho' too late, how dangerous is it 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 Processes of Time, drawing the Regalia majora after them; so that fe- veral Subjects have set up for real Sovereigns. See Mr. Tommasi's Notes on Huber, De Jure

Graecitatis, 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 Title to the Rights of Sovereignty, either as it exists now, or 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 ei- ther such Rights as relate to the Exercise of some publick Office with which the Subject is invested; and in that Case, he does 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 Privi- leges granted expressly, but without any Clause of Irrevocability. See the same Author's Notes on the same Book, p xxi. and his Dissertation, De Praescrptione Regalium ad Fera Subditorum non pertinentes. Printed at Hall in Saxony, 1626.

XIV. (1) That is, so long as the Person, on whom the Right is conferred, keeps within the Bounds prescribed either expressly or tacitly.

2 Bell. jud. Lib. II. Cap. XXVI.

3 Ibid. Lib. VI. Cap. XXV. We find almost the same Words in the Comment of Plutarch's Speech to the Milites. Radevic. Lib. I. Cap. XL. Grotius.

1
Of the Rights of

Book II.

like Madmen and Depraveds, and not like Lovers of Liberty. And 'twas this very Anwer that Cyrus * made formerly to an Armenian King, who cloaked his Rebellion with a pretended Delire of regaining his ancient Freedom.

2. However, I see no Reafon to doubt, but that a long Forbearance in the Prince, such as we have above describ'd, will justify Subjects returning the publick Liberty, upon a Prefumption that he has quitted the Crown.

XV. As for those Rights, which are not daily exerciz'd, but only once, and when it is convenient, as the Right of recovering a * Pledge by paying, etc. those thofe Rights which he has undertaken to explain; from which, as in themselves, are subjed to Precription. The Definition which the Lawyer, against whom I am defending him, has pretended to put in his Room, instead of being more clear and exact, is equally obfure and falf, as Mr. THOMASUS observes, in his Notes on this Place; and as is thorn alo by Mr. de TOULLEV, my very much honour'd Colleague, in a learned Difertation, De Jus necemr Facul'tatis, in which the Proprietors have been very fally handled, and difcard'd from their Right. But that Lawyer, and fuch as approve of his Criticism, have not obferved that those Words contain only Part of the Definition, or rather of the Divifion, here propofed by our Author: for explaining the Nature of impreffcriptible Rights, of which he treats in few Words. In the Summary of this Chapter, he calls them in general, Qua femur Facul'ias, or Rights which confit in a bare Power of doing fuch or fuch a Thing; but in the Paragraph itfelf, he plainly reduces them to two Claffes, the latter of which is more extensive and confiderable, inforrn the what he fays of that, ought rather to be considered as a Definition, than the Definition he gives us of the other. According to him, there are fome Rights which we ufe only by one fingle Act, which is limited to no Term, and concerning which, we may exercize at any Time, and have the Liberty of deferring it. Thofe are the Rights here firft specified; and of which he gives, for Infance, the Right of redeeming a Pledge, by paying what was borrofd on it. See the following Note. There are others, which are the Refult of every Man's natural Liberty to difpofe of his Actions and Goods, and of all his Rights in general, of what Sort foever, fo long as he has not either exprèsly or tacitly renounced any Part of that Liberty. Thofe are what he immediately stiles Term Jura Libertatis: They are both called Jura mora Facul'ias, becaufe no one has a Right directly or indirectly, to require we should make Ufe of them, before a certain Term, or during a certain Space of Time, as Sir, as we have on us an Obligation to make Ufe of them, if we would not lofe them. This Necessity may proceed either from our own Confent, as when we engage to redeem at a certain Time the Pledge delivered to a Creditor; or from fome Law, whether natural or civil, as in the Cafe of Precription, which in itfelf is founded on natural Law, and for the Term commonly regulated by the Civil Law of each Country; or laftly, from the Will of him who has permitted fomthing which he might have hindered, or granted a Privilege which he might have denied, on Condition of ufeing fuch Permiilion or Privilege from Time to Time, or within a certain Space of Time. Thofe, I think, were our Author's Notions in this Affair; and when thus propof'd, they are fufficient for diftinguishing the Rights of the fool who are not daily exerciz'd, but only once, and when it is convenient, as the Right of recovering a * Pledge by paying; etc. this expalined.

4. Grop. Lib. III. Cap. I. § 6, 7. XV. (1) The late Mr. HUBER, in his Pra
tesim ad Pandectar. Lib. XX. Tr. V. Quibus multis Iugus ut Hypoth. fuit. Num. II. confirments this Definition of our Author. It is not complete, fays he, for the Right which a Proprie
tor hath to claim his own Goods, poffefiod by another, and the Right which a Creditor hath to re
demand Money lent to his Debtor, do not confit in a Series of repeated Acts; they are both exerciz'd by a fingle Act, and when a Man has a convenient Opportunity of making the Claim or Demand; and yet neither of them relate to the Res mora Facul'tas, in Quoition; since the Poffedior and the Debtor are perfectly defpof of the Proprie
tor, and the Creditor. But that Lawyer, and fuch as approve of his Criticism, have not obferved that those Words contain only Part of the Definition, or rather of the Divifion, here propofed by our Author; for explaining the Nature of impreffcriptible Rights, of which he treats in few Words. In the Summary of this Chapter, he calls them in general, Qua femur Facul'ias, or Rights which confit in a bare Power of doing fuch or fuch a Thing; but in the Paragraph itfelf, he plainly reduces them to two Claffes, the latter of which is more extensive and confiderable, inforrn the what he fays of that, ought rather to be considered as a Definition, than the Definition he gives us of the other. According to him, there are fome Rights which we ufe only by one fingle Act, which is limited to no Term, and concerning which, we may exercize at any Time, and have the Liberty of deferring it. Thofe are the Rights here firft specified; and of which he gives, for Infance, the Right of redeeming a Pledge, by paying what was borrofd on it. See the following Note. There are others, which are the Refult of every Man's natural Liberty to difpofe of his Actions and Goods, and of all his Rights in general, of what Sort foever, fo long as he has not either exprèsly or tacitly renounced any Part of that Liberty. Thofe are what he immediately stiles Term Jura Libertatis: They are both called Jura mora Facul'ias, becaufe no one has a Right directly or indirectly, to require we should make Ufe of them, before a certain Term, or during a certain Space of Time, as Sir, as we have on us an Obligation to make Ufe of them, if we would not lofe them. This Necessity may proceed either from our own Confent, as when we engage to redeem at a certain Time the Pledge delivered to a Creditor; or from fome Law, whether natural or civil, as in the Cafe of Precription, which in itfelf is founded on natural Law, and for the Term commonly regulated by the Civil Law of each Country; or laftly, from the Will of him who has permitted fomthing which he might have hindered, or granted a Privilege which he might have denied, on Condition of ufeing fuch Permiilion or Privilege from Time to Time, or within a certain Space of Time. Thofe, I think, were our Author's Notions in this Affair; and when thus propof'd, they are fufficient for diftinguishing the Rights of the fool who are not daily exerciz'd, but only once, and when it is convenient, as the Right of recovering a * Pledge by paying; etc. this expalined.
Chap. V.

War and Peace.

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.

We have a Right, not only over Things, but over Persons too, and this Right is originally derived from Generation, from Consent, from some Crime. By Generation, Parents, both Father and Mother, acquire a Right over their Children; but if their Commands should run counter, the Father's Authority is to be preferred in regard to the Dignity of the Sex.

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.

See my first Note on Pufendorf, B. VI. Chap. II. § 4.

2. See Pufendorf, B. VI. Chap. II. § 4.

3. Seneca maintains, that the Father sake the first Right, over his Children, and the Mother the second. Controv. Lib. III. Controv. XIX. (p. 255. Edit. Ebrard. 1752.) 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. See I. ad Corinthi. xi. 3. He elsewhere allows the Wife

3 B 10
II. A Definition of Seafan in Children. Wherein Children's Property in Things.

II. 1. And here in Children, three Seasons are to be carefully observed and distinguished. The first Season, that to which Aristotle, in the Tragedies, as Aristotle speaks, when they have no property, a Definition, as he elsewhere calls it. The second Season, that of ripe Judgment, in which the Child is yet a Member of the Parent's Family, when as soon as he is separated or gone from it, as the same Aristotle expresses it. The third, when he has left that Family. In the first Season, 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 Aristotle's Opinion and Observation, the Children not having the Use of Reason, and being like the Brutes, need to be educated and conducted by the Reason of another. And none but Parents are naturally intrusted with this Charge.

2. Notwithstanding this, Children in their Infancy are, by the Law of Nations, capable of having a Property in Things, tho' by Reason of that Imperfection of Judgment we spoke of, they cannot exercise that Right. They have a Right, as Plato speaks of Children, that is, when they are capable of having a Property in Things, the second Power, attended with Authority, and a great Share of Honour; but that the Husband has somewhat more. St. Augustine, writing to Eudoxia, asks her this Question, Who doth not know that your Son, because born of lawful and beneficent Wedlock, is more in the Power of his Father than in yours? E. C. C. C. C. N. II. 259. One of the Byzantine Historians, speaking of Auranus Palaiologus and Irene, observes that, among other Reasons, it was urged, that A Father has more Power than a Mother, and that there was no Reason why the Father's Will, in Regard to his Child, should not take Place, even preferably to that of the Mother. NICOPHORUS CREOR. C. VII. Concerning the Respetc due to a Mother. See Code, Lib. VIII. Tit. XLVII. De Patriis Pratiffatis, Leg. IV. Grotius. II. (1) Politic. Lib. I. Cap. X. p. 311. Edit. Paris. 3rd Ed. Nicem. Lib. II. 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. IX.

4. At that Age Children belong to their Parents, in the same Manner as their Possessions, say MAIMONIDES, Can. Pennitential. Cap. VI. § 2. Grotius.

5. The Author quotes this Passage in Latin only, according to the own Version of it, in the Extracts ex Traged. & Comed. Grat. p. 34. In the Original it stands thus,

6. "To me I say you, &c., in Latin.


Carlyle. (p. 275. Edit. H. Steph.) To which may be added, what is said in the Institutes, Lib. I. Tit. XX. De illia. Tutors, § 6. It is convenient to the Law of Nature, that Children (impudiciora) should be under Guardianship, that thus he who has not arrived to a perfect Age may be governed by the Care of another. 7 Tit. II. 15. Sed quod exstant. Thus our Author expresses himself. The whole Passage of Plutarch, from whence this Distinction is borrowed, runs thus, Grandeur confits not in the bare Possession of Things, but in the Use of them; for even Infants inherit their Father's Kingdom and Authority, De Funere. Alexandri. Orat. II. p. 337.

2. Tom. II. Edit. Wech. 7 All those Distinctions took Place as the Roman Law, which expressly forbids Women having their Children in their Power. Institut, Lib. I. Cap. XI. De Adoptione, § 10. See Mr. Nourse's Observ. 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 Proces of Time. See the Interpreters on the Institutes, Lib. II. Cap. IX. Per quos paries mola acquirat. 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 Patriis patris, init. Therefore those who are born from a criminal Concupiscence, 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 Virtue of the Fatherly Power, established by the Laws.

III. (1) Thus MAIMONIDES explains the Law, which occurs in the Book of Numbers, chap. xxx. ver. 6. Grotius.
only, because it is but just, that what makes a Part of the Whole, should conform itself to the InteHect of the Whole. As for other Actions, Children then have 

Apoll. • ch'.lrdrcngo out the GroTius. As 1 on 75. Ad 1 have as altogether 3 Family., the no all a fecond Cafe it See See bebehave Pufendorf, if even in thefe 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 thofe above are, but proceeding from natural Affection, Reipet, and Gratification, does not invalidate what is done contrary to the Will of Parents; no more than a Donation made by a lawful Proprietor, would be null and insignificant, becaufe granted against the Rules of good Husbandry.

IV. During both thefe Seafons, the Right of Governing comprehends alo the Right of Chaffifying, fo far as Children are either to be forced to their Duty, or corrected and reformed. As to what regards more rigorous Punishments, we shall examine that in some other Place.

V. But, tho' the paternal Authority be fo 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 obftru it, pawn his Child, and fell him too, if there be a Necessity for it, and no other Way of maintaining him; as it was authorized by an antient Law of the Torben, (which Aelian mentions in his 2nd Book) who had borrowed it from the Phyrgians, and they from the Hebrews; and which very Law, Apollonius tells us, in his Epiftle to Dionitian, obtained among the Phyrgians too. Indeed Nature itfelf is supposed to grant a Right to every Thing, without which, what the commands, cannot be compaflled and brought about.

VI. In the third and laft Seafon, the Child is altogether *ψυχικος*, at his own DispofiH, that Obligation, however, of Affection and Reipet, remaining fill in Force, becaufe the Reafon of it is perpetual, and never ceafes. From whence it follows, that the Actions of Kings cannot, on the Account of their having their Parents living, be null and void.

VII. Whatever Authority Parents have beyond what we have now flated, proceeds from fonie 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 difannul their Vows, was not perpetual, but lafted only fo long as they continued in their Father's Houfe. Thus the Roman Citizens had a

2 See § 10. of this Chapter; and B. III. Chap. XXXIII. § 3. As alfo what I have laid at large on this Subject, Not 2. on Pufendorf, B. III. Chap. VII. § 6. feu thefe Edition; and my two Let ters against Mr. Du Tremellai, infected in the Journal des Savans, Ann. 1712, 1713.

V. (1) Jornandes obferves, that Parents judge it better that Liberty fould be left them Life; when they fell their Children, in Order to have more prudently provid'd for, rather than keep them to fave it. Hist. Goth. (Cap. XXVI. p. 75. Edit. Vulcan. 1557.) I find the Mexicans had a Law which allowed of this. Grotius.

In the General History of the West Indies, written by F-rated Lopez de Gomara. B. II. Chap. LXXXVII. we read that in Mexico, the Fathers might fell their Children for Slaves, without any Divifion or Exception of Cafes; as all their Men and Women might alfo fell themselves. On that Point the Example would not be to the Purpofe.

2 That Law requires the Thing fhould be done by the Authority of the Magiftrates, who fhould oblige the Purchafe of the Child to make a fure Promife to keep the Child well, till it was in Condition of doing him Service. Aelian, Var. Hift. Lib. II. Cap. VII.

The Writer here quoted does not speak precise ly of Children. Apollonius only fays, It is com mon among the Phyrgians to fell their People; and if any of them fallen into Slavery by Force, they give themselves no Concern about redeeming them, Vit.


V. Of the Right of making Parents pay for Children go out of the Family.

VII. Of the Difference between natural and civil Power of Parents.

VI. (1) Either they are private Matters, in which the King doth not act as King; and in that Cafe 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 lefs obliged to confult 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 Rejeft he is under the paternal Power. This is a Decision of the Roman Law, which, notwithstanding the executive Power it gives Fathers over their Children in other Cafes, confiders a Son as Mafter of a Family, when he is made a Magiftrate or Guardian. Digeft. Lib. I. Tit. VI. De. his, qui prius eftj anum juris font. Leg. IX. By the fame Law, a Son, as a Magiftrate, may even force his Father to fuch Things as belong to his Jurifdiction. Lib. XXXVI. Tit. I. De Senato, efconf. Terr. Leg. XIII. § 5. and Leg. XIV. In like Manner, tho' a Son always owes his Father Reipet, the Father is obliged to accept him, in what regards the Honour due to his Pofit. See Pufendorf, B. VI. Chap. II. § 12.

VII. (1) Seneca fays, that As it is advantageous for young People to be governed, the Law has put upon them a Sort of domicile Magiftrates, for directing their Conduct. De Bene. Lib. III. Cap. IX. Grotius.

Sort

Chap. V. 

War and Peace.
Sort of paternal Power over their Children peculiar to themselves, as long as they were not 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. 3. 11. a quoque quoque, &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 Epifletus Manual, a quoque quoque, &c. 5 The ancient 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 A ristotle 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 authorized by the Law of Nature.

VIII. 1. That Right over Persons which arises from Consent, is derived either from Affiliation or Subjection. The most natural Affiliation is that of Marriage; but because of the 1 Difference of Sex, the Authority is not equal; the Husband is the Head of the Wife in all conjugal and family Affairs; for the Wife becomes a Part of the Husband's Family, and it is but reasonable, that the Husband should have the Rule and Disposal of his own House. If there be any other Prerogative of Husbands, as the Privilege allowed them by the Jewish Law of invalidating every Vow the Wife made; and among some People, that of selling their Wives Goods: This is not founded on Nature, but on an arbitrary Establishment. Let us now see in what the Nature of Marriage consists.

2. Marriage then when 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 such 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. 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, Persians even of the greatest 1 Holiness had several Wives at once, and in 2 that Law too are some Precepts directed to those who have several Wives at one and the same Time; and the King is ordered not to multiply to himself too many Wives and Horses; where the Hebrew Interpreters remark, 3 that the King was allowed eighteen Wives or Concubines; and GOD

IX. (1) St. Chrysostom, speaking of Sarah, says, She endeavoured to comfort her Husband under her Bereavements, with Children by her Handmaid; for such Things were not then forbidden. (Hom. in Genet.) See the same Father on I Timothy, III. [and another Place in his Treatise On Virginity, already quoted, B. I. Chap. II. § 6. Note 5.] St. Augustine speaks of the Custom of having several Wives at the same Time as an innocent Thing, inexplicabilis conjuge. De Decr. Chrift. Lib. III. Cap. XII. and observes, that it was prohibited by no Law. De Creat. Dei, Lib. XVI. Cap. XXVIII. See also De Deor. Gortius, 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. Gortius.

2. Josephus says, It was the Custom of his Country to have several Wives at the same Time. Antiqu. Jud. Lib. XVII. Cap. I. Gortius.

3. See Selden, De Usure Hebrarum, Lib. I. Cap. VIII.
oberves to David, that he had given him 4 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 the 3 Priest. But this Liberty of passing to another Husband, is even by the Law of Nature so far to be refrained, as that no Confusion of Issue may thence arise. And from this came that Question which, as Tacitus relates, was formerly proposed to the Priests, Whether she who had conceived, and was not yet delivered, might lawfully marry? Among the Jews the Intervention of three Months was enjoined. But our Lord JESUS CHRIST has prescribed in this, as well as in many other Things, a more perfect Rule; according to which he declares 7 both him who parts with his Wife, — except

4. Josephus relating this, makes Nathan say, that GOD had given David Wives, whom he might lawfully and happily have. (Antiq. Jud. Lib. VII. Cap. VII. p. 237. Ed. Parv.) The Author of the Pelasgia Zelotara, 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. (Ed. 24. Col. 1.) Gronius.

See also Selden, De Jure Nat. & Gent. justa Digest. Etiamum. Lib. V. Cap. VI.

5. Leviticus xxi. 7. Nor was a Priest allowed to marry a Widow, as appears from Ver. 14. of the same Chapter. Philo the Jew, (De Monarch, cap. 827. Edit. Parv.) And most of the modern Interpreters understand this of the High-Priest, on Account of what goes before, Ver. 15. &c. But that it is spoken of all Priests without Exception, appears both from a Passage in Ezekiel xiv. 22. and from Josephus, both in his Explanation 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.

Gronius.

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 did not absolutely prohibit a High-Priest to marry a Widow, "that he might permit 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. 1076. 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 fame Remark. As to the Passage of Ezekiel, Mr. De Clerck, 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 Usura Hibr. Lib. I. Cap. VII. and De Succession. in Pontifical. Lib. II. Cap. II.


7. In Order to clear up this Matter, and at the same Time to demonstrate, it is the Opinion of our Author, 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 does 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 show 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, before that a Husband, who had not only separated his Wife, but also divorced her, was not obliged, according to the Law, to do it in a judicious Manner; when he accused his Wife of Adultery before the Judges, that was done with a View of having her put out of the State, not of obtaining a Divulsion of Marriage. Thus, when our Lord speaks of Adultery, as a just Cause of Divorce, he alludes either to a mild and merciful Husband, who is not disposed to bring his Wife to Punishment, who culpable ever the may be, as was the Case of Jephthah in regard to Mary; before he was able to conceive the miraculous Child of her Pregnancy; Or, a Husband, who had not sufficient Proof of his Wife's Crime to allure in Court, tho' he himself was persuaded of her Guilt, or had such Assistance of it as placed it beyond Doubt in his Opinion. On which St. Jerome says, that Whenever there is Adultery, or Ripudia of Adultery, the Wife may be divorced without Scruple. On Matthew XIX. p. 56. Tom. IX. Edit. Basili. 1637. Not that every Imagination of a turgid Mind doth authorize a Man to proceed to a Consequence to make Use of this Right; but he is not obliged to stay till he is furnished with all the Proof necessary in a Court of Justice, and according to the Rigger of the Laws. It is sufficient in this Case, that a just Mediator 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 had been twice, or three Times with other Men against her Husband's Prohibition, or without his Knowledge; that she lay a bare, and good Reasons, except at a Father's or Mother's House; or appeared at the publick Show against her Husband's Will. Justinian added the following Cases, if a Woman designedly caufed herself to miscarry, if she bathed with other Men, or talked of Marriage with another Man. See Coh. Lib. V. Tit. XVII. De Repudio, Sec. Leg. V, VIII. and XI. But our Author's Opinion, 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,
Of the Rights of the

Book II.

except for Adultery, and him who marries her, guilty of Adultery. And his Apostle and Interpreter, St. Paul, not only gives the Husband Power over the Wife's Body, which in the State of Nature all was allowed him, (οὐχ ἐξ ἡμῶν ἀλλ' ἐξ ἰδίων), &c. For he who is joined to a Woman, is, by the Laws of Marriage, Majler
merry a divorced Wife as Adulterers; supposing, for Example, such a Woman’s Virtue being in Danger, a Man married her out of Compulsion, would not this rather have been a commendable Action? We are therefore to understand the Words of JESUS CHRIST, as spoken of him, who marries a divorced Woman, before all Means are tried for reconciling her with her Husband, as the Apostle St. PAUL directs, 1 Cor. vii. 11. or, which is still worse, by their Wife filling 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, 1. He who shall put away his Wife, and marry another, commits Adultery; but he that 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 reconcile his former again, and thus gives her an Occasion, as far as his limbs, to abandon herself to an immodest Life, or engage with another Husband; thus we are to understand the Word ἐπισταμένος, which is rendered committed Adultery; but which ought to signify the same as ἐπιστάμενος, made 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 in the Law as long as her Husband lives, he doth not there speak of a Divorce. The Apostle design only to prove, that the Tie of Marriage doth not suffer after the Husband’s Death; and therefore the Woman may then marry again. The same Apostle giveth the same Thing, Rom. vii. 2, 3, both 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 Paphians 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 lawful in that Controversy for every Cause. Matt. xix. 5. Thus we find that our Author, in his Treatise of The Truth of the Christian Religion, first published in 1693; 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 Marriage, Lib. II. § 13. And in the Notes he quotes no other Passage of the Gospel, but only those Words of St. PAUL, 1 Cor. vii. 4. The Wife hath no 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 pithnous Notes on the Epistles, he explains those Words agreeably to the Sentence of the Gospel, which a Wife has to require that her Husband re- fuse her not the conjugal Duty; because by Virtue of Marriage she enters into a Society with him, which demands the reciprocal Use of their Bodies: But it is not so, if one of them can, and it is likely, 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 of Genius of the Gospel, which directs us to avoid what may cally be abused, than that of obeying any express Law of our Saviour or his Apostles. See Mr. LE CLERC, Hift. Eccl. Prolegom. Sect. III. Cap. IV. § 5. Nov. 9. p. 162. It is not as at all probable, that JESUS CHRIST designed to oblige such as had several Wives before they became his Disciples, to divest them all but one. And when the political Laws of MOSES were tacitly abrogated by the Declaration of Jesus, and the Jewish Government, as the Jewish and Christians were dispersed through the Roman Empire, where a Plurality of Wives was not allowed; it was not so apprehended that the Christians would revive the Practice of the Jewish Nation, which is yet left to be feared & prevented, since all the Laws both Civil and Ecclesiastical have so long prohibited Polygamy.

8 Omnibus.

9 Infiltrat. Diviu. Lib. VI. Cap. XXII. That Father adds in the same Chapter, that A mutual Felicity is to be observed; and that the Wife is to be taught Chastity, by her Husband’s Example, it being unwise 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. 590. Edit. Colm. seu LPhil.] ST. JEROME observes, that The Laws of CHRIST differ from the Laws of the Emperors; and the Prefects of St. PAUL, from those of Papinianus. The latter give a Loafe to the Debacheries of Men, and condemning only Fornication with free Women, and Adultery, allow of carnal Conversation with Slaves in publick Bribe; as if the Equality of the Part was 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. Bofiji.) GROTIUS.

10 Several wise Men of Antiquity have likewise preferred the Marriage of one Man to one Woman to Polygamy. EURIPIDIS maintains, that it
is best, and most grateful to GOD; and consequently, what has always been excellent and commendable; but not, that it is any Crime to do otherwise, because 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 Pharasc's Daughter, Psal. xv. 10. Forget thine own People and Fa-
ther's House. And tho' from the Injunction of so strict a Friendship, it is plain enough, that 'tis very agreeable to GOD, that this Union should be perpetual; yet can it not be proved from hence, that GOD did even then 11 command that this Engagement should not, upon any Account whatever, be broke and dispensed with. But it is CHRIST who has forbid Man to put aside 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 Ger-
mans were almost the only Barbarians, in his Time, who were contented with one Wife a-piece; and History furnishes us with an infinite Number of Examples of the contrary Practice, amongst the 13 Persians, and the 14 Indians. Among the 15 Egyptians, the Priests alone took up with one Wife. And among the Greeks, 

my Maid; it may be that I may obtain Children from her. And Abraham besought to the Face of Sarah, &c. Lib. I. De Abraham. Cap. IV. Gra-
tian has inferred this Passage, and another to the same Purpofe, in the Canon Law, Cauf. XXXII. Quoth. IV. (C. III.) Cujus arbitrarium aliqua sequa-
unc, &c. Grotius.

That Person had good Reason for saying Poly-
gamy was not prohibited in Abraham's Time; but then he ought not to call it Adultery (Adulterium) as he doth, in Regard to that Time; much less ad-
ance, that Adultery was then allowed. Here is at least a great Confusion of Ideas, and Such a Wrant of Extravagance in the Expression, as may lead an igno-
ranor Reader into an Error.

12 De morbis. German. Cap. XVIII. The His-
torians 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 Fa-
thion, than a Thing looked on as unlawful.

13 See BRIESEN, De Regno Perfarnas, Lib. III. 
15 His Account, indecently of the Civil Laws, it is certain it will frequently hap-
pen that a Man that cannot use the Liberty of Poly-
gamy and Divorce, without finning against some Virtue, and engaging himself in great Inconveni-
cies, in Consideration of which the Prudence of Legiflators has required an indiree Prohibition of a Plurality of Wives, and Divorces, except in cer-
tain Caufs, 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 
faid is, that it is one of those Things indifferent in 
their own Nature, which may be easily abused, like Play, and several other Diverfions, from which 
it is fadly to obtain, how little fovere we find our 
felves inclined to make a bad Ufe of them. See 
what I have said farther on this Subject, in my third 
Note on Book I. Chap. I. § 15. and Note 3, on 
§ 17.

11 Thus ST. AMBROSE, speaking of Polygamy, 
says, that GOD, in the terrestrial Paradise ap-
proved of the Marriage of one with one, but with-
out condemning the contrary Practice; because Sar-
rah said to Abraham, Behold now the LORD hath 
reftrained me from hearing: I pray thee go in unto

16 Among the Egyptians the Priests marry but 
one Wife; but other Men as many as they please. 
Edit. H. Steph. Our Author, who quotes this Pas-
sage in his Margin, refers likewise, in a little Note, 
to HERODIAN, Lib. II. He certainly means He-
rodotus; for the former Historian says nothing on this Subject; and the latter treats at large of the Manners of the Egyptians, in his second Book. 
Note the Author in his Direct Contrary; for, hav-
ing spoken of the Egyptians, who live beyond the 
Marines, he remarks, that Those who lived in the 
Moabites observe the same Customs as the other 
Egyptians; and among others, that of each having 
but one Wife, like the Canaanites. Cap. CXII. Let the 
Learned consider how to reconcile these two His-
torians, or which of them is to be credited.

Cecrops
Chap. V. War and Peace.

Cyrust was the first, as Athenaeus testifies, who "saw in Cypbe, 17 coupled one Woman with one Man; which tho', by the By, was not long observed, even at Athens, as the Example of 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 Jupiter, among these Romans, was never dissolved but by Death: However, it does not follow from all this, that they who did otherwise, before the publishing of the Gospel, were guilty of a Crime in so doing.

X. 1. Let us now enquire, what Marriages are valid by the Law of Nature: To form a right Judgment in which Affair we should remember, that 1 Not all Things which are contrary to the Law of Nature, are, by the Law of Nature, null and void; as is evident in the Case of a prodigal Deed of Gift; but only those Things which want the Principle that makes an Act valid, or which are attended with some lasting Effect, whereby the Turpitude of the Act is perpetuated. The Principle necessary to render an Act valid, is here, as in other human Acts, capable of producing a Right, a moral Faculty, joined with a sufficient Will. What Will is sufficient to constitute a Right, will be better enquired into, when we come to treat of Promises in general. As to the moral Faculty, there arises a Question about the Consent of Parents, whether that, as some People contend for, is in some Sort necessary by the Law of Nature to the Validity of a Marriage; but they quite mistake the Matter, for all the Arguments they bring for it, prove no more than that it is the Duty of Children to endeavour to obtain their Parent's Consent; which we readily grant too, with this Provifo, 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 the Romans and other Nations, which declare some Marriages to be void, where the Father's Consent was wanting, are not then founded on the Law forbbiden, neither by the Law of Nature, nor by any written Laws.

X. (1) See § 3. of this Chapter, Note 2.
2 East, in quibus vivam durat in effesto. Our Author, in his Note on Matthew xxii. 30, where he likewise treats of this Subject, expatiates himself, Ubi nullius turpitude est permanent. We shall explain his Thought by a familiar Example. He who pollutes another Man's Goods, which he has acquired unjustly, doth ill, not only in stealing, or otherwise letting 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 Poifferor 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 dishonour. The Consent of Parents is an exterior Thing, which doth not enter into the Efficence of the Contract of Marriage, except some Civil Law gives it that Force.

3 D Yet
Law of Nature, but the mere Will of the Legislators. For by the same Laws
the Mother, to whom however the Children do naturally owe a Respect and
Veneration, does not, by her not confessing, disannul the Marriage; nor even the
Father, if the 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 Difficulties 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 de-
determined by the Judgment and Will of 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 Ephes's
Marriage pronounced void, nor his Children declared illegitimate, for being mar-
rried without such Consent and Direction. Quintilian, with a Regard to what is
strictly and naturally right, expresses himself thus, 8: "If it be allowable for a Son to
do sometimes even against the Father's Will, what would otherwise deserve no Blame
at all, certainly that Liberty is never more necessary than in Matrimony."

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 dis-
vorced her; for till then his Property in her continues: But by the Christian Law, 9 till
Death breaks off the Engagement. And such a Marriage is therefore void, as well
because the moral Faculty is removed by the former Marriage, as because all the
Effects of it are criminal; every Act of the second Marriage being an Usurpation
of that which belongs to another. So on the other Hand a Marriage contracted 5
with him who has a Wife already, is void, by Reason of that Right which CHRIST
has allowed the virtuous Woman over her Husband.

XII. 1. The Question about the Marriages of those who by Blood or Affinity
are related, is a nice and difficult Point, and which has frequently been managed
pro and con, with no little Heat and Commotion. For whoever attempts to affign
certain and natural Reasons why such Marriages are unwarrantable, in the Manner

Yet is 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. Instit. Lib. I. Tit. X. De Nuptiis.

5 Nay, farther, the Will of the Grandfather, if he be free, has in his Cafe more Force than the
Will of the Father who is a Slave. This is deter-
mined by the Canon Law, Cauf. XXXII. Quaest. III. Canon unius. Grotius

5 An emancipated Son may marry, even without
his Father's Consent, and his Son shall inherit his
Estate. Digest. Lib. XXXII. Tit. II. De rei
nuptiariarum. Leg. XXV.

6 If a Grandfather, married, the Consent of his Fa-
ter 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
Pisistrati, and Antonius Fabrius. Jurisprud. Pa-
opinian, Tit. IX. Princip. IV. llatt. 2, & 4.

7 For it is not fit to subject the Modesty of a Vir-
ingen to the will of a Husband, says St. Ambrose, De Ar-
tribus. Lib. I. Cap. ule. This Sentence is by
Grafian inferred in the Canon Law, Cauf.
XXXII. Quaest. II. (Can. XIII.) Donatus, in
his Commentary on TERENCE'S Andria, (Advt. IV.
Scen. IV. ver. 2.) observes, that the Word yubam
is properly used in that Place, because the chief Pow-
er, in regard to the Marriage of a young Woman,
is in her Father. EURIPIDES makes Homework say,
Her Father shall have the Care of her Marriage,
and that, it is not her Betroths to make a Choice.
(Adsd: Nov. 987.) Here tells Leander, that She
cannot marry him, because her Parents were un-
willing. Muses, (v. 179.) Grotius.

Our Authors, in a Note on the Gospels, which I
have already quoted, says, that in Reality Children are
in nothing obliged to shew more Deference to the
Will of their Parents, than when their Mar-
rriage is concerned; as ARISTOTLE somewhere ob-
erves. But adds, that there are some Circum-
stances, which form a reasonable Exception in this
Cafe. 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 pro-
vide her with a Husband, or even formed against
her own Body, she was reclaimed innocent in Re-
gard to them, who were not allowed to diliberate
her on that Account. Novell. CXV. Cap. III.
§ 11. We know likewise what Care St. Paul
would have taken for avoiding the Inconveniences
of Inconvenience. 1 Cor. vii. 9. See Pufen-
doer, B. VI. Chap. II. Parag. 11.

9 ENGRAPHIUS, in his Comment on the An-
dria, Act. I. Scen. V. says, It is evident, that Chil-
dren may follow their own Will in disposing of them-
seves in Marriage. And CASSIODORUS thinks it
hard to lay a Restrains in the Affair of Matrimony,
from which Children are to be born. Varia. Lib. XVII.
Cap. XL. Grotius.

XI. (1) See Note 7. en Paragraph 9. of this
Chapter.

2 Consult the Note last referred to.
they are prohibited by the Laws and Customs of Nations, 1 will by Experience find it a Talk not only difficult but impracticable. For as to that Reason which Plutarch 2 in his Roman Questions offers, and St. Anselm 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 left useful is not merely upon that Account unlawful. Add to this, that it may possibly happen, that some greater Advantage, however great this may be, may interfere with and oppose it, and this too, not only in the Case which GOD in the Jewish Law has excepted, when a Man dies without Issue, in Order to keep the Eldest of their Anceffors still in the Family; on which Reason is founded another Regulation, wherein the Attick Law was conform to that of the Hebrews, 4 I mean, in reference to Virgins, who are sole Heireffes, called by them αἱδιασος, 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. 5 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’ he 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, 6 that In contracting Marriages we ought to consult the Right of Nature, and the Decency of the Thing, subjoined, that it was a Breach of that Decency to marry one’s own Daughter. Such Marriages

XII. (5) We may be convinced of this, on reading the fabulous 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 AMMART, in a French Tractate, entitled, Considerations on the Laws by which Nature has regulated Marriages, printed at Smarow, Anno 1648. The other is LAMBERT VELTHUYSEN, in his Tractatus Moralis de naturali Padre, & dignitate Hominis, in quo agitur de Incesto, Scuttitatione, Viti coe-putati, Conjugis, Adulterio, Poligamia, & Diuerditat, &c. Tom. I. of his Works, printed at Rotterdam in 1652. See also a Diferation by Mr. THOMAS- SUIS, De fundamentum de nuptiis causas matrimonii humanis reperios insufficentia; printed at Holf in Saxony, 1658.


3. For a short Regard has been had for Charity, that Men, to whom Concord is most useful and honorable, 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 divided among several Families for the improvement and strengthening of a Social Life. De Grot. Del. Lib. XV. Cap. XVI. This Palliate is inferred in the Canon Law, Can. XXXV. Quoit. I. Can. 1.

PHILIP the Jew employs the same Reason, where he speaks of the Marriage of Brothers and Sisters. Where is the Niceness, lays he, of returning mutual Friendships and Intermarriages 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 Conjunions, not inferior to those contracted by Blood. For which Reasons he (Moses) prohibited every other Marriage between Relations. De Legib. Special. p. 782. ST. CYRUS in reasons in the same Manner, Why do you shew the Extent of Law? Why do you utterly destroy the Foundation of Friendships, from which you might have Occasion to make another Friendship, by marrying a Wife out of another Family? On 1 Cor. xii. 13. Grotius.

4. If the Deceased left a Brother, he was obliged to marry the Widow. Dom. xv. 5. But in other Cases the Law forbids marrying a Brother-in-Law. Levit. xviii. 16.


6. See our Author’s Note on Matt. i. 16. and SAMUEL PETITT. Leg. Anti. Lib. VI. Tit. I. 7. The Question turns on Inheritance of Lands, and the nearest Relation was obliged to marry such Heireffes. See Num. xxvi. 8.


9. DIGEST. Lib. XXIII. Tit. II. De Rito Nepo- tiorum, Leg. XIV. § 3. PHILIP the Jew reason 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 undefiled, as a Thing sacred: To pay no Respect to the Age and Name of a Mother: To be the Son and Husband of the same Woman, and the Father and Brother of her Children. De Specialibus Legib. (p. 778.) Grotius.
therefore, there is no Room to doubt, are unwarrantable, and ipsa Paœta void, because the Effect of them is attended with a perpetual Crime.

3. Nor ought we to be any ways influenced by Diogenes 10 and Cystiphus'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 As Inceft, according to the Law of Nations: And Xenophon, 12 a Law, which is so less a Law, the' the 13 Persians despised it. For that is justly termed Natural, which, as 14 Michael Ephesius very well observes, is, τοιούτος τις πλείστης καὶ ἀποξείρης καὶ μίας θάνατος ἔχων, practised by the Generality of such People as are uncircumcised, 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, πάρα φύσιν αὐτοίς Ταγ- βουσιν, ἀποξείρης ἐφαινα, ἀποξείρης δεας, unnatural and immoderate Loves, unpli- bridled Passions, most impious Pleasures. Lucon speaking of the Parthians, says, that amongst them, 16 The King, when drunk, does not dread any Sort of Inceft prohibited by the Laws. And presently after, 17 What can we suppose a Man not capable of, who thinks he may lawfully be with his own Mother? Dion Phusenitis very judiciously ascribes this Custom of the Persians in particular, to their bad Education.

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 graven 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 shun such an Abhorrence. For many have been of this Opinion; and Arno- bia, in his fifth Book against the Gentiles, 19 What I could Jupiter conceive an infamous Passion even for his own Mother, and could not be deserted from such a criminal Delight 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 Syrian Horse 20; and another not unlike

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10 See Plutarch, De Stoicorum repugnatissi, p. 1044, 1045. Tom. II. Edit. Wech. 11 Digest. Lib. XXIII. Tit. II. De rite Natu- riarum, Leg. LXVIII. See likewise Lib. XLVIII. Tit. V. Ad Leg. Jus de Adult. &c. Leg. XXXVIII. § 2. 12 The Philosopher says he is sensible, that Thoje who offend against this Law, violate many others. Memorial Sorra. 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. adv. Jovinian. (p. 75. Tom. II. Edit. Basili.) In the Andromachia of Eu- ripides, 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 these Acts, (ver. 177, &c.) Grotius.

As to the Persians, among whom the Men, in particular, approved of and practised this Kind of Inceft, See Diogenes Laertius, Praeumen, § 7. Edit. Amst. with the Notes of his Interpreters: As also Quintus Curtius, Lib. VII. Cap. II. Num. 19. and the Notes of Pitiscus on that Place; who mentions a great Number of Au- thors speaking on the same Subject. 14 Michael Ephes, in Etum. Nisem. V. § 10. 15 Here our Author imitates one Pythagorean for another. This was the Saying of Hipparchus, as recorded by Strabon, in his Geographia, Mythol. Phytc. Eticum. Amstel. 1688. p. 670. 16 Pharnab. Lib. VIII. ver. 402, &c. 17 Ibid. ver. 409, 410. 18 Memor. Sorra. Lib. IV. Cap. IV. § 22. 19 After having described Inammarable Virtues, and asbed Matroni, but Jupiter conceived an infamous Passion, even for his own Mother? &c. Adv. Gens- ter, Lib. V. p. 161, 162. Edit. Salmofo. 20 Pind. 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 Cafe fell on the Groom; from which the Historian concludes, that Even Beasts have some Knowledge of the Degrees of Kind-
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unlike it in Oppianus, Of Hunting, B. i. And Seneca, in his Hippolytus, the every Beasts join incefluous Commerce, and without knowing the Rules of Duty, by their natural Meflady observe the Laws of Proximity of Blood.

XIII. 1. The next Question is about all the Degrees of Affinity, and the Degrees of Conflanguinity in the Collateral Linc, 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 Mofes, Defile not yourselves in any of these Things; for in all these the Nations are defiled which I call 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 Cannanities, and the People about them offended by such Actions, there must have been some Law that prohibited them, 1 which Law not being purely natural, must needs have been given by GOD, either to them in particular, (which indeed is not very likely, nor do the Words import so much) or to all Mankind; either at the Creation or after the Flood. But now such Laws as were injoined all Mankind, seem no Ways abolished by CHRIST, but only thofe, which, like a Partition-Wall, separated the Jews from all other People. To which we may add, that St. Paul does not in very levere Terms express his Abhorrence of the Marriage of the Son-in-Law with his Mother-in-Law, tho' there is no Command of CHRIST relating to that Affair; nor does he himself urge any other Reason, than that such a Mixture was even by Pagans reckoned impure, It was a Fornication not so much as named among the Gentiles. The Truth of which Affertion, among several other Proofs, appears from Charondas's Laws, which


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 Cannanities, tho' the general Term all is used, when the Question turns on such or such a Degree of Conflanguinity or Affinity, if we fe no nothing in it that renders it unlawful by the Law of Nature, we may reasonably doubt whether it be not one of tho' which ought to be excepted; so that it cannot thence be inferred, that it was forbidden by a divine, positive, and univerfal Law; the Publication of such a Law is in itdf very difficult, not to fay 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 fay, that the Vices of the Cannanities, for which Moses declareth GOD would punish them, did not confit fo much in infcefluous Marriages, as in an unbridled Debauchery, which made them transfert almost every Law of Marriage, and put them on satisfying their carnal Desires with the firft Persons they met, such as commonly are tho' with whom one has fome Relation or Affinity, and with whom, on that Account, one converses most. Thus the infcefluous Cornithan had his Father's Wife, 1 Cor. v. i. not that he was married to his Mother-in-Law, which the

1 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 probable that the Cannanities 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 Chaffements of the Divine Vengeance, even tho' it be fuppofed, that some of tho' Degrees have nothing in themselves which makes Marriage unlawful according to the Law of Nature alone.

2 Tertullian supposes it, when he fays, I do not maintain, that, according to the Law of the Creator, a Man is not允许 to have his Father's Wife. Let him in this Cafe follow the religious Discipline of all Nations. Adv. Maricon. Lib. V. (Cap. vii.) Grotius.

The Law of Charondas, here mentioned, as the learned Gronovius justly observes, did not forbid a Man to marry his Mother-in-Law; but second Marriages, as appears from Zebulon Sticulus, Lib. XII. Cap. XII. p. 296. Ed. H. Step. It may be added, that our Author himself, in his Excerpta ex Traged. & Comed. Gracici. p. 915. has given a good Version of the Law in Question, express'd in Verse by an ancient Poet unknown,

'O πατερινής μη να παεινονεται, 
Μη διακατηκεται, μη διαμεταπνεσθαι.
Παπας οι πατριους.

Naus Neveram si quis indutur fals, 
Expert honorum vixit atque injurias
In Civitate——

Let the Man who sets a Mother-in-Law over his

E Children,
which put a Mark of Infamy upon such a Marriage; and from that Passage in Lyfias's Oration, "Quamquam e quibus Cælum dextera, astra vix, ut melius tu, ut facilius", That most profane Wretch lived as Man and Wife with the Mother and her Daughter. And that of Cicero, in a Cæse not unlike this, is not foreign to the Matter in Hand: For when he had declared how the Mother-in-Law had married her Sonin-Law, he subjoins, "Oh, the incredible Wickedness of the Woman! a Wickedness that no other was ever known to be guilty of." When King Solomon would fain have given his Wife Stratonice to his Son Antiochus, he was afraid, as Philiarch relates it, left the should be shocked, this a wrong Thing, as at an unlawful Thing. And in Virgil we have,

Tbalamos autem incesare Noverce.

Who then'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.

3. The antient Hebrews, who in this Matter are no contemptible Expositors of the Divine Law, and after them Mofes Maimonides, who has read, and with great Judgment digested all their Writings, say, that there are two Reafons assignable for the 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 Perfons, or in the Perfons of them to whom they are by Blood or Marriage nearly related. And the Second, That the Familiarity and Freedom with which some Perfons daily converge together, would give Occasion to Fornications and Adulteries, if such Amours might terminate in a lawful Marriage. If we rightly apply these two Reafons 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 Reafon, tho' there were no express Law about it; I say, it will appear, that those who are related by Affinity in the direct Line; and also, those who are related by Confanguinity 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 Reafon, because of the too lively Image of their common Parent, whom

Children, live without Honour and inglorious among his fellow Citizens. The following Lines contain the Reafon of this Censure; on which see Puffendorf's Reflection, B. VI. Chap. 1. § 7. as also, for the Manner of reading the Passage, Dr. Bentley's Differtation on Pufendorf's Epistles, p. 374. 174. I have found what gave Occasion to this Mitigate, StORBEUS thus exprefses the Law of Churcanod, in Profe, "ο μηνιατα Φαλαμπος μη δεινησων αλλα ενιαυιασων, αποκειναι αυτην οι οικοεο έκ οικοειασας σεμε εικουσαις." Serm. XLIV. The first Words literally signify, A Man who marries a Mother-in-Law. Whereupon our Author, probably deceived by his Memory, which did not retain the Sequel of the Discourse, imagined the Greek Writer was speaking of a Man who marries his Mother-in-Law; whereas the Sentence is, Η ε μηνιατα Φαλαμπος μη δεινησων οικοειασας σεμε εικουσαις: as if Storbeus expreſses himself in EURIPIDES,

Και μη δεινησων εις ι μηνιατας τινος. 

Alci. v. 305.


3 PHILo the Jew says on this Occasion, The Parts are divided, they retain the Right of Fra-ternty, and are joined by Relation as a natural Tie. GROTIUS.

The Passage stands thus in the Original, Αδελ-φοι δε, ει τη διαλοια τω μηνιατα, αλλα τω αμαρτητω, τη διονυσου, ευγενεια μη. (De special. Leg. 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 has rendered it justly, Germani autem, quamvis Membra disjuncta sunt, natura tamen ac cognatione coepta tanta. PHILo is there speaking of the Prohibition of marrying two Sifters, either at the same Time or successively, but both alive together. On which Occasion that Author sets forth the Inconveniences of the Jealousy and Enmity such a Marriage would occasion between the two Sifters. It would be, says he, as if the Limbs of our Body were torn off and divided; for, adds he, the the Perfons who have a Relation of Brotherhood clashing 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.
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every Child immediately repreffents. 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 thefe, 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, the Daughter's Daughter's Daughter, the Daughter's Son's Daughter, the Wife's Son's Daughter; Daughter, the Wife's Father's Mother, the Wife's Mother's Father's Mother; that is, to speak after the Roman Fation, all Grandmothers and Great Grandmothers, Mother-in-Law's Mothers, Great Grand-daughters, Son-in-Law's Daughters, Daughter-in-Law's Daughters, Grandfons Wives, Wives Grandmothers; becaufe, under the Title of Relation by the Father's Side is comprised also that by the Mother's, and the second Degree under the firt, and the third under the second; beyond which it is scarce poiffible that any Controuery can arife, for if the Thing were poiffible, all the following Degrees would be comprehended in infinitum.

5. Now the Hebrews think that thefe Laws, and thofe that prohibit the Marriages of Brothers with Sifters, were given to Adam 5 at the fame Time as that Injunction of ferving GOD, of administering Justice, of not shedding Blood, of not worshipping fale Deities, of not Robbing; but fo that thefe 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 Sifters. Nor do they look upon it at all material, that Moses 6 has said nothing of it in its proper Place; becaufe it was enough that he had tacitly signified it in the Law itlef, by condemning foreign Nations upon that very Account; for there are feveral fuch Things in the Law, which are not taken Notice of in Order of Time, but as Occafion requires: From whence arifes that celebrated Maxim among the Rabbins, that In the Laws there is no fuch Thing as frft or laft; that is, many Things are fett down before or after their Time.

6. Michael Ephraim, at the fifth Book 7 of the Nicomachia, has thefe Words, concerning the Marriage of Brothers and Sifters, Τι ἀδέρφοι μείζονες τοι ἀδέρφοι, &c. For a Brother to lie with a Sifter, was at the Beginning indeed a Thing altogether indifferent; but now there being an established Law againft fuch Conversations, it is far from being indifferent. Diogenes Sicius calls the forbidding of Brothers and Sifters matching, καθώς ὥς τὰς ἀδέρφους. The common Custom of all Men: From which Cufom however he excepts the Egyptians; and Dion Plutarchus, all Barbarians. Seneca has written, 9 We repreff the Gods, as marrying one with another, and that in a criminal Manner, fince Brothers among them marry their Sifters. Plato, in his eighth Book De Legibus, calls fuch Matches, ἡδικὰς ἡμῶν καὶ μηθαυρ, "Unlawful, and detefted by GOD."

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

6 For neither do we any where find the Law, by Virtue of which Judah would have had Thamar burnt. Gen. xxxviii. 24. Thus Judith fays the Schemites were juftly lain for ravishing a Virgin, Chap. ix. 2. and Judith curfed Rehoboam for the Inceft he had committed. Grotius.

The Law againft Adultereties, like feveral others, were only on the Customs of the Eastern Nations in thofe Times. The Slaughter made by the Sons of Japhob among the Schemites, was by no Means a commendable Action; as our Author observes in a Note on the Paffage here quoted from the apocryphal Book. See Mr. Le Clerc on the Chapter of Genialis, where this Hiftory is recorded. And the Sons of Jacob did not proceed thus by Verue of a Law againft Ravithers of a Virgin, but merely out of a Spirit of Revenge, which made them join Perfidiousness to the Action. As to Rehoboam, see Gen. xxxvii. 20. 21. and c. vii. 8. It is said the Egyptians, contrary to the common Custom of all Nations, made a Law that Brothers and Sifters ought marry, in Imitation of Mor. Lib. 1. Cap. xxvii. p. 16. Ediz. H. Steph.

8 This Paffage is found in a Fragment preferved by St. Augustine, De Gen. Doi. Lib. vii. Cap. x.

10 Plato adds, τις ἀδέρφοι μείζονες, and the
7. All which evidently proves, that there was an ancient Tradition of a divine Law against such Marriages, and therefore we find that they commonly use the Word Нія,c (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 between these and more distant Degrees: For Example, to marry an Aunt by the Father's Side is forbidden; but to marry a Brother's Daughter, where there's the same Degree of Blood, is not forbidden; nay, there are several Instances of this Kind among the Jews. 3 To marry Nieces is to us entirely new, but very usual with other Peoples; nor is it by any Law prohibited, says Tacitus. 4

The Reason


11 See the Chaldees Paraphrast on the Text. The Lacedemonians and Athenians made a bad Distinction in this Case, and that in several Manners. Grotius.

See Selidn on this Subject, in De Jure Nat. et Gent. Lib. IV. Chap. V. Lib. V. Cap. XIII. p. 627, 628. Edit. Argintar. and Puffendorf, 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 Sibers 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 Confinement 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 tender, which would be laying an unreasonable Retraint on the natural Liberty of Man.

2 The Jewish Historian is of Opinion, that Sarah was thus related to Abraham, (Antiq. Jud. Lib. IV. Chap. XI.) The same Author gives us an Instance of such a Marriage since the Law of Moses, in the Person of Hrod, who married his Niece Mariamon, and promised his Daughter to his Brother Phorerus. See Antiq. Jud. Lib. XIV. and XVI. Andronicus had been promised to Phereus, 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; Nerfo renewed the Prohibition; and Herodius removed it again. Grotius.

Sarah was not Abraham's Niece, but his Sibher by the same Father. This is evident from the Patriarch's own Words, Genesis xx. 12. on which see Mr. Le Clerc. In Stutonius's Life of Claudius, Cap. XXVI. and Tacitus, Annal. Lib. XII. Cap. VI. VII. We find that 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 Romans, but in his Father's. Mr. Norris proves in his Oration, Lib. II. Cap. V. that Mr. Reynolds, Professor at Frankfurt on the Odre, has undertaken to refute him on this Subject, in his Varia, jur. Civil. Cap. XXII. Norris, who, according to Xiphilin, (p. 241. Edid. Steph.) by a Law forbid marrying a niece, Abrahœa, meant only a Sister's Daughter to this Term, as has been shown by Clulah, Obser. XIII. 16. and several other learned Interpreters after him. I do not find that Herodius made any Law about this Matter. That Emperor indeed married Mariam, his Brother's Daughter, for his second Wife; as we are assured by Zonaras, in his Work, T. I. Consens. p. 375. 376. 377. Edit. Basili. 1566. Paul Diac. Hist. Lib. XVIII. p. 553, &c. Edit. Basil. 1569. and others. The Translator of thefe Notes begins to make a short Observation on the learned Mr. Barrow's Notice, 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 Expreflion 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 Tobia, Abraham's Father, left any Female issue. Josephus expressly tells us, that Herod had three Children, Lot, Sara, and Milcha, Annal. Lib. I. Chap. VII. toward the End. And in the Beginning of Chap. VIII. he calls Lot the Brother of Abraham's Wife, but makes Lot a Daughter of Abraham, and proves it, by mentioning Gen. XI. 29. whence several antient Chriftian Writers have concluded the fame Perfon meant under the two Names of Ibcab and Sara, 3 Annal. Lib. XII. Chap. VI. Num. 42. 4 I find nothing on this 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 Leucoruss, where it is related that Miletius proposed marrying his Daughter Clistonæe to his Brother Alcibiades, who declined the Offer, because he was not dispised to marry. p. 671. Edit. Basili. 1572. which evidently fuppofes fuch Matches allowable at that Time. The fame Orator elsewhere speaks of one who married his Sister's Daughter, Orat. in Neorun. 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. Archel, Græc. Lib. IV. Cap. XI. where he likewise observes, that at Lacedemon Marriages with collateral Relations, in which the Person married, being the Daughter of his Father, on which he advances the Example of Anaxandrides, who married his Sister's Daughter, as Herodotus relates, Lib. V. Chap. XXXIX.

5 He says, that Lyfus married the Daughter of
Reafer that the Hebrews allledged for it is this, that young Men often frequent their Grandfathers and Grandmothers Houfes, 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 confonant enough to Reafer, we muft acknowledge, that the Law of not marrying Relations in the direct Line, as well as Sifters, fince the Multiplication of Mankind, is perpetual, and universal too, as being founded on natural Decency; inomuch that whatever is done contrary to this Law, is, on Account of the Vice that always subsifts, null and void: But the Cafe is not the fame as to Laws concerning other Degrees, fince they are rather made to prevent certain Inconveniences, than to divert Men from a Thing that is in itfelf difpofe: Befides that, there are other Means of remedying thofe Inconveniences.

2. And by the antient Canons, which are called Apoftolical, 6 he who married two Sifters one after another, or his Niece; that is, his Brother's or Sifter's Daughter, was only incapacitated for the Minifterial Office. Nor is there any Difficulty in anfwering what we faid of the Sin imputed to the Cannaanites, and the People about them. For the Terms of Scripture, tho' general, may be re- 

3. But yet the primitive Christians were very much in the right of it, who vol- 

4. The Generality of the jewifh Doctors under- 

5. The Generalities of the jewifh Doctors under- 

6. In the Latin Version we read a Confuf-Ger- 

7. De Civit. Dix. Lib. XV. Cap. XVI. The Poet AESCHYLUS, speaking of the Donards, calls Marriages between Cousin - Germans, Unlawful Conjonfions, by which the Race is deftroyed. (Supp. p. 379. 315. Ed. H. Stephi.) But the Scholiad adds, (in his Observations on the former of this Paffages) that they were unlawful, becaufe the Fa- 

8. De Civit. Dix. Lib. XV. Cap. XVI. The Poet AESCHYLUS, speaking of the Donards, calls Marriages between Cousin - Germans, Unlawful Conjonfions, by which the Race is deftroyed. (Supp. p. 379. 315. Ed. H. Stephi.) But the Scholiad adds, (in his Observations on the former of this Paffages) that they were unlawful, becaufe the Fa- 

9. This we learn from Aurelius Victor, 

10. See Euclid's Eleftra, v. 312. 313.


2. V.224. Id. inOdylyl.I.v. 146.

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9. This we learn from Aurelius Victor, 

10. See Euclid's Eleftra, v. 312. 313.
and is highly commended by St. Ambrose, as a Regulation of great Sanctity and Piety.

Thus may be some very excellent Matters, which, yet may be termed by the Laws of Concupiscence.

The inference allowed, and therefore permitted, a Man to marry a Woman, even when she was excluded from the Sacrament of Five Years; which evidently supposes that the Marriage Engagement full stands good. And as we just now said, by the Canons called "Apostolical," he who married two Sisters, or his Brother's Daughter, was only rendered incapable of Orders.

XV. 1. But to go on to other Matters, we must observe, that there is a Sort of Concupiscence, 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, 4 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, ταξισμό-ς, Marriage. So the Commerce between a Freeman and a Woman Slave, is called not Marriage but Concupiscence; 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 Ballards, as appears from some Passages of Aritophanes 5 and Ælian 6. "Servitus" 7 upon that Veré of Virgin,

Supplices de Matre Nothos surata erevov.

XX. Thee may be some very considerable Matters which, yet may be termed by the Laws of Concupiscence.

expounds the Word Nothos, of mean and obscure Extraction by the Mother's Side.

the Form of the Dispensation, Var. Lib. VII. Ep. XLI. Grotius.

In the Justinian Code we find a Law made by Arcadius and Honorius, which provokes the Prohibition of Marriages between certain Gentiles, which had been confirmed by those Emperors in the first Year of their Reign, Lib. V. Tit. IV. De Nuptiis. Leg. XIX. See Theodoric de Marcellly, on the Justinian, 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 Ancyra, 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 Mannor as not to differ from those already contracted. This Decision is in the Canons Laws, Cauf XXXIX. Quatt. II. III. Can. VIII. Thus the Lawyer Paul observes, that "to the Laws forbids Contracts of Matrimony without the Consent of the Father, such Contracts, when made, are not dissoluble. 2"Receiver. Sentent. Lib. II. Tit. XIX. § 2. Except it may be said, that the last Words are an Addition of Arianus. Tertullian, speaking of Marriages contracted, with Persians, not Christians, says, "The LORD rather requires that such Marriages should not be contracted, than that they should be dissoluble." Lib. II. ad Ussuram. (Cap. II. See § 16, of this Chapter.) Grotius.

In regard to Marriages contracted without the Consent of the Father, see my fourth Note on B. I. Ch. III. § 4.

11 In the first Edition we have the Addition of these Words, And even too it dote, the Nullity regards only the Acts of such as are subject to the Laws, that it may lay a Contra;aint on them; for the Power of annulment 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, put on to the following Paragraph.

12 Because the Canons declare the same Thing in regard to two Siflers, as they do in regard to two Brothers. Longob. Lib. II. Cap. VIII. 13. Grotius.

XX. (1) See Puffendorf, B. VI. Chap. I. § the last; and a Differtation by Mr. Thomassius, Puffendor. Concupisc. printed at Halle in 1735.

2 Contubernium. (See also B. I. Chap. III. § 4.) The Cohabitation of Slaves was however called a Marriage in Greece, at Carthage, and in Arabia. See Plautus, in the Prologue to the Cajina. It is allowed the same Appellation in the Laws of the Lombards, Lib. II. Tit. XII. 10, and XIII. 3, as also in the Solit Laws, Tit. XIV. § 11. But among the Jews such Marriages were not good and valid, but when the Matter conferred on them; as is observed by the Rabbis, on Exodus xxi. where they are mentioned. The same Regulation obtained among the Great Christians, as it appears from St. Basil's Canons. We see also in Cassiodore, that those who were deformed of marrying a Woman of a Condition inferior to themselves, commonly asked the Prince's Leave for so doing. Var. Lib. VII. Cap. XI. Grotius.

3 In the Comedies of the Birds, where Pyllheatacra calls Hercules a Ballard (vēge) 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, but 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 Ballards remaining. Var. Hift. Lib. VI. Cap. X.

5 On Exodus VII. 284.

2. Now.
 Chap. V. War and Peace.

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 indefeasible Union of one Man with one Woman; this, I say, will be a true Marriage, theo' 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 the Words of the first Council of Toledo: 6 As for him who has no Wife, but a Concubine instead of a Wife, let him not be refuted; provided however, that he be contented with this one Woman, whether Wife or Concubine, as he pleases. To which you may add a Paffage in St. Clement's Institutions, B. viii. Chap. xxxii. And to our present Purpofe it is, that Theodosius and Valentinian 7 call some Sort of Concubinage an unequal Marriage, and that from thence it is said 9 a Charge of Adultery may also arise.

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 9 calls imperfect. Such was the Cicilian Law, which forbade to give above a certain Sum, but did not make void the Gift which exceeded that Sum.

6 Cap. XVII. This is inferred in the Canon Law, Distinct XXXIV. Cap. IV. And the Council, from which it is quoted, was held in the Year CCC. 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 Affairs of the legitimate and legitimated Princes. p. 50, &c. where it is shown 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 Crime were not civilly legitimized.

7 St. Augustin makes it a Doubt, whether a Concubine, if she has promised to know no other Man, and is disjunct by the Perfom to whom fo was subsefol, ought not to be admitted to Baptism. De Fide & Operibus. (Cap. XIX.) The fame Father elsewhere propofes this Question, whether, when a Man and a Woman have carnal Conversation together, not being Husband and Wife, and this without any Difgrace of being Children; but only for satisfying their Deferes, after a mutual Engagement not to take the fame Liberty with others, this Contravent may not be called Marriage? To which he replies, that it may be termed Marriage, without any Adultery, if they have agreed to remain in that State till the Death of one of the Parties, and if they did not enter into it for the Sake of propagating their Species, they knew 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, left his wife for the Concubine draw his Affections from his Wife. Lib. VII. Cap. CCLIV. Grotius.

8 Codex, Lib. V. Tit. XXVII. De natural. Librit. Leg. III. The Lawyer Paul lays the whole Difference between a lawful Wife and a Concubine, consists in the Degree of Affection; and therefore, a Man is not allowed to take a Wife and a Concubine at the same Time. Recept. Sent.

Lib. II. Tit. XX. § 1: See Mr. Schulting; and Cujias, on the Title of the Codex, De Concupinis, v. 26, in Mr. Farel's Notes.

9 The Perfom 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. Jurl. de Adulteris, etc. Leg. XIII. See the President BriSSon's Tractate, Ad Leg. Jurl. de Adult. p. 324, 323. Edit. Antonii, 1785. The Law was the fame in Regard to a Foreigner married to a Roman Citizen; as appears from a Fragment of Papian, Cellat. Leg. Med. & Rem. Tit. VIII. § 5. See Mr. Schulting on this Question.

XVI. (1) Institut. Tit. I. § 1. The Valerian Law forbids 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. This is, in Opinion, that Sentiments of Honour and Honour had in those Days so strong an Influence on the Minds of Men, that a bare Declaration of that Nature seemed sufficient for presenting the Violation of the Law. (Lib. X. Cap. IX, Num. 5, 6.) The Peranian Law prohibited the receiving of any Legacy or Gift on the Account of Deaths, exceeding a certain Sum (about 200 Crowns) plus quam mille Aflium, some Perfons 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 Same. Ser. (Lib. II. Cap. XVII. By a Referpt of the Emperor Marcus Antoniust, it is declared, that If an Hair hindered the Perfom named to that Perfpn by the In- tutor, from Burying the Deceased, he doth ill; but then no Penalty was decreed against him. (Digest. Lib. XI. Tit. VII. De Religiosis & Sumpunktis fune- rum, Leg. XIV. § 14.) Grotius.

See Puffendorf, B. I. Chap. VI. § 14, with the Notes; and Pleis BRUMMELI, Comment. ad Leg. Cicinana. Cap. III.
Of the Rights of

Book II.

2. We know indeed that it was afterwards enacted by Theodotus, * that in Cafe a Law only prohibited a Thing, and did not preciely 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 establised, 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 Inconveniences 3 that follow the Receipt 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 a Pofiten or Perfon who govern them, or composed of several Nations. But all of them have this in common to them, that in Matters for which each Allocation was inflittu'd, the whole Body, or the major Part in the Name of the whole Body, oblige all and every the particular Members of the Society. For it is certainly to be preferred, that thole who enter into a Society are willing that there should be some Method fixed of deciding Affairs; but it is altogether unreasonable, that a greater Number should be governed by a leat; and therefore, tho' there were no 3 Contrasts or Laws that regulate the Manner of determining Affairs, the 3 Majority would naturally have the Right and Authority of the Whole. Thucydides says, κώμοις τί μπαίνω, τα έθιεν έτε νικώ, 4 What the Majority Vote, must stand good. Appion, έτε δέ έν τι χρησιµοις δικαιοίς, τα έθιεν δικαίους τον δικαίοντα, 5 In Elections and Judgments, the Plurality of Voices always carries it. So Dionysius Halicarnassensis, έτε εν τα δικαιοτα τα δικαΐως, 6 What the major Part approve of, must prevail. And in another Place, έτε δέ τα δικαιοτα τα δικαίως καθισταται τα δικαίως, What the Plurality of Voices shall repeal we must submit to. And again, έτε δέ τα δικαιοτα τα δικαίως καθισταται τα δικαίως, What the Majority of Opinions declare to be null and void, that must be in Fact and Law. So Aristotle, κώμοις τα δικαίως δέχονται, 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 Perjura fits et Sedicia nec Curia confitat.

2. Codex, 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 Scholia Turri Quinquem, Lib. I. Cap. I. To whom MR. SCULLING Likewise refers, in his Explanation of the first Part of the Digest, Lib. I. Tit. III. § 8.

3. For this Reason Alcinus, King of the Phaeacians, being made Arbitrator between the Inhabitants of Calidus, and the Argonauts, determined that if Medea had lain with Jove, she should not be restored to her Father; but if she was still a Virgin, she should be sent back to him. APOLLODORUS, Biblioth. (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 Sumerarum postquam circa facra, Cap. IV. § 6. As also BoeCLE'S Differenfion, De calculo Minarum. Tom. I. p. 226. &c.

2. Thus, according to the Canon Law, if the Concave is not unanimous, and two Parties agreeing in their Votes, the third will not agree with them, or professes to name another Perfon: 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 Eleetione & Electis Postfaha, Cap. VI. GROTIUS.

3. Thus the Cadle's Paraphrase, and the Rabbis understand what is said, Exod. xxiii. 2:3: [But consult MR. LECLERC on that Text.] See Digest. Lib. XII. Tit. 1. De re judicati, &c. Lib. XXXVI. and XXXX. and what I shall say, B. III. Chap. XX. § 4. GROTIUS.

4. Lib. IV. Cap. XXX. Edit. Osn. 5. I do not find those Words in Appiano's History; nor have I the Excerpta Legationum in my Hands, to see whether they are taken from that Collection.

6. Ante Rom. Lib. II. Cap. XIII. p. 85. Edit. Osn. (87 Edit. Sylb.) and Lib. VII. Cap. XXXVI. p. 428. (444 Sylb.) It is just, says he in another Place, that each Man should propose what he thinks will be to the Advantage of the Publick, and then submit to what shall be resolved by a Plurality of Voices. Lib. XI. Cap. LXI. p. 695. 696. (734 Sylb.)


8. Lib. X. Cap. VI. Num. 17.

9. that,
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that, A final Number of People do not represent the State nor the Senate. And a little afterwards,

Informa Minoris  

Vox cedat Numeri parvisque in parte quietat,

that, Their Suffrage ought to yield to that of the greater Number. And in Xenophon § you have this Expression, διό μὴ νευτίας ἐρωτήσθω, 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 when the Yeas and Noes are equal, the Defendant is supposed to be acquitted. And this Right of Discharge the Greeks, from the Story of Orifes, call Minerva's Suffrage: You have this Matter display'd in Æschylus's Furies, and in Euripides's Tragedies of Orifes and Electra. By the same Reason the Poetesse, in that Cafe, is maintained in Possession of the Thing contented; as is very well observed * 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 Sylogism, where the Conclusion follows the weaker Part of the Premisses.

XIX. But here a Question does commonly arise about joining or dividing Opinions: 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 Cafe, we should distinguish between the Opinions that differ in the Whole, and those whose one includes a Part of the other. The latter ought to be


XVIII. (1) This is decided by the Roman Law, in the following Words, * If in 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, the Defendant, which ought to take Place alfo in publick Judgments. Decret. Lib. XLII. Tit. I. De Adjudicat. &c. Leg. XXXVIII. Seneca says, One Judgment condemns a Man, the other clears him; in a Division of Opinions, let that prevail which favours more Mercy. Contr. (Lib. I. Contr. V.) A little after, he observes, that Providence is not oblius, when it becomes superius by Mercy. See what the Emperor Julian says in Commendation of Euphbia. (Orat. Ill. p. 147. Edit. Spah.) Even among the Jews, a Criminal was not reckoned condemned, when the Number of Judges who declared him innocent, was left only by one Voice; as the Chaldee Paraphrast affirms us, on Exod. xxiii. 2, 3. Rabbi Moses de Kosteki says the same, Pseudoj. jud. tom. XXVIII. 3. &c. Ex. LXXV. Grotius.

Ziegler observes here, that this takes Place chiefly in criminal Cases, where the Court ought to incline to the more merciful Side; but that in civil Affairs, the President or Dean of the Assembly sometimes turns the Scales, which, he tells us, is the Practice in Portugal, and in the Senate of Piedmont. On this Occasion he quotes Anthony de 'Gamma, Decif. I. Num. 12. And Anthony Tezauro, Decif. I. Num. 13. I know that in the Canon of Berne in Switzerland, the Magistrates have by this Means prevented this Inconsistency of Equality of Votes in all Sorts of Causes.

2 See on this Subject Boecler's Differtation already quoted, and the learned Gronovius's Oration on the Royal Law, p. 44. &c. of the French Translation, published in the second Edition of Mr. Noudt's Diffourses On the Power of Sovereigns, &c. in 1714.

3 In the Electra, Cælor and Polixen 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 Philaenius, (ver. 1470.) Grotius.

To which join what Spinellis says on the Fores of Aristophanes, ver. 697.


XIX. (1) For which Reason, in the Roman Senate, when one man bid given his Vote, as to to include several Things, he was ordered to divide his Opinions, as we are informed by Ausonius, the Grammarian. In Orat. Cit. pp. Milione. (Cap. VI.) We have an Instance of this Manner of proceeding in one of Cicero's Epistles. In the Affair of King Pelomyol the Houfe was divided, Bibulus proposed raising 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 palled the more easily, because there was no Possibility of restoring the Monarch; but in regard to the three Embassadors, great Numbers voted against him. Ad Familiar. Lib. I. Ep. II. Seneca applies this Catoon to philosophical Opinions, which one approves of only in part. I am of Opinion, says he, that what is

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be joined as to what they have in common, but the former cannot. If, for example, some fine a Man twenty (Pounds), and others ten; the Fine must be reduced to ten, against the Opinion that acquires. 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 acquires, because they are two Things altogether different, Death not including Banishment. No more can they who would acquit him, unite 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, did very well observe, that the two Opinions were fo opposite, that it was impossible to make them compatible together; and that it signified very little that the Voters all rejected the fame Thing, since they did not all approve the fame Thing. And Polybius 

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This Right of the absent Persons, ought to be done in Philosophy. When any Man has delivered his Sentiments, part of which I like, I order the Opinion to be divided, and then follow what I approve of. Epith. XXI. I also have a Right to deliver my Opinion, I will therefore follow one, and order another to divide his Opinion. De Viris Beati, Cap. III. See likewise Pliny the younger, Lib. VIII. Epist. XIV. (Num. 15. Edit. Gellur.) GROTIUS.

practised in the Senate, ought to be done in Philosophy. When any Man has delivered his Sentiments, part of which I like, I order the Opinion to be divided, and then follow what I approve of. Epist. XXI. I also have a Right to deliver my Opinion, I will therefore follow one, and order another to divide his Opinion. De Viris Beati, Cap. III. See likewise Pliny the younger, Lib. VIII. Epist. XIV. (Num. 15. Edit. Gellur.) GROTIUS.

A celebrated Lawyer of Frijland does not agree with our Author in this Point. He requires that Regard-be had to the Intention of the Opinion, rather than to the Nature of the Things declared. On this Foot, says he, those who absolve, would excuse rather to join those who are for banishing the Criminal, how innocent forever they themselves may believe him, than to suffer Sentence of Death to pass on him; and in Cafe of a Doubt, we ought always to incline to the most merciful Side. Ulric Huber, Dr. Juris Crinitatis, Lib. III. Sec. II. Cap. VI. Num. 5. 6. See the Parameira Juris Germ. by the late Mr. HERTIUS, Lib. III. Cap. VIII. § 5. &c. See also the late Mr. Conceivus's Differtation, De es quod jutum est circa numeros antiquorum ffigiurariam. Sec. III. Epi. VIII. Epist. XIV. Num. 15. 14. Excerpt. Leg. XXIX. P. 1331. Edit. Amst. See Fulpulsioni Urenius's Note on the Place. XX. (1) The Cafe is not exactly the same, as is evident; but it may serve for a Case. The Cafe is thus decided in the Roman Law, If the whole Number is reduced to one Person, it is rather allowed that he may sit alone; face the Right of all devolves to one Man, and the Name of the whole Body remains. Digest. Lib. III. Tit. IV. Quod cuique uniusvis numinis, &c. Leg. VII. § 2. See Weeber on the Pallige; and Lib. II. Tit. XIV. De Parias, Leg. X. Zadius in Paupert. Digest. De Parias. Bartol. in Leg. I. § 3. De Non Scribenda. BOER, Decif. I. Num. 4. ANTHONY FABER, Cod. Sac. Lib. I. Tit. III. Defin. 40. RAINING, Lib. I. C. 25. Cap. VIII. But this is, as in the Rule concerning the major Part, the Laws often make an Exception, and require two Things instead to be present. Leg. mult. § 3. Digest. Tit. Quod cuique uniusvis numinis, &c. Leg. numinis. XVI. G. DE DECURVOLOSS. By the Canon Law the absent may depurate 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, Conf. DC. Num. 22. and Conf. DCLXXXVIII. Num. 31. MARTIN WACHER, Conf. Caesar, in Controversia Saxoni. GROTIUS.

See a Treatise written by JAMES GODBEHR, Dr. a bachelor of law. Second Edition, with large Additions, printed at Geneva, in 1664. PUPENDOERF has since treated this Subject at large, B.VIII. Chap. IV. § 15. &c. 2 Ethic. Nium. Lib. VIII. Cap. XII. pag. 111.
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They are equal, (that is, Brothers) except only as they differ in Age. Theodotius and Valens, in a Conflation regulating the Rank each Cardinal ought to keep, very pertinently asks, When Persons are of one and the same Quality, and in one and the same Post, who should have the Precedence, but be who was first advanced to that Dignity? And therefore it was the antient Custom among Christiant Kings and States, for those who had first embraced Christianity, to precede the rest in all Councils, where the Affairs of Christianty were managed.

XXII. But here we must subjoin, that when a Society is founded on a Thing which all do not equally partake of; as for Instance, if in an Estate, or a Piece of Ground, one has a Moity, another a third, 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, _Monentia proportiones_, as the Mathematicians call it, in a Geometrical Proportion. And as this is highly conformant to natural Equity, so was it also approved of by the Roman Laws. Thus Strabo 2 relates, that when Libyca, and three other neighbouring Cities, were made, as it were, one Corporation, it was agreed that they should have one Vote a-piece, Libyca two, because this contributed much more to the Advantage of the Community than the rest. The same Author 3 tells us too, that in Lycaea there were twenty-three confederate Cities, some of which were entitled to three Votes, some to two, some to one only, and in Proportion to this, bore the Taxes and Expendence of the Publick. But, as Arideotus well observes, 5 this will be reasonable only, if _exsisterent ejusmodi_, When they are affiliated on the Account of Gods and Poffeffions.

XXIII. The Union of many Heads of Families into one People or State, gives such a Body of Men the greatest Power over its Members, because this is the 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 what is this Arideotus means, when he says, _Tres visus aliquotque_, *That the Laws prescribe concerning all Sorts of Things.*

XXIV. 1. And here it is useful to enquire, whether Subjects may go out of the State they belong to, without obtaining Leave for so doing. We know there are

1 3 Code, Lib. XII. Tit. III. De Conflabulis, &c. Leg. I. See also Tit. VIII. Ut Dignitatem erudiri receat, Leg. II. Tit. XIV. De Siriornis, Leg. III. De Socio, Lib. I. Tit. III. De Aliis Societih, &c. Tit. VI. De Iure immunitatis, Lib. V. Grotriuss.


XXII. (1) The Laws quoted by our Author in the Margin, do not speak of the Rank of Persons, nor of the Weights 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. XII. p. 936. Edit. Aug. (66) Pard. The Author, or the Printer, had put Libyca instead of Libya, as it is in Strabo, _Köpp_ : which Fault appears in all the Editions of this Work, published since the Addition of the Examples, which were not in the first, till mine, which was published at the Beginning of 1720.


4 Thus in the Treaty of Smalcald, the Elector of Saxony had two Votes. Grotius.

5 This Regulation was made in 1533, 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 XVth 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 Examinations in this general, I left it to the Editor of this in the Author, History, Lib. IX. toward the End; where he speaks of the Renewing of the League.


2 Ob. de viso aliquotque. Lib. V. Cap. III. p. 19. All Editions before mine had _aliquotque_, which makes a different Sense from what our Author himself gives in his Translation of the Words. Besides, the Peripatet does not perhaps signify precisely what he finds in it. See Mr. Morth's Commentary on it, in p. 376, &c. of a Collection, printed at Heidelberg, in 1602.

XXIV. (1) On this Question see Puffendorf, B. VIII. Chap. XI. § 2, &c.

2 See the Treaties of the Swiss Cantons, in Simler, De Repub. Helveti. (Lib. I. p. 203. Edit. Aug.) and in Elsis, 1637, and in other Authors. Serenus, his Additions from the Manuscript of the Abbey of Feld, says, It was customary among the Antients, for Persons who entered into a new Family in Nation, to renounce that which they left, before they could be received into the other. On Adamit, 1565. Marianus's History affords us some Instances of Persons who have declared they have disengaged
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are some People that have no such Thing allowed them, as particularly the Mece-
vites; nor do we at the same Time dions, 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.

2. But what we desire to be satisfied in, is what would naturally obtain, were
there no Agreement to the contrary; nor are we speaking of going out of one
Part of the State into another, but out of the whole State, or out of the whole
Extent of the Dominion of the Sovereign. That we ought not to go 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 Cafe 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. Tryphotonius says, 6 that Every Man is at Li-
berity to change the State of which he has a Mind to be a Member. And Gicera, 7 in
his Plea for Balbus, comments 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 Dispositions 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 bad to the Interest of the Society, and not merely
to the particular Interest of any of its Members. Thus, for Inflaunce, it is no
Ways for the Benefit of a Civil Society, if there be any great publick Debt con-
tracred, for an Inhabitant to leave it, unless he be ready to pay down his Proport-
on towards it: Or if a War be undertaken upon a Confidence in the Number of
Subjects to support it, and especially if a Siege be apprehended, no Body ought
to quit the Service of his Country, unless he substitutes another in his Room, equally
qualified to defend the State.

3. Excepting in such Cases as thefe, it is to be premised that Nations leave to
every one the Liberty of quitting the State, because from this Privilege they them-
engaged themselves from the Obedience they had promised to a King. The lafl Example of this Kind, which is very remarkable, may be found in B.
XXVIII. Chap. XII. Grotius.

3 The Law runs thus, "Municipes sint liberti & in e loco, ubi ipfi domicilium sui voluntate tulerunt, nec aliquid ex loc origini paterni faciant praegi-
ciun, & utrique muneribus afferentur." Digest. Lib. I. Tit. I. Ad municipa
um, & de Inluisi, Leg. XXII. § 2. Where it speaks of a Freeman, who
was reckoned to belong to the Place from whence his Patron or Master came, that if he left elsewhere, where 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
city (Municipis). See Coke, Lib. X. Tit. XXXVIII. De Municipis & Originariis,
with Cajj's Notes; and Spanheim's Orbis Ro-
manus, Exercit. I. Cap. V. and VI.

4 For thus the Quantity of the Contributions remained always the same; and the Inhabitants of
each Place (Municipis) were not more oppressed

that the former complained, that the Emperor drew away their Subjects, and made them his own. Zo-
nox, Tom. III. in Jutius Thucyd. Groti-
us.

It is evident the Cafe is different, that here mentioned
can hardly ever happen but when the Go-
vernment 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 So-
vereign 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 Ex-
ception from the most express and formal Engage-
ment. The natural Obligation of preferring one's Self takes Place of all Contracts; and whoever sub-
mits to a Government, does it only for his own
Good and Advantage.

6 Digest. Lib. XLIX. Tit. XV. De Capt. &
Posstilimia, Leg. XII. § 6. See Spanheim's Or-
bis Romanus, Exercit. I. Cap. V.

7 Cap. XIII.

8 Digest. Lib. XVII. Tit. II. Pro Socis, Leg.
LXV. § 1.
felves may reap no less an Advantage by the Number of Strangers they receive in their Turn.

XXV. Nor has the State any Power over Exiles. The Héraclide being by Euripides banished Argos, do in Euripides, by the Mouth of Iolau their Defender, thus express themselves,

XXV. A State has no Power over those it has banished. See B. 3, Ch. 20, § 41.

For with what Justice can be claim us, As Myceneans, when we're settled here, Us whom be banished from his Country? We now are Foreigners.

Alcibiades's Son, in one of Iocrates's Orations, speaking of the Time of his Father's Banishment, 'or ἵνα ἀπόστειλεν ἡ Ἰορνίδας Ἐριστικόν, When the State had nothing to do with him, nor be 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.

XXVII. Let us then pass to the Right which one acquires over Persons, by Virtue of a Subjection into which they enter by their own Consent. This Subjection is either private or public. 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 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 Purpofe.

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 among the Germans, who at the last Stake ventured their very Liberty upon the Capt of a Die, He that helps, says Tacitus, voluntarily became a Slave to the Winner. Nay, even among the Greeks, as Dion Phusieus, in his fifteenth Relation relates, μόνα Δέματα φυλάσσεται καὶ οὐδὲν ἐναλλάξει τοιχικά διὰ ἰδιοτήτος, Thousands who are free oblige themselves by Convention to be Slaves.

XXVII. 2. This was formerly prohibited in Egypt. It was allowed at Athens till Solon's Time, who, by one of his Laws abolished the Practice of engaging the Bond; that is, Liberty, for a Debt. Plutarch, in Solon, (p. 86. Edit. Wch.) The PETITION Law, among the Romans, contained the same Prohibition. GROTIUS.

The Egyptian Law was made by King Bacchoris, and allowed the Creditors to fetize 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 PETITION Law, see YARRO, Dr. Ling. Lat. Lib. VI. p. 82. Edit. H. Steph. and LIVY, Lib. VIII. Cap. XXVIII. as also what is said on PUFFENDORF, B. III. Chap. VII. § 3. Note 7. of the second Edition.
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2. Now perfect and utter Slavery, 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 recomposed 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* said, frequently happen,

*Εβούλε γάρ αυτῷ μυρία χρόνη κατασκηνῶν
*Ετοί σιγῶς.*

He was willing to stay with them for his Virtualls without Wages. And the same Comedy in another Place,

Πελλαί Φιλόδρακας, &c.

Many that run away from their Service, return of themselves; to their old Manners. Thus too *Pheidonius* the Stoick has observed in his History, that there were many People formerly, who, being of their own Weakness and Incapacity for getting a Livelihood, voluntarily submitted themselves Slaves to others, *πάντας μᾶς ἐκδοθέντες*, &c. That their Masters should provide them Necessaries, and they should, in return, do them all the Service they were able. Others add an Instance of this in the *Maryandini*; who, for the fame Reason, made themselves Slaves to the *Heracletes*.

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. *Thou* 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 uncontrollable Power, may every where do it. *Seneca* has long before us made this Comparision, *If the Necessity he is under, and the Dread of suffering severely in Cafe 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 Plead of Merit in him who has a Prince, and in him who has a General; for, 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* with Reafon afferts, but the Impunity paffes for a Right in an improper Sense. It was such a Right or Power that *Solon*, and the old *Roman* Laws, granted Pa-


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 Judicators, 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 unprofitable Child out of his House, and disinherit him, but could do nothing further*. *Amst.*, *Rom. Lib. II. Cap. XXVI. p. 93. *Edit. Owen*. (30, Sib.) He had been speaking of *Solon*, *Pitta-

4. *Unc.
Chap. V.  War and Peace.

XXIX. 1. Concerning those who are born of Slaves, the Point is more difficult. By the 'Remen Laws, and by the Law of Nations in regard to Prisoners of War, (as we shall shew elsewhere) as the young ones of Beasts, to 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 Males 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 this Matter, Children would follow as much the Father's Condition as that of the Mother. Let us suppose then, to lessen the Difficulty, that both Parents are Slaves, and let us see whether their Children would be naturally Slaves too. If there were indeed no other Way of maintaining their Children, Parents might with themselves bring their future Progeny into Slavery: Because upon the very fame Account, Parents may even sell their free-born Children.

2. But since this Right does naturally rise from mere Necessity, it is in no other Circumstances allowed, that Parents should infale their Children; nor have Matters any other Right over the Children of their Slaves, than as they are to find them Victuals and other Necessaries of Life: And therefore, if the Children of Slaves have been a long Time maintained before they are capable of being serviceable to


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2. Seneca has observed, that Children belong equally to both Father and Mother, when they have two Children, are not sold each to have one, but each two. De Benefic. Lib. VII. Cap. XII. In the Laws of the Wijbistis, this Quotation is cited, if a Son is produced by the Concurrence of both Parents, why should he share the Condition of his Father 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 Slavonian followed their Father; as appears from the Speculum Saxoniacum, I. 73. The same Thing was practised in some Parts of Italy. See the Dict. of Spec. VII. IX. Tit. IX. XXII. VI. The Children of two Wijbisthis, the Tate of Father in their Condition was lower, Spec. Sax. I. 16. This Regulation took Place also among the Wijbistis in Spain, in Guidone's Time; as appears from the Commentaries of 62. 22. 17. Tit. I. 14. XXII. VII. 7. Tit. I. 16. The Laws of the Wijbistis 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. 3. 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 belonged to the Father's Matter, on paying the Mother's Matter half its Value. In regard to those who were termed Orphanes, the Father's Matter had two Thirds, and the Mother's Matter the other; according to the Edit of King Thoerick, in Can_SDKOGR, C. 67. In England a Person is either free or a Villain (Francus et Villanus) according to the Condition of his Father. De Villanis. See also the Book De Jurisdiction Anglie. These Laws differ from the Roman Civil Law; but Thomas of Aquinas owns they are not repugnant to the Law of Nature, (Supplement. Quod. I. Art. IV. in Conclus.) Even the Roman Laws were not always conformable to their Principle; for one of them declares, that whether the Father or the Mother of a Child were Foreigners, the Child was so too. Ulpian, Tit. V. De his quod in potestate fuit. § 8. Grotius.

The Slavonian (Slevi) 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 Differtation by the late Mr. Hortus, De Hom. Propr. Tom. II. Comm. & Opusc. § 5. p. 161, 162. We have but little Reason to doubt that the French Word Eflaves, [and so of the English Word Slave] is hence derived; as it has been observed by some Etymologists. As to the Originaries, who are likewise called Ariphutis. See JAMES GODFREY's excellent Comment on the Tresdonian Code, Lib. V. Tit. IX. p. 451. &c. Tome I. as also Mr. Schulting's Jurisprud. Ante-Justin. p. 330. 348. 4. This was established by Charles the Bold, Cap. XXXIV. Edict. Fifh. Grotius.

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

Book II.

their Master, and their Work then can only answer the Expence of their present Maintenance, such Children can never quit their Service, unless they pay what is reasonable for all their former Entertainment. If indeed the Master's Cruelty be extremely great, it is an Opinion highly probable, that those Slaves, even they whose Slavery was their own Choice, may run away, and in that Manner consult their Safety. For what the Apostles and ancient Canons enjoin Slaves, of not leaving their Masters, 6 is 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.

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 * Freedmen, who were yet obliged to do some Offices for their Patrons; of 7 those who were to continue Slaves no longer than till such and such Articles were performed; of 7 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 8 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 6 Penefle among the Thessallians; that which they call the Service of 6 Mortmain; and lastly, that of 7 hired Servants: All which Differences do depend either upon

6 We have several Maxims in Scripture, which seem general, and are really so, if we consider the Terms only; but which however admit of Exceptions, which easily appear from the Nature of the Thing, and the Circumstances. Sometimes these Maxims are general only as they regard what commonly takes Place. This is the Meaning of our Author, who answers the Objection more at large in the Place quoted in the Margin.

XXX. (1) Among the Romans tho' a Slave received his Liberty, he was still obliged to respect his * Patron, (for so they called the Perfou 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 be 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 behind him. See Digest, Lib. XXVIII. Tit. XIV. De Jure Patrumati, Lib. XXXVIII. Tit. I. De oper. Libertariam, Tit. II. De bonis Libertariam.

2. Status liber; 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 Status liber. Leg. I. See Ulpian's Fragments, Tit. II. with the Notes of Mr. Schultzing, and others, whom he has collected in his Jurisprud. Ante-fofin. p. 571.


4. Adjectio, or Adscriptio Glora. Husbandmen, who belonged to the Lands given them, [and changed Masters with the field itself]. The Persians called them * * * * * as seems from a帕fage of Sozomen, Hist. Ecleid. Lib. II. Cap. 4, in which he applies that Term to Calomnians. 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 Cod. in the Code, Lib. XI. Tit. XLI. De Agricult. equliti & coloniis; as also JAMES GODFROY'S Commentary on the Place in the Theodosian Code, quoted in Note 3 of the foregoing Paragraph.

5 Penefle. ATHENAEUS gives the following Account of their Origin from ARCHIMECCHUS, an ancient Historian 66 A Colony of Bastards coming into Thrasy, 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 6 * Thessallians should neither drive them out of the Country nor kill them. Deipsophyl. Lib. VI. Cap. XXVIII. p. 264. [That Writer says they were formerly called * * * * * remains to prove; but afterwards Philostr.] JULIUS POLLOX ranks the Penefle with the Iuta among the Luciendemnians; and says they were a middle State, between Freemen and Slaves, Lib. III. § 83. Edit. Angeli. Dionysius of Halicarnassius compares them to the Chretians of the old Romans. But there was a wide Difference between them, as HYPERNESE proves in his Scholasticus, Lib. IV. Cap. XV. XVI. where he likens their stupidity with the Etymology of the Word Philan.

6 Quis non est mortuus versus. Persou who could not dispose of their Goods by Will, without the Consent of their Patron, nor marry out of his Hands. 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 * * * mortua, 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 Estate, if there were none. The word, in the Language of the Decreed 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. Heral. Rear. quotid. Lib. I. Cap. X. Num. 13, p. 81.

7 Among whom such as the English call Apprentices, are admitted to the State of Slavery, under their Apprenticeship. Grotius. See Thomas Smith, De Repub. Angli. Lib. III. Cap. X.
XXXI. The Persians term this, "Giving up Land and Water. But this is a perfect and entire Subjection; there are some other not to absolute, either in Regard to the Manner of enjoying the Sovereignty, or with Respect to the Extent of Power; you may learn the several Degrees of them from what we have already said above.

XXXII. There is also an involuntary Subjection arising from some Crime or other, and this happens when he  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 shall ice it by and by. And here not only particular Persions may be thus brought into a particular Subjection; as those at Rome, who did not appear when accused to submit themselves; and those  who either gave no Account of their Eftate, or gave a false one. And afterwards, those Women who married another's Slave: But likewise a whole People  may be brought into Subjection for a publick Crime; with this Difference only, that a Nation's Slavery is perpetual, for a Succedence in the Members of it does no Ways hinder it from being one and the same People still; whereas that Slavery which is such as did not appear when called on to submit themselves, were reduced to Slavery, as Persions who had forfeited their Liberty: Digest. Lib. XLIX. Tit. XVI. De re militar. Leg. IV. § 10. See DEUS- KEN. Diffut. antiquit. Lib. I. Cap. IV.

3 Inconj. The Lawyers speak of them. See ULPIAN. Tit. XI. § 31. Servius Tullius, one of the ancient Kings of Rome made a Law, that whoever did not give in a faithful Account of the Value of his Eftate, should forfeit it, be whipped, and sold. DIONYSIUS HALICARNASSIUS, Antiq. Rom. Lib. IV. Cap. XV. p. 212. Lib. De font. (221, Sib.) 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, Cenja perfectis, quem manus autem metu Legis de incensis data, eum vin- culum minis meritis, &c. Lib. I. Cap. XLIV. Num. 1. I think it should be read metu Legis. The Affettation was not halleted by the King; but the Fear of incurring the Penalty made every one hallet to give in his Name, and Value of his Eftate. 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 NICOLAS of Damascus. (Excerpt. Pierec. p. 517.) Among the Witches the same Penalty was infilled for several other Crimes, as appears from the Collection of their Laws. GROTIUS. 5 See TACITUS, Annal. Lib. XII. Cap. LIII. SuetONIUS, in VESPAS. Cap. XI. and the Passage of ULPIAN, referred to in Note 3. 6 See some Examples of this Kind, Chap. XIII. of this Book, § 4. with the eighth Note. 3 I inflicted
inflicted on particular Persons, extends no farther than their own selves, because Crimes are personal. But both Sorts of Servitude, either that which is publick or that which is private, may be perfect of 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.

7 Nova caputsequitur. Crimes are personal. Thus our Author understands these Words, which frequently occur in the Roman Law, as in FAD'S Receipte Sententiae, Lib. II. Tit. XXXI. § 8, in the Digest. Lib. XII. Tit. VII. Comm. unda, vol contra, Leg. XXI. § 1 and in the Cod. Lib. III. Tit. XLI. De nexuali. 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, (Allo N e x u a l i) 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 N e x u a l i. edit. Leg. XX. Inst. Lib. IV. Tit. VIII. § 5. See also Digest. Lib. IV. Tit. V. De Capite ministris, Leg. VII. § 1. and Lib. XLIV. Tit. VII. De Obligat. et Action. Leg. XIV. Cod. Lib. IV. Tit. XIV. An Scero sae facit, potf manumissionem, tematur? 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 Descendants.

CHAP. VI.

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. I. A Thing becomes ours from a direct or derivative Acquisition, either by the Deed of another, or by Virtue of some Law. Since the Establishment of Property, Men, who are 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 complete Property; and therefore Aristoteles says, 'Oµη τιμος, ην ηται και ααυτων των των, δη τον αυτω αυτω 'αναλληλοεινυς. It is the Definition of Property, to have in one's Self the Power of Alienation. But there are two Things here to be observed; the one in the Giver, and the other in the Receiver. In the former it is required, that whatever he does in this Kind should appear by Words, or by some other open or external Sign, the mere internal Act of his own Will and Mind being no Ways sufficient; nor is such an Act, as we have observed elsewhere, agreeable to the Nature of human Society.

2. But that there should be a formal Delivery made, is what is required only by the Civil Law; which, because it is now received by many Nations, is improperly filled the Law of Nations. So in some Places we find it customary for
such an Alienation to be made, either before the People, or before some Magistrat, and that the Particulars thereof be also 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 a Will governed and directed by Reason.

II. So also in the Receiver (without any Regard to the Civil Law) it is naturally required, that his Willingness to accept of what is given him do appear by some outward Sign or other; which Willingness, tho' it doth generally succeed the Act of the other Party, may also be sometimes antecedent to it; as for Instance, if any Man shall request that such a Thing be given or granted him; for it is here to be supposed, that that Defere continues still, unless it appears that he has altered his Mind. What further relates as well as 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 are the same, if we judge of them by the Law of Nature alone.

III. Now as it is in other Things, so it is also in Sovereignty, it may be alienated by him who has a just Title to it; that is, as we shewed above, by a King, if the Crown be patrimonial; otherwise by the People, but not without the King's Consent; because he too has some Right here, like to that of an Unfruitful, which Right he ought not to be deprived of contrary to his Will. And this regards the whole Extent of Sovereignty.

IV. But in transferring a Part of the State there is something else required; it must be done with the Consent of that Part also, which is thus transferred. For when Men form themselves into a State, they make together a Sort of perpetual and eternal Society, in respect of those Parts, which are called 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 therefore may be justly cut off for the Service of it; for this Body that we are

6 As, for Example, according to the Savon Law. See Hertius, Differt. de Conveniition. dominii translativis. § 15. in Tom. III. of his Opuscul. & Commentat. p. 77. and the Differentius juris Comm. & Savon. by Mr. Mencelius, at the End of the third Volume of Huber's Prælectiones juris Civilis, p. 8. Edit. Lips. 1707.

7 Thus, according to the Roman Law, all Donations, above a certain Sum, were to be regiftered. See Infilt. Lib. II. Tit. VII. De Donationibus, § 2. and the Commentationis, p. 320. 5th. of Cassiodore, that The Alienation of Goods requires an entire Freedom of Judgement. Var. Lib. II. Epif. XI. Grotius. Those Words contain the Reason why King Theodore annulled Alienations made by a Woman, who leading a debauched Life, had left her Husband. See Chap. XLII. of this Book, § 5.

II. (1) For which Reason Prefents may be sent to the absent by Messengers, as Servius obseruer, on those Words of Virgil, Quae misciti duxit. Aen. IX. (v. 561). Grotius.

III. (1) See Puersdorf on this Subject, B. VIII. Chap. V. § 9, et sq.


IV. (1) This is the Opinion of Gaius, De Pace jubilata. Cap. XV. Num. 14. See De Serv. Res. Inventaire de l'Histoir de France, in the Life of Charles the Wife. [In Regard to some Towns and Countries which that Prince had granted to the English, by the Treaty of Briggnoy, p. 104. Edit. Paris. in Folio, 1667.] See the same Histotin, in the Life of Francis I. where he is speaking of the Duchy of Burgundy, [which the King, being Prisoner, had promised to deliver up to the Emperors, p. 565.] Grotius.

2 That is, which is left for ever, as far as in them lies, unless all concerned consent to some Separation. That is, Towns, Provinces, in a Word, all the particular Bodies of which the general Body of the State is composed.

3 The learned Gronovius pretends, that the Conclusion to be drawn from thence is directly contrary from what our Author inter. For, says he, since the Parts of a State may subsist, when separated from that Body, least 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, were 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. Besides the common Interest of the whole Body they have a particular Interest; and if the latter is to be sacrificed to the former, this is not to be done at all Times, or beyond the Engagements which they have contracted voluntarily. But no Part of the State can be supposed to have consented that the others
are now speaking of, is of a very different Nature from that, it being formed by Compact and Agreement only, and therefore the Right that it has over its particular Members, is to be determined by the Intentions of those who originally framed it; which can never be reasonably imagined to be such, as to invest the Body with a Power to cut off its own Members whenever it pleases, and to subject them to the Dominion of another.

V. So, on the other Hand, no Part has a Right to separate from its Body, unless it plainly appears, that it is absolutely necessary for its own Preference; for, as we have before observed, in all Matters of human Institution, Causes of extreme Necessity, by which all Things return to a mere State of Nature, seem to be excepted. St. Austin, De Civ. 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 Horrors 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 Periasts, this Clause was subjoined, 3 Unlefs compelled to it.

VI. And from hence it is easy to comprehend, why in this Cafe a Part has a greater Right to prefer itself, 4 than the Body has Power over the Part; because the others should have a Right to make it change its Matter against its Will. This is not one of those Things that are left to the discretion of each Party, as Her witus pretends, who founds an Objection on it against our Author, in bis Treatise De Feudis Oblatis, Part ii. §23. Tom. ii. Comment. 2. Op. p. 543, 544. For the Right of a Plurality of Peoples does not go so far as to separate them 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 Locumdenarios formerly declared Anxious innocent, who had surrendered Pretensions, being forced by it to Famine. Xer.

NOMON, Hist. Græc. Lib. i. (Cap. iii. § 12. Ed. Lexam.) The Emperor Augustus even thanked the Governor of Martyropolis in Mæotisamia, for surrendering that Town to the Periasts, when he was no longer able to defend it. Procopius, who relates this in his Treatise on Justinian’s Buildings, (Lib. iii. Cap. ii.) elsewhere observes, that Famine and Famine cannot dwell together; nor will Nature bear, that the same Person should want Food and act bravely. Gothic, Lib. iv. (Cap. xxiii. Hist. Mih.) Miles, who was written by Cod. 26, to the Emperor Alexius, concerning the Siege of La-

riffa, 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. COMMEN. Lib. v. (Cap. iv.) GROTIUS.

2 De Civ. 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 Matter, 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, confide its own Preference as well as that Part. It is sufficient that no direct Force be employed for putting it under another Government, and that it be done by a Right of defending itself, if it can: in a Word, that it no longer supports it, which is all that can be reasonably required by him who has reduced the Body to so bad an Extremity. Thus, in this Case, the Body of the State does not alienate the Part in Question; but only renounces a Right, that is, the right of defending itself, by Verue of the tacit Exceptions made by Cafes 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 Ule of the Right of preference into which it had before the Establishment of Society; whereas the Cafe is not the same in regard to the Body. This is founded on a fallible Reason, from which a falfe Consequence is drawn, viz. that the Body being formed only by the Establishment of Society, it had no Right before it was a Body, and consequently, had not that of preferring itself. But, tho’ a moral Body has no Right precisely as a Body, before it is formed, it still has a Right to prefer 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 prefer themselves, which they cannot do without the Preference of the Body; they are and ought to be supported to communicate that Right to the Body itself. The Body therefore may be lawfully divide itself, in the manner aforesaid, from any one of its Parts, when its own Preference requires it; as that Part might divide itself from the Body in the like Cafe. 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 Matter 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 Cafe 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 Cafe, I say, the Body would in vain endeavour to prefer and defend such a Part, being not in a Condition of preference and defending itself. It is charged with Misfortune, under which the unhappy Part must confide itself, if it finds no Way of remediying it; and it would be highly unreasonable to expect, that the
the Part makes Use of that Right it had before it entered into that Society; but it is quite otherwise with the Body. Nor let any Man pretend to tell me, that the Sovereign Power is lodged in the Body; as in its Subjectz, and may therefore be alienated by it, as a Thing that properly belongs to it. 2 For if the Sovereignty resides in the Body, it is as in a Subjectz 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 more Right of Nature, cannot take Place here, because the Law of Nature gave indeed a Right to use Things; as for Instance, to eat or keep them, which are natural Acts, 3 but not to alienate them. This Power was introduced by the Fact of Men, and therefore it is by that we must judge of its Extent.

VII. But why the Jurisdiction over any particular Place; that is, any Part of a Territory, that lies, suppoze, uninhabited and waste, may not be alienated by a free People, or by a King in Concurrency with his People, I see no Manner of Reason to dispute. Were indeed any Part of the People to be transferred, as they have a Freedom of Will, so have they likewise a Right to oppose such an Alienation; but the Territory, whether wholly, or in part, belongs in common and infeparable 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 Diffincon we made above.

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

of the Body of the State should usefully facriilege itself for the Stake of such a Part. Our Author's Opinion being thus refuted, will be fet forth from the Criticifm of some of his Commentators, who offer several poor Reasons for confcuting it, and perplex Things according to their usual Custom. As the Objeclion is fabulous, and not very hid, the Answer is obvious 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 the Will of the whole Body. These Two 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 fmal Bodies, which compofe 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 Matter, we are to enquire whether there is Reason to believe, that each Member defigned in this Point to subject itself to the Will of the whole Body, which is not the Case. Even the most absolute Sovereigns do not, in its own Nature, include a Power of making the Subjects acknowledge another Matter against their Will; as we have observed on B.I. Chap. III. § 11. Note 4. In answer to the Objeclion before us therefore, it is not necessary to
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.

IX. Under the Title of Alienation, is justly comprised an Infeoffment, or granting a Dominion in Fee, under the Penalty of Forfeiture, in Cafe of Felony, or for Want of Iliue; for this is a Sort of conditional Alienation. Wherefore we find, that as Alienations, so likewise some Infeoffments of Kingdoms, which Princes have made without the People's Approbation, have by many of them been considered as void. Now the People are underoofd to give their Approbation, either when they assemble in a whole Body for that Purpofe, as was formerly the Custom with the Gauls and Germans, or when they signify their Content by particular Deputies committed thereunto, and invested with a sufficient Power from the integral Parts of the State; for whatever we do by another, is equally the fame 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 execute 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. But as for Jurifdictions that are not Sovereign, I fee no Reason why the People may not grant them, even for an hereditary and perpetual Right, since it no Ways affects the whole Body, nor is any Ways destructive of the Sovereignty it fell; but the King cannot do fo without their Content, 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 Succesion to the Crown, can produce nothing but temporal Effects. Yet might the People, as well by their express Consent, as by a tacit Consent, founded on Custom, (and this is what we fee does now almost every where prevail) give up this Right to their Princes. And we frequently find

IX. (1) For the fame 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. Pol. Lib. XXV. GROTIUS. a Thus in Germany, in the Cafe of Alienations, the Consent of the Electors is looked on as the Consent of all the States, according to Custom, and the Approbations made on that Article. GROTIUS. b 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 BOLLINGER'S Note on this Paragraph, p. 220, ete. and the late Mr. HERTIUS'S Difertation De Superioritate Territor. § 91, 92, 93. Tom. II. Comment. & Opoj. p. 353, 364. as also the juris Publici Prudentialis, by the late MR. COCCHER. Cap. XIV. § 9. etc.

X. (1) Minoris Functiones Civiles. In the Summary of this Paragraph, the Author title 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 polluted.

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 indiscriminate Expressions. An Ultrafuchary, (a Tenure) to whom he compares the Kings under Confeffion, has only a temporary Right; and yet the Difpofals by him made of the Income of the Estate which he enjoyed, subsifted after the End of the Term or for which he was Tenant. Laws made by an English Parliament, do not loft their Force as soon as the Parliament is difolved, whether a new one be called or not. Our Author himself does not pretend that a King can revoke all the Acts of his Predecessors; as appears from Chap. XIV. of this Book, § 3. The Principle 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, it 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, that such a Practice of bestowing Sort of Con- fessions have been to them; because those who have been favoured with them, have in Proofs of Time made themselves so great, that they have entirely shaken off the Yoke, and fet 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.
in History, that this was a Right which the Kings of the Medes and Persians enjoyed, who gave away not only 3 Towns, but even whole Countries, to be held for ever.

XI. Nor can 1 Kings alienate, either in Whole or in Part, the People's 2 Domain, the Revenue whereof is appropriated to the Service of the State, or to the Maintenance and Support of the Royal Dignity. 3 For they have no more than a Tenant's Right to it. Nor do I at all allow the Exception, If the Thing be but of little Value, because I can have no Right to make over the smallest Part of what is none of mine at all. But the People indeed, when they know the Affair, and are silent in it, may much more easily be suggested to confer in smaller Matters, than in those of greater Moment. And in this Sense too, in 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 Domain is established on Account of the Sovereignty, and consequently, cannot have more Privilege.

XII. But here lies the Mistake of many, they confound the Revenue and Profits of the Domain, with the Domain itself. Thus, for Instance, the Right of Alluvion is usually in the Domain; 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 Domain, the Money arising from thence in the Revenue: The Right of Confiscation in the Domain, the Lands thus confiscated in the Revenue.

XIII. But after all, Princes, who have a full and absolute Sovereignty; that is, who have a Power upon a lawful Occasion, and when Revenues 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 Revenues of State; so are they no less obliged to redeem what is upon such Revenues 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, I have also a Right to pawn again. What we have hitherto said of this Matter, will only hold good, provided there be no fundamental Law of the State, which shall either enlarge or confine the Power of Prince or People.

XIV. 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

3 Thus Darius gave Sylphos the City and Island of Samos. Grotius.

This Example is not entirely full. Darius only drove out Mæandrus, who had feized on the Government, and thus facilitated Sylphos's Way to the Throne, of which his Brother Pericrates had taken Possession. The Story, with all its Circumstances, may be read in Hérodotos, Lib. III. Cap. CXXXIX. &c. It would have been more to the Purport to have related what C ornél i us Nepos says, viz. that Darius gave the Heads of some Cities in Ionia and Àeolis the permanent Command of each respective City. Vota Mihryan. Cap. III. Num. 1. See also the Life of Themistocles, Cap. X. Num. 3.

3. (1) See Puffendorf, B. VIII. Chap. V. § 8, 11.

2 The ancient Grecians gave the Name of Τηματον, to a Portion of the publick Lands assigned to Kings. We have Infrances of this in Homer, in Relation to Bellerophon, King of Lycaon, Ibid. Lib. VI. (v. 194.) In Relation to Megareg, ibid. Lib. IX. (v. 173. &c.) And in Relation to Glaucon the Lycaian, Lib. XII. (v. 312. &c.) Grotius.

We have a memorable Passage of the Grammatician Sertius, on that Verse of Virgil.

Infopar his, campi quad Rex habet igitur Latinius. Aenid. 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 τὴματα. According to the Laws of Lycurgus, a King of Lacedomia was allowed Such a Portion of the left Lands as was necessary for supporting him handsomely, without making him too rich. As we learn from Xenophon, De Rerum. Legat. Cap. XV. £ 5. Edition, Oxon.

3 Therefore they cannot alienate it, without the Consent of the States of the Kingdom. See an Instance of this Mr. Dr. Trew, Hist. Lib. LXIII. In the Year 1577. Grotius.


establisht,
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, reverting 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 Cafe of Death, 'till then to be reverfed or altered at Pleasure; and in the mean Time reverting 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, ἔστε ἡμών ἀνθρώπων, * He thereby made what they had properly their own. And Quintilian, the Father, in a Declamation of his, 3 Our very Estates would seem burthenfome, 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 Virtue of this natural Right, that Abraham, in Cafe he should die without Issue, was 4 to have left all his Effects to Eliezer, as is plain from the Paffage, Gen. xv. 2.

2. But that Foreigners have not in some Places a Power to dispose of their Effects by Will, is not from the Law of Nations, but from the Civil Law of such or such a State; and I am much mistaken, if it does not proceed from those Ages when Foreigners 5 were looked upon as so many Enemies; and therefore, among the more civilized Part of Mankind, 6 it hath been justly abolished and laid aside.

XIV. (1) On this Question see Puffendorf, B. IV. Chap. X. with the Notes.
3 Deecham, CCCVIII.
4 Sophocles has given us the Will of Hercules. Trachin. ver. 1164, &c. That of Alcibiades appears in Euripides, (Alcibi. v. 282, &c.). We read in Homer, that Telemaque made a Donation, in Cafe of his Death, which is a Sort of Will. Odyss. Lib. XVII. (ver. 79, &c.) In the fame Poet are fome Examples of a Declaration of a laft Will in Relation to certain Things to be done; as Plutarch fhews from the Words of Andromache and Penelope. We have already produced other Influences 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. xii. 16. and Eccl. xxxii. 25. Orosius.

The Wills of Hercules and Alcibiades contain no Difposals of Goods, but only Directions for doing certain Things. We find in Euripides’ Alcibiades, a Sort of Donation in Cafe of Death, made not by Alcibiades himself, but by Hercules, ver. 1020, &c. Our Author has produced this Example in his Homer paffage to Pliny, p. 56. Edit. Anift. and this probably gave Occasion to the Miller, which made him confound the Penfons in this Place. Plutarch’s Reflection occurs in the Treatise on Homer’s Poerty, by fome attributed to Dionyfis of Halicarnaffus. He there says, that The Poet knew it was encomany for Penfons going to War, or being in Danger, to recommend certain Things to their Relations. p. 74. Edit. Barne. The Words of Andromache, from which he infers this, are in Iliad XXIV. v. 743, 745. Thofe of Penelope, in Odyss. XVIII. v. 264, &c. See Chap. XV. of this Book, § 5. 6 It has not been quite abolished. See Bodin, Of the Commonwealth, B. I. Chap. VI.

C H A P. VII.

Of an Acquisition derived to one by Vertue of some Law; where also of succeeding to the Effects and Estate of a Man who dies without a Will.

1. Some Civil Laws are unjust, and therefore do not transfer a Property; but are those that confider the Goods of Reconciliated People.
Laws * that are plainly unjust; as those by which a shipwrecked Goods are
confiscated. For to take away a Man's Property, without any apparent Cause, is
manifest Injustice. Very well then has Euripides said in his Helen,

Namque hæc uinam, absoluta uinam.

*Being shipwrecked, and a Stranger, I am one of those who ought not to be plundered.
For what Right can the Prince's Treachery have (they are 4 Confidens's own Words) in the Calamity of any Man, that it should purify its Advantage in so unfortunat an Affair? And Dominicus, in his fourteenth Oration, speaking of a Shipwreck, mi 174, et ætis, a 68, &c. GOD forbid that I should gain by
Men's Misfortunes.

II. By the Law of Nature; that is, by a Law which results from the very
Effence and Virtue of Property; an Alienaion is made two Ways, by Compensat-
on, or by Succession. Alienaion by 1 Compensat 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-

[Note: The text is incomplete and contains many errors, possibly due to transcription issues.]
Of the Rights of

Book II.

§ 24. In Verb

B. i. Ch. 3 § 52.

&c. § 4 1. cit. 1.\\n1. lit. 3. de Ex.
& C. Sec. leg. 12. & D. D. in leg.
39. § 1. in tit.
Ding. & leg.
Aqu. Deit. intr. De
Repr. § 59. B.
III. Ch. 3.
§ 4 5.
III. How the
Succedaneum of
the Easate of
him who dies with-\nout a Will does
originally and
naturally

took the Gold and Silver Veils of the Egyptians, in Compensation for what was due to them for their Work. For, says he, the Egyptians were indebted to the Israelites, not only for their Goods but also for their Lives. Terentius, Adv. Marcian. Lib. II. (Chap. XX.) has the same Thought. The Egyptians, says that Father, redeem their Gold and Silver Veils. The Hebrews, on the other Hand, urge their Demand, alleging their Right to Wages for their Service and Work, &c. He afterwards shows, what the Liveries took was very much short of their Due. Grotius.

4 See Puffendorf, B. V. Chap. XIII. § 10 and loll.

Instead of Hesianus, Levikes, read Euntes, Ferresii; an Emendation long since made by Mæziriac, 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 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. Dig. Lib. XII. Tit. 11. De aquir. vel amsteniis poffessio, 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. Dig. Lib. XLVIII. Tit. VII. Ad Leg. "Jul. de i privati, Leg. VII. See also Lib. XLVII. Tit. VIII. De ob honor. reip. Leg. II. § 18.

7 If it shall be proved to me, that a Man rashly takes or possess of 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 Debt. Dig. Lib. IV. Tit. II. Quod metu ans, &c. Leg. XIII.

8 The Author supposes, without Doubt, that the Perfon 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 loosing it. We must here likewise suppose a Cafe, 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 Reformation of what was taken. What have we here said is intended 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 Puffendorf, B. IV. Chap. XI.

2 Paul, the Lawyer, says, that A Presumption of Truth may be granted (by a Conclit) to the Successors of Peripatian dying intestate; because the Mother of the Family is supposed willing that they should succeed to the Inheritance which falls to them by Law. Dig. Lib. LXIX. Tit. VII. De foro Coadiuit. Leg. VIII. § 1. 

Geuicu.
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 sup-
poed, 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 fol-
ows, that such Effects should go to him, to whom there is the greatest Prob-
ability that the Deceased, had he made a Will, would certainly have bequeathed
them. 2 To know the Intentions of the Deceased, says the younger Pliny, "stands for a Law." But in Cases that are doubtful, it is always premised that a Man would
make that which is the most fair and honest. And among Things fair and honest, we
must rank in the first Place, that which is strictly due; and afterwards that which
has a certain Suitableness to the Character or Person of one, tho' not strictly
due.

IV. 1. It is a Thing disputed amongst * 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; yet but, at the same Time, think that it is
agreeable to Reaon that it should be fo. It is our Opinion entirely, that we
ought to distinguish the Word Obligation, which is sometimes taken strictly, for
that which is founded on expulsive Justice; sometimes in a larger Sense, for that
which cannot be omitted without offending against the Rules of Decorum, tho'
this Decorum proceeds from some other Source than rigorous Right, 'properly' so
called. Now the Obligation we are speaking of here, 1 is to be taken in this larger
Sense, except there should be some human Law that lays Parents under a stricter
Obligation. And it is thus that I understand what Valerius Maximus has ad-
vanced, when he says, that * Our Parents, by maintaining us, have laid an Obliga-
tion upon us, that we do the same by our Grand-Children. And Plutarch, in his
most elegant Treatise of the Affection to one's Children, 2 says, * When we are
1. Eph. Lib. IV. Ep. X. See also Lib. II. Ep. XVI. Grotius.
2. That Author speaks of what an Heir ought to do, when there is Reaon for thinking the Deceased had an Intention of doing certain Things, the
3. there be not sufficient legal Proof of it, or the 4. his Dispositions may be annulled by the Law. This therefore is a particular Case, or rather a Sort of Case of Conficience, on which the Reader may confid
5. Pufendorf, B. IV. Chap. X. § 7, 8, together with Note 2, my § 8, second Edition. Whereas the Business here is to lay down a general
6. Rule for knowing to whom the Goods of a Perfon ought to belong, who has not disposed of them by Will, and whose whole Intention is supposed not to
7. be known.
9. (1.) In my Opinion, we are here to dilin-
guish between the Time, during which Children are not in a Condition of providing for their own Sub-
fistence, 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 preferring 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 indispensible Ob-
ligation on Parents to leave them their Estates, ei-
10. ther 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 to their Interest to leave them to others, they would do ill to prefer any one to their
11. own Blood. But even in this Case, Children would have no Caufe to complain of any Wrong, properly so called, and still less, when the Father or Mother had good Reafons for disposing of some Part of their Estate in Favour of Perfon more worthy, or such as had more Need of it.
12. 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 immedi-
ately preceding their having been proposed, are, Nature has not obliged you a Law for getting Children, as will as for being born yourselves, Lib. II. Chap. IX. Num. 1. fo that the Sentence taken together, speaks 'directly of marrying, of which the Obligation of Maintaining Children is a Consequence.
13. Tim. II. p. 499. Edit. Wech, where he ob-
serves, that this is the Reason why Children have so little Gratitute to their Parents for what they leave them, and how hee little Concern for honouring and serving them.
14. The Emperor Julian says, * It is just (or ra-
er a received Cultum, viximus) that Children
15. should inherit their Father's Estates. In Cæsarii.
16. (p. 354. Edit. Spanheim.) Nor are Daughters to be
17. excluded; and it appears from the Book of Jos,
18. that according to the Cultum 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 Child-
19. ren. His Words on that Subject may be seen in the Comm. L. Comm. LXXIII. Quat. II. (Can. VIII.) and Cafl. XVII. Quat. IV. (Can. XIL.) and Cafl. XVII. Quat. IV. (Can. VIII.) The first Passage is taken from B. II. De Vita Clericienarum; and the second from his fifty-second Discourse, Ad Prætes in Ermetis, if the Piece last mentioned is really St. Augustin's. Poccorrës
20. observes, that the Laws, in their latter Reforries dif-
21. ferent
Of the Rights of

Book II.

them. For, as Aristotle has it, whoever gives the Form, gives also what is necessary for producing the Form; and therefore, whoever is the Causer 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.

And for this Reason it is, that other Animals too do, by mere natural Instinct, supply their young Ones with such Necessaries as are convenient for their Subsistence. Hence Apollonius Tyaneus, what was said by Euripides, 5

\[\text{Ἀπατώ δὲ κεφάλαιον ἢ ἂρτον τίμη.}\]

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

\[\text{Ἀπατώ ἢ ζωὴν ἢ ἂρτον τίμη.}\]

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. viii. Ch. 7. and 8. To which Paffage that in Oppian, in his Gymnastica, Lib. iii. (ver. 107, &c.), and Haliectica, Lib. i. (ver. 646, &c. 702.) does perfectly agree. And the same Euripides, in his Tragedy of Diḍys, lays, that This one Law is what all Men have in common among themfelves, and with all other Animals. Hence it is, that the antient Civilians refer the Education of Children to the Law of Nature, whereof the very Beasts have some Sence from a natural Impreflion, and which is prescribed to us by Reafon. 7 A certain natural Incentive, as Juftilianus exprefles it; that is, the ἀγάπη, a natural Tendernefs and Affection urges Parents to provide for the Maintenance and Education of their Children. And in another Place, 8 Nature has obliged the Father to maintain either Son or Daughter. So Diodorus Siculus, ἀρετὴς ἡ ἡμῶν ἡ, &c. Nature teaches all Animals to prefervé themfelves and their Off-spring, that by this Means their Race may be perpetuated for ever. So by Quintilius a Son is introduced delivering himfelf thus, I claim my Part by the Law of Nations. And Salluf called a Will by which a Son is disinherited, impious and unjust. And becaufe this is a natural Duty, therefore is the Mother obliged to provide for 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 illegitimate; and that by Solon's Laws it was provided, that a Man should not be obliged to leave any Thing to his natural Ifiue; yet the Canons 9 of

\[\text{different in different Nations, agree in this, both among the Romans and Barbarians, that Children are the proper Mafhers of what is left by a Father. Perfic.}\]

\[\text{Lib. i. Cap. XI. Grotius.}\]

5 Andras, ver. 448.

\[\text{Plain, speaking of Swallows, fays, They feed their young ones by Turn, with the greatest Equity.}\]

\[\text{Nat. Hist. Lib. X. Cap. XXXIII. Grotius.}\]

6 Juftit. Lib. i. Tit. II. De Jure Naturæ, &c. See also Diefyl. Lib. i. Tit. I. De Juris. &c. See Leg. i. § 3.

7 Cod. Lib. V. Tit. XIII. De rei woriae adiun., &c. Leg. un. § 3.


\[\text{The Paffage of Salluf appears in 8 Fragment containing the Letter from Mithridates to Jason, King of Pontus; where he speaks of the Will by which Attalus had made the Roman People his Heir. Fragm. Lib. iv. Cap. ii. Edit. Wolf.}\]

\[\text{Diefyl. Lib. XXV. Tit. III. De agniend. &c. annal. Leg. VI. § 4.}\]

\[\text{10 Children born of an adulterous or incestuous Comerce; for fuch were not called natural Children. See Nost. LXXXIX. Quibus modis naturales, &c. Cap. XV.}\]

\[\text{11 Our Author, deceived without Doubt by his Memory, makes a wrong Application of this Law of Solon, concerning natural Children. That celebrated Legiflator, according to Heraclides of Pontus, as quoted by Plutarch, ordered, not that a Father should not be obliged to fupport fuch Children; but that they should not be obliged to fupport their Fathers. The Reafon given for this Law is, because tho' Fathers had had no other View than that of gratifying their own Passion, and inftead of expelling any grateful Return from their Children, they gave them a Sort of Right to rejent the Ignoring of their Birth. Vit. Solon. Tom. i. p. 90. Edit. Wech. As to the Bufness of Fathers in regard to their natural Children, tho' the latter were not Heirs to the Goods of their Fathers, unlefs they had been legitimated, yet they received a certain Portion of the Inheritance, which was termed the Bohgard's Port, Nobis, and which was fired at a thousand Drachms, or ten Minæ, that is about a hundred Crowns, a pretty considerable Sum for those Times. See Aristophanes, in his Birds, ver. 1635, &c. Harpocratus, on the Word Nobis: And Meursius, in his Themis Atticæ, Lib. ii. Cap. XII.}\]

\[\text{12 Decretal. Lib. ii. Tit. 7. De ce qui doit in Matrimoniun quam pollut per Adulterium. Cap. 5. in fin.}\]
the Christian Church have very much fostered 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.

4. Neither are we obliged to maintain our Children of the first Degree only, but those of the second too; and even beyond this, if the Case be so: This is what Justinian 12 informs us of, when he declares, that for Nature's Sake we ought to provide not only for our Sons, but for those who come after them, and this extends to such also who are defended from us by our Daughters, 13 if they have no other Subsistence.

V. 1. Children too ought to support their Parents; a Duty not only prescribed by the Laws but also taught by a common Proverb, 14 ἵλινθάετε, Do as the Storks do, return the Kindness you yourselves have received; and we find that Sophron 15 is highly applauded for letting 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 influence 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, ὁ τι παρά τοι φειδό εστι, &c. 3 Nature injures Parents to love their Children, more indifferently and more strongly, than Children to love their Parents. And that of Aristotle, μάλον (ωνικώς), &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 Suceffion to one's Estates devolves on the Children, because that Parents are supposed to be willing not only to supply them, as being Parts of themselves, with Necessaries, but also to make such a plentiful Provision for them, as shall enable them to live agreeably and handsomely; and especially at a Time when they can no longer enjoy their Estates themselves. Natural Reason, says Panopolis 5 the Civilian, is as it were a sort of Law, that entitles Children to the Inheritance of their Parents, calling them to that Succession as their Right and Due. Papinius, 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 conform them in their Affiliation; whereas Children are called to inherit the Estates of Parents, not only by Nature, but also by the usual Desire of Parents. That is, the Estate goes to the Children, partly from an express Obligation in Nature, and partly from the natural Conjecture, that Parents would have their own

12 See the Law quoted in Note 8. on this Paragraph; and Law V. § 1, 9. of the Title of the Digest, cited in the Note immediately following this.

13 It is evident, that a Daughter's Children are not a Burthen to their Grandfather, but to their own Father, unless the Father is either dead or in Want. Digest. Lib. XXV. Tit. III. De agnendis. &c. alim. libertas, &c. Leg. VIII.

14 In the Fragment of Meander, collected by Mr. Le Clerc, p. 278.


5 Digest. Lib. XLVIII. Tit. XX. De bona damnatarios, Leg. VII.

6 Ibid. Lib. XXXVII. Tit. VI. Si testi transt. &c. Leg. VII. § 1. Paulo the Jew fays, 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 Cafe, as being ominous, and against the Wisdom of Parents. De Vie. Modis. 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, Mem. Vol. II. (Cap. II. § 5.) Grothus.

3 M. Children
Children to be as handomely provided for as possible. 2 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, &c. 673. § 8. Children ought not to lay up for their Parents, but the Parents for the Children.

VI. And now, because it is usual for the Father and Mother to take Care of their Children, therefore while they live, the Grandfather or Grandmother are thought to be under no Obligation of providing for them: Yet if they, or either of them, die, it is then but reasonable, that the Grandfather or Grandmother should, in the Stead of their deceased Son or Daughter, take Care of, and provide for, their Grand-sons or Grand-daughters: And this Duty does also, by a Parity of Reason, extend to Parents that are still farther removed. And hence has that Right its Original, which entitles the Grandchild to succeed in the Son's Room, as Ulpius expresses it. Modestinus termed it, "πᾶν οὖν καθάρος, &c. § To fill up the Place of the dead Father. And Justinius, * ὑπὲρται οὖν τοίς τιναῖς, ** To come into the Father's Room. *** Ιερόν, in his Oration, where he speaks of Philo-Semitism's Estate, calls this ταυταία, To enter upon again. And Philo the Jew, των γενεσεων, &c. 3 For the Grandchildren, their Fathers being dead, supply the Place of Sons to their Grandfather. And this Kind of Vice-Succession, * our modern Civilians are pleased to call a Representation, where the Children represent the Persons of their Parents. And that this was in Ulæ amongst the Hebrews, is sufficiently proved from the Division of the 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 Demoklines says, in his Oration against Macoburus.

VII. What we have hitherto said of the Right of Succession, by making a Conjecture at the Will of the Intestate, holds good, unleas there appear some certain and evident Signs to the contrary; amongst which Signs was that which the Greeks fly'd an 'Abdication, and the Romans a Dissertion'; yet in this Case, if the Peron so dispossessed has not by his Crimes merited Death; he ought, for the Reasons above-mentioned, to have a sufficient Maintenance allowed him.

7 Lib. V. Cap. IX. Num. 2.
8 VI. (1) Justinius pronounces this, just and equitable, ισραίας, equal, in his Book. Lib. III. Tit. I. De hereditationibus, 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 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 Chastisements, who observed it Religionously, 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 Attallia says, that Each of the Defendants takes the Place of his Father. Grotius.
9 2 Digl. Lib. I. Tit. VI. De his qui fui, vel alieni juris sunt. Leg. VII.
11 *** Ierus. 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. Wib. 1619. 'Ο γαρ μητε των ιδιων, ετω μη διαζωνθαι γνω.
12 He is there speaking of an Article of one of Sabin'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 Clole of his Oration against Leochares. The same Exposition occurs in the same Oration, p. 673. Edit. Basf. 1772.

where it is explained by ταυταίας τιναῖς οὖν τοίς τιναῖς Return to inherit his Father's Substance. And Ierus himself elsewhere terms this, ταυταίας τιναίς, It is their Children. Returning to his Father's Family. Orat. IX. De hereditate Aristarchi, p. 555. See also Harpocrates, or the Words εν εϊς των υμων. &c. The Paffage therefore is entirely foreign to the Purpose.
14 The Defenders of Euprim and Menandar, * 'Sphes'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 Jacchi had adopted them, as our Author himself observes, Note 5; on § 9. See Numbers xxvi. and Joshua xvii. 6 Orat. adversus Macartatum, p. 661.
15 VII. (1) Aristobulus. Aristotle calls this άναδρομή, and Συμβολής. Ethic. Nicom. Lib. VIII. Cap. XVI. and ult. where he says, It perhaps never happens that a Father remembers his Son, unless the Son be extremely worked.
16 See a Treatise intitled Buba Kuma, Cap. IX. § 10. and § 25. of this Chapter. Grotius.
VIII. 1. Another Sign, which forms an Exception to the general Rule, is, when there is not a sufficient Proof, that he who paffes 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 Senfe 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 affifted at its Birth, and were Witnesses of its Education. But it is impossible to have such an Assurance of the Father. And this Homer intimates, when he says,

ο ναγ νω τι έν γινο εις αενω.

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

Αυτοι γαρ άδης οδε άδης νοντοι.

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

* των γηνοιαν γαρ άδην άδης κολνις

A Mother loves her CHILDREN better than the Father, because he knows they are hers, but be 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, ^ inherit by Virtue of a Premption of the Deceased's Will?

2. But our natural Issue too, tho' distinguished by Law from such as are legitimate,

(Των γενοιων γαρ άδην άδης κολνις

Nemo verer.

They are not inferior to our legitimate CHILDREN; but the Law renders their Condition itself 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 AnoUafios; 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 offer them to be Members of

3 Άοιοι γαρ άδης οδε άς το νος επινοι,
ΆΑΑ παντοφλα παλαιο, η νεωμοτρ.

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 Puffage is quoted in the other Manner by Clement of Alexandria; but with this Difference, that that Father reads επινοι, and not επινοη.

* In Stobae FieLigio. Tit. LXXVI.
3 Or a Grandson adopted, as was done by the Patriarch Jacob, in Relation to his Grandsons Ephraim and Manasseh. Grotius.

See Grafas xlvii. 5 and Mr. Le Clerc on the Place.
4 Ex Andream. Tragm. Barnet. v. 12, &c.
5 Cod. Lib. V. Tit. XXVII. De naturalis. libris. Leg. VI.
6 Per Curia obstationem. 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 burdensome. The Curiales, or Decuriones, were charged with all the publick Affairs, and that frequently at their own Petit, 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
of Town-Councils. We have an Instance of this antient Way of adopting natural Children, in the Cæse 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 Virtue of a Law, but by some particular Agreement, such Children as are born in lawful Wedlock, shall have no more than a Maintenance, or at least be excluded from the Bulk of the Estate. Now a Marriage that was contracted in this Manner, notwithstanding it was with a free Woman, was what the Hebrews called Concubinage; such as was that of Abraham with Keturah, whose Children, as also Ishmael, the Son of Agar his Bond-maid, received some few Pretents 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 Margengabic Marriage: Not very different from which are those second Marriages in Brobant, where the Children of the first Marriage acquire the Property of the real Estate that was in Being at the Difsolution of the former Marriage 9.

IX. 1. But where there are no Children, it is not so easy to determine on whom a Man's Estate should naturally devolve; neither do the Laws vary in any one Point so much as they do in this particular. All which Difference may, notwithstanding, be for the most Part referred to these two Heads: The former whereof respects the nearest Degree of Blood, the latter will have the Effects return from whence they originally came, and this is usually signified, by The Father's Effects to the Father's Relations, the Mother's to the Mother's. And here, in my Opinion, we should distinguish between a paternal Estate, that comes from Father to Son, (as was usually expressed in the Form that cut off the extraneous Son from the Administration of his ESTATE) and one that is newly acquired. In regard to the former,

Persecutions, were sometimes sentenced by cruel Emperors, to enter into these Bodies, as appear 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 frow to be excused from that Office, or quit it at any Rate, there was a Necesity of granting such Privileges as in some Manner should counterbalance the Barthen 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 Libris, &c. Leg. III. See also the Institutes, Lib. I. Tit. X. De Nuptiis, § 13. and Brigade's Solute Antiqu. Lib. III. Cap. XII. as likewise Godesreo, on the Theodosian Codis, XII. 1.

7 This was formerly the Cae of all the Children but the eldest, in the Country of Mexico. Grotius.

See Francis Lopez de Gomez's Gen. Hist. of the West Indies, B. II. Chap. LXXVI.

8 Maximum ad Margengabiam; or, as the Writers on Feuds call it, ad Margenaciunum, Lib. II. Tit. XXIX. This Word comes from the German Morgen-Gah, which signifies a Morning Pretent. 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 Pretent, 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. Grotius of Tours calls this Matrimonium Donum, Lib. IX. 19. as Gronovius observes, who likewise refer us to Lindenburg's Glossary on the Codex Legum Antiquarum. See Cujas, Lib. IV. De Feud. Tit. XXII. (Edit. vulg. II. 29.) and Mr. Hertius's Dilocation, De speciabile. Rom.

Germ. Rekus publ. &c. Soci. II. § 7. p. 104. &c. Tom. II. Comment. &c. Opuscul. &c. The Reader may likewise consult a Dilocation written by the late Mr. Cocceius, De Legi Morganatici, printed at Frankfurt in the Oder, in 1655, 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 Maximam ad morganaciunum, or ex Legi morganatici.

9 Both that of the Father and Mother: For on the Death of either of them, the Children inherit his or her 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 Proper of them. We have a Treatise on this Subject, intitled Tratatus de Jure Dei, 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 1657.

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 Marriage shall partake only of the Portion which the Father reserved for himself. Lib. I. Tit. I. Num. 2. Grotius.

IX. (1) This Form may be seen in the Lawyer Paul's Collection of Rescript Sententias. It runs thus, Seeing that you surrender away your Father's patrimonial ESTATE, and are bringing your Children to Poverty, I (the Exorc) therefore deprive you of the Administration of such Estate, Lib. III. Tit. IV. De Tijmanittis, § 7. See Mr. Schulting's excellent Notes on the Place.

2 The Hebrews distinguish these two Sorts of Estates: They called that which descended from Father to Son הָּ֫רָֽעַבְּן, which was entirely acquired
War and Peace

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former, this Passage of Plato may take Place, ἐγώ ὁ ἡγομένος, &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 κάποιον παντοτέν. 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 of 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 doubtfull Cafes we should most naturally suppose to be the Design and Intention of the Intestate; for I grant and suppose, that he, whose Design and Intention we want to find out, was absolute Master of his Estate, so that he could have disposed of it as he thought fit.

2. But since a Man when he is once dead, can no longer retain any Right or Property in what he had, and since we take it for granted, that he would be unwilling to lose the Opportunity of doing the Favour that is in his Power, let us now see what is the most natural Order by which we could suppose such Favours might be conferred. Aristotle well observes, άριστος ἀνεξεργως, &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 enclines us to do Good, and the other to requite it; it is in our own Power to do a Piece of Service or not to do it; but an benefit 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 Lyfias 9 has shewn, in his Funerall Oration, to the Dead, when we do kind Offices to their Children, who are naturally a Part of their Parents, and to whom, were their Parents living, they would carnally 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 fame, both Father and Mother;

5 Seneca speaks thus on the Subject, When we are at the Clofe of Life, when we make our Will, do we not then distribute those Benefits which will be of as much Life to us? When Time do we not employ in confidering with unceasing how much, and to whom, we are to give? 6 What signifies it to us whom we give, since we can receive no Return? However, we never give with more Delegation and Precaution, we never rock our Thoughts more, than when, laying aside all Considerations of our own Interests, we have nothing in View but how to do what is kind and decent. De Benef. Lib. IV. Cap. XI. 7 These Words are not a Decision but a Question. The Philosopher places it in the Rank of problematical Questions, ἐνοχερὸς ἡ ἐγκείστε οὐ καὶ ἅμα, &c. And if he doth afterwards decide it, it is with some Reftriction, adding, that this must commonly take Place, θέσῳ δὲ: in short, esterit paribus, all Things else being equal. Edict. Nicom. Lib. IX. Cap. II. 8 De Offic. Lib. I. Cap. XV. 9 Ofice. Lib. I. Cap. XIX. 10 Thus in Procopius, a Man in his last Moments says to another, The God you do to my Children it is done to me. Peric. Lib. I. (Cap. IV.) See an Example of this Kind in what the Emperor Theodosius did in Favour of Valentian the Younger, acknowledging, in his Perfon, the Obligations he had to his Father; as we learn from Zosimus, Lib. IV. By the Laws of Moses, the Uncle inherited after the Brothers, as being a nearer Relation to the first Possessor of the Estate than the Nephews. Numb. xxvii. 10. Grotius.

The Emperor Gratian, to whom Theodosius had great Obligations, and who raised him to the Imperial Throne, was not Valentian's Father, but his Brother, as is well known. Besides Zosimus is so far from saying what our Author attributes to him, that he tells us, that when Valentian fled into the Dominions of Theodosius, and sent Ambassadors to define his Alliance 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 Palion for the Princes Galla, Daughter to the Emperors Aurelian, and Sister to Valentian. See Chap. XLIII. and XLIV. of B. IV. of that Historian. Edict. Carol. 3 N

Brothers
Brothers by the same Father, but different Mothers; Brothers by the same Mother only; and also in some other Questions. 'ἀδέξας ἀδεξάμων φίλαρχον, &c. Brothers, says Aristotle, 'εἰς, as they are born of the same Parents, do by Conjunction love one another, for the same Birth being common to both, makes them as it were the same Person. So Valerius Maximus, "As the receiving of many and great Favour from him whom we love, is the first Tie 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 Jufin 'εἰς says) one Brother should succeed another.

4. But in Cæse neither that Person from whom such and such Effects have been more immediately received, is to be found, nor any of his Children; our Gratitude then must extend to those who have next to him the justest Title to it; for Instance, to the Father of the Degree above, (the Grandfather) and to his Children; especially since by this Means we will keep in the same Family, not only of him whom whole Inheritance we are speaking of, but also of him from whom such and such Effects were more immediately derived; so the same Aristotle observes, 'Αἱ δὲ τὰ συμφέροντα, &c. 3 Cousin-Germans, and other Relations are united together, in so far as they are defended of those, who, as it were, the same Person. And there is between them more or less Union as they are more or less remote from the common Stock.

X. 1. But as for such Effects as are newly acquired, called by Plato, προϊστά σπανίων, "The Surplus of a Patrimony, as they lay no Obligation of Gratitude upon us, so all we have to do in this Cæse, 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, 'εἰς, that the Person who is nearest related to him.

And therefore Ieus 'εἰς says, that it was customary with the Grecians, Τὰς ἐπιθέμας, &c. For the Effects of the Deceased to pass to the next of Kin; and then adds, τὶ αὑτὸν τὰ ἀνάπληρα, &c. Why not, for what is more equable than that the Estate of one Relation should pass to another? There is a Passage to the fame Purpose in Aristotle, in his Book to Alexander, Ch. xi. 4 Nothing can be more, says Cicero, έν τούτῳ, 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 he ranks immediately after Children, those Relations with whom one maintains a good Understanding; and so does Tacitus, "Nature itself would have every Man's Children and Relations the dearest to him; and Cicero in another Passage, speaking of Relations, says, "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 Juf-
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WAR AND PEACE.

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tice, but kar' al'grid, By Way of Decency and Fitness; and again, 9 when he had mentioned that Love we bear to our Relations, he pressedly 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 Libcrality justly commendable, not to neglect those of your own Blood and Family.

2. Now the Succession to the Estate of a Perfon 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 Declarations, Next to fuch Persons as are mentioned in a Will, the nearest Relations have the justifi 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 fuch Effects being as it were deferted, and without an Owner, there is none nearer to take Possition of them. What we have said of later Purchafes, that they should naturally go to the next Relations, will hold equally good in those also that come by Inheritance, in Café 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 Succeffion.

XI. 1. But what we have here advanced, tho' highly agreeable to a natural Conjefture, 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 fome Places they consider from whence the Eftates came, and in others they mind no fuch Things; in fome Countries the Eldest has a larger Share than the Younger, as among 2 the antient Jews, and in others the Children have all alike; with fome, Preference is given to the Relations on the Father's Side; with others thofe of the Mother's Side are upon a Level with them; fome have a particular Regard to the Sex, and others have none at all; with fome 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 extremly tedious, so would it be far from agreeable to our present Purpofe.

2. It is proper, however, to obferve here, that when there is not a clearer and more certain Evidence of the Intention of the Deceased, every one is suppos'd to have defigned that the Succession to his Eftate should be regulated by the Laws of the Country; and that not only because of the Power that Sovereigns have to make or authorize fuch Regulations, but even from a Conjefture of the Will of the Deceased; which Conjefture alfo is in Force, in Regard to thofe Persons in whom the supreme Power is lodged. For it is but reasonable to believe, that Sovereigns 3 have

9 De fuis. horn. & mal. Lib. III. Cap. XX.
10 De Offic. Lib. I. Cap. XIV.
11 De Offic. Lib. I. Cap. XXX. This is taken from fa. lib. vii. 7. You have some fuch Ex- persions in St. Chrysost. upon 1 Cor. iv. 7. and St. Augustin, De Doctrina Chrifti. B. II. 12. Grotius.
12 Declam. CCCVIII. int.

XI. (1) The ancient Germans knew nothing of any fuch Representation, nor even among their Children. Childbeft was the firit who introduced this Right into France by a particular Edict; and Othe, Son of Henry, brought it up in the Parts on the other Side the Rhine, as is attested by Wit- zering, B. II. See the Lombard Laws, B. II. Tit. XIV. 18. And the old Scots Right of Succession regarded only the Nearnefs of the Degree. See Pontan, Deu. VII. where he relates, that it was so declared by the King of England, who was made Umpire in this Affair. Grotius.

3 Formerly this Rule was Place in fome of thofe Provinces, according to the Law of Zealand, other- wise called "Jus Scabiniacum; and on the contrary, in others, the old Law of the Frigialanders was fol-
have thought it very just to follow, in what concerns their own Affairs, the Dispositions or Laws they themselves have made, or the Cufmons they have approved; such Affairs I mean, in which they can be no Ways injured.

XII. But as to what relates to the Suceeion of Crowns we must diftinguish between such as are poftified with a full Right of Property, and as a Patrimony; and such as are enjoyed in a certain Manner, determined by the Convent of the People; a Difinction which we have treated of before. Patrimonial Crowns may be divided even between the Males and Females, as we find it was usual formerly in Egypt and Great Britain.

Nulla disparate Sexus Regiam fiet ferre Pharos.

Pharos no Diflimiation makes,
But Male or Female Monarch takes.

Says 2 Lucan: And 3 Tacitus of the Britons, Nor do they make any Difference of Sex in their Government. And adopted Sons are no lefs capable of succeeding than real ones are, by a Prefumption that it was the Defire of the decafed Prince that it should be so; thus did Hyphasis, the adopted Son of Hercules, succeed Ephyllus the King of Locris. So Pyrrhus, 4 having no lawful filfe, declared Molipus, 5 his natural Son, his Suceeor to the Crown of Epirus; so King Aheus promised to

Book, § 12. The fift of these Reafons is inconclusive; for our Author certainly here speaks of patrimonial Crowns, in which he Supposes the King has a Power of altering the Crown, and consequently, dippofing of the Succession as he pleafes; whereas in § 28, he treats of Crowns originally established by the free Convent of the People. But the second Reafon is good; and there is still left Reafon to Suppofe 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 pretending they defigned to follow such Crowns as are most generally receiv'd, in Regard to the Succession to the Crown. See Introductio ad Ref Publicam universam, by Mr. Bohmer, Part. Spec. Lib. III. Chap. IV. § 19, with the Note. Concerning the Matter of Succession to the Crown in general, confider Pufendorf, B. VII. Chap. VII. § 11, 23.

XII. (1) In Asia the Brothers reigned jointly, only one had the Prerogative of wearing the Crown. Polybius, Ex. Legat. XXIII. And in Libya, and the fame Polybius, you will find that Ephyllus was divided between the two Brothers the Polyaces. Antilus's Sons desired that the Nations might be part'd among them in juft and equal Shares. Jornandes, De Rebus Gotthic. Gregor. B. VII. speaking of Irene the Wife of Ambrotius Palatius, says, 2 she reigned, Sec. But that is still more strange, is, that they would not that one should reign, according to the ancient Custom of the Eastern Roman Emperors; but as it was the Western Practice, would have their Cities and Countries feared amongst her Sons, that each of them might have a separate and independent Government to himself, even as if they had been jo many diftint Crowns derived to them as their proper and paternal Inheritance, in the fame Manner as ordinary Princes come to their private Estates and Possessions, and so to defend to their Children and Successors after them. For the being of Western Extravagance, had a Mind to bring up here that new and unprecedented Custom 5 he had received from thence. Grotius.

2 Of Alexander and Lacedaemon, see Polybius, Ex. Legat. CXXI. Of Antilus's Daughter. Strabo, XVII. Abrian (auctore) relates, that feveral Women reigned in Asia after Semiramis. So Ninus in Babylon, Artemisia at Halicarnassus, Tamporis among the Scythians. And Servius upon the first Ennius, (ad ver. 674) fayz, Because Women govern'd before. And upon the ninth Ennius, ad ver. 706, he fays, that this was a Cufion among the Rumi. Grotius.

3 Pollar. Lib. X. ver. 91, 92.


5 Our Author, in his Margin, quotes Pausanias, Lib. I.; but gives a wrong Account of the Fact. Molipus was not Pyrrhus's Bufard; but the eldest of three Sons which Pyrrhus had by Andromache, Helen's Widow. The two others were Pirrus and Perippus. Servius tels us, that Pirrus considered Andromache, tho' his Captive, as a lawful Wife, so that his Children by her had a Right of succeeding to the Crown. On Ennius, Lib. III. v. 297. Pausanias doth not fay, that Pyrrhus appointed Molipus to succeed him, on Defult of legitimate Children; but that Helenus, the Son of Pirrus, who married Andromache after the Death of Pyrrhus, succeeded him, and left the Crown to Molipus, Cap. XL p. 10. Ed. Wech. Servius indeed doth, in the Page above cited, make Helenus reign either after Molipus, or in his Name, as his Guardian; for the Terms are not very clear; you cannot or cannot treat Helenus regnum privatum, qui succedaverat patri; d quo Molipha dicta est parte Epoch. &c.

6 Among the Tartars natural and legitimate Sons are on an equal Foot. But Herodotus (Lib. III. Cap. II.) lays of the Persians, Nerb. 2 eis egi in Boeotiam, gynas tikhon. They never let a natural Son have the Crown, if there is a legitimate one in the Way. Two Vandalis reigned in Spain, Gontharis, who was legitimate, and Zigerits, the bafe-born Son of Godgreidis, as Procopius reports; according to the old Cufion of the Northern Nations, testified by Adam Bre-
to adopt Philip, in Order to succeed him in Sestos; and so Jugurtha, tho a Sal. Bell. Jug. Baedard, succeeded in the Kingdom of Numidia by Adoption. And we read, too, that Adoption was received in those States which were conquered by the Gotes 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 Tjflus, declare, that the domestick Princes of Paphlagonia being all dead, the Right of Succession did belong to his Father. XIII. But if it be expressly said, that a Kingdom shall not be divided, and at the same time be no ways declared to whom it shall go, the eldest then, whether Son or Daughter, shall undoubtedly enjoy it. We read in the Taldred Title of Kings, that 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. He who has the best Claim to the Crowns, and in other Places he frequently terms this, the Law and Practice of Kingdoms. So Lyai speaking of two Brothers, of the Country of the Allobroges, that contended for the Crown, says, that the younger had left Right but most Power. In Trogus Pomponius, 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 titles The Law of Nations. As Lyai, 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 Polibos in the same Trogus. But whoever comes to a Crown in this Manner, is obliged, if, and as far as it can be done, to give those who would be his Co-heirs, if the Kingdom were divided, the Value of what their portion should amount to.

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 preumed the People shall most readily agree to; now it is supposed that the People will always consent to whatever shall appear to be for the publick Advantage. And hence our first Inference is, that a Kingdom should always remain undivided, unless the Laws or Customs of the Place be against it.

MEN. Hift. Echaf. Cap. CVI. HELMOLD. Stori. Lib. I. Cap. LI. and LI. And Michael, a natural Son, the lawful Linea falling, succeeded Michael, Prince of Troy, GREGORY, B. II. And he also was succeeded in part by his natural Son, GREGORY, B. IV. See SERVUS upon the third Annal, about Maecenas, Pyrrhus's bastard Son. GROSNIUS. Caffard. in Chron. Paul. Dian. De gen. Langobard. Lib. VI.

7 Which (Paphlagonia) came into his Father's Hands, not by Force or Conquest, but by Adoption, and on the Demand of Domichick Princes. JUSTIN, Lib. XXXVIII. Cap. V. Num. 4.

XIII. (1) Concerning the Swedes, see BRIGGIT. IV. 3. the Danes, SACKO, XII. and XIII. APPIAN. Mithridatic. Diodorus. 7 Eutropius's, or, Thinking it just that the Elder should enjoy the Crown. NICETAS CRONIATIS, in his Life of John Comnenus, in Chron. v. p. Diodorus, &c. Nature, following her own Order, rates to give the eldest Honors 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 Hyacinths, &c. in the 168. 2. & 169. 1. Alexander, called by Birth-right to the Succession of the Crown. And Aristotle in his Polity, says, that The Kingdom was Hyrcanian, as being eldest. See LUCULLUS. Trans. XVI. GROSNIUS.

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. 7 JUSTIN, Lib. XVI. Cap. II. Num. 7. 8 See PEPENDORF, B. VII. Chap. VII. §1. XIV. (1) Diodorus and Tafos fix jointly on the Throne of Troy. SERVUS upon this Passage of the third Eutropius: Sutlicads Porates. In Core, Minus, and Rhadamanthus; Julian against the Chriftians. Alba, Numis, and Amulius, as the Writer of The Lives of Illustrious Men. For others relate, that Numitor had the Money, and Amulius the Crown. Of this Number is TUTRICH: In the same Manner as some have reported, that the Kingdom of Tiber fell to Eutro's Share; and to Polynes, in the Lieu of that, Hermelund's Necklace. Thus in Norway, one has the Crown and another the Shipping, and the Advantage arising from Sea Expeditions. GROSNIUS. What our Author says of Eutroes and Polynes is probably taken from the Scholast on Euripides, who relates it on the Authority of Hellenicus. Hellenicus, says he, to tell us that Polynices, according to Agreement, gave up the Kingdom to Eutroes, and that Eutroes gave him his Choice whether he would accept of the Kingdom, or take part of the Effects, and live in another City: That Polynes took Harmony: (or Hermelund's) Necklace and Crown, and retired to Argos. In Plaut. ver. 71. Concerning that Necklace, see APOLLODORUS, Pisidius, Lib. II. Cap. IV. §2. And STATTUS, Thucid. Lib. II. v. 265. &c. I know not who thefe new Princes were, mentioned by our Author, are; but I find in an Anonimous and Compendious History of the Kings of Denmark, that Claus I. having two Sons, Harold and Frads, left
Of the Rights of
Book II.

(As at Thebes in Boeotia, the Government was divided among the male Heirs, as appears by the History of Amphion and Zethus, and also by that of the Sons of OEdipus; and the antient Attica was parted among the Children of Pandion, and the Country about Rhodes between the Brothers, Camirus, Jafyes, and Lindus, and the Kingdom of Argos among Perseus’s four Sons,) for, that it should remain entire, is certainly more expedient, not only for the Preservation and Security of the Kingdom, but also for maintaining the Concord and Unanimity of the Subjects. Accordingly it is observed by Jufitus, B. xvi. It was their Opinion that the Government would be more secure under the Dominion of one Man, than if it were parcelled out among all the Sons into several Shares.

XV. Another Inference is, that the Succession should be continued in the first King’s Family; for that Family is supposed to be elected on the Account of its Nobility and Figure; and therefore, whenever it becomes extinct, the Sovereignty should return to the People as before. So Curtius, B. x. 2 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 should rejeft and reverence the very Name (of Philip) and that now took the Name who was not born to Reign.

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; because Demetrius was born in good and lawful Wedlock. And we read in Ovid,

At nec nupta quidem, Tedaq; accepta jugali:
Cur nisi ne copesra Regna Paterna Nostros?

Unwed’d too — — in Spight,
To boast arise and rob thee of thy Right.

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 generous Sire.

XVII. Fourthly, That even of those who have the same Pretensions, either as they are Relations of the same Degree, or by Representation, the male Issue must certainly

left the Empire of the Sea to the former, and the Kingdom to the latter. Deiurit. Dami. p. 177. epoli. Elizin. 1729.

2 Euripides, Her. sat. femim. (ver. 29, 30).

Τά δευτεράτα αὖν τεχνικά χρήσες,
᾿Αμπιόν᾿ χάριν ἔδωκεν Ἀδωνις.

Before Amphion and Zethus,
Jove’s great Offspringardless. 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, Jafyes, 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 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. 5.

2 Ep. Philod. ad Hippoly. v. 121, 122.

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

XVII. (1) See Nicetas Chonias,
certainly be preferred to the female, as being thought more proper for the Burthen and Fatigue of War, and better qualified for discharging all the other Offices of a Sovereign.

XVIII. I. Fifthly, That not only amongst the male Ilians, but also among those of the other Sex, in Default of Males, the 1 Preference must always given to the eldest; it being presumed that he has, or, however, that he will sooner have, more Judgment and Conduct than the younger. So Cyrus in Xenophon, τα πρεσβεία, &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 transient Advantage, but that of the Sex perpetual; therefore the Prerogative of Sex much more confidorable than that of Years. So Herodotus, when he related that Andromeda’s Son Perseus succeeded Cepheus in the Kingdom, assigns this Reason, ἵνα ὃς καὶ τοίς, &c. 4 For Cepheus had no male Ilius. And, Having no Sons, οὐδεὶς ὁ ἀνδρικὸς, &c. as Diodorus informs us, Tenthras left the Crown of Mytra to his Daughter Argope. So Trogus tells us, 5 that the Empire of the Medes belonged Lib.iv. to his Daughter, because Alypaeus had no male Heir. So doth Cyrus in Xenophon declare, that the Crown of Media was his Daughter’s, ηδ’ ἀνδρικός, &c. 6 For, says he, Ιαντον δὲ οὐκ ἔτηλετα and the King’s Father, to his Daughter heir’d the Royal State.

Dryden.

So before the Reigns of the Heraclidae, Sparte, his Daughter, or her Children, succeeded Eurysteus in Locotia, as Helena’s Children did Tyndar eus, because there were no Males: And his Uncle Acreus succeeded Eurytreus, in the Kingdom of Myce-

In his Life of Manuel, B. IV. GEO-

Cap. IV. where Anacreon says, that if the Emperor Manuel Constantus should have Sons, the Oath which obliged his Subjects to acknowledge his Daughter Mary, as Emperors after his Demise, would be null, and of no Effect. 2 Mr. THOMASius, in his Notes on Huber, De Jure Civitatis, Lib. I. Sect. VII. Cap. VII. § 10. p. 281. maintains, that this Reason proves Women ought to be entirely excluded the Succession to the Crown; unless they are admitted to it by Custom, or an express Clause in the Act which regulates the Succession. 


Where Homer very likely, as indeed he usually does, assigns the Reason why the elder is preferred to the Throne, a Reason that generally holds good, and that is sufficient in such Cases as thefe, Τῇ νόμῳ τῆς πρεσβείας τῆς κυριαρχίας, ἡΚ Δανεῖ ἡμῖν, The Law giving the entire Sovereignty to the elder of the King’s Sons, says ZO-

NIS. B. II. taking of a Law of the Persians, Periander succeeded his Father in the Kingdom of Corinth, καὶ πρεσβεῖα, by the Right of Eldership. So NICOLAS DAMASCENUS informs us, in the Collections we have by the Favour of that excellent Man NICOLAS PRISHERIUS, GROTIUS. Mr. THOMASius makes Ufe of another Method for proving the Eldest ought to succeed. It is the Will of the People, says he, that the Kingdom should be indivisibl, and at the fame Time successive. Now, supposing the deceived 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 thofe Things which belong to nobody; or he will make Ufe of this Pretence, that he is better qualified than his Brother for govern ing the State; and then it is his Business to prove the Allion. But who shall be Judge in this Cafe? Shall Foreigners? This would expel the State to great Troubles, and other fatal Inconveniences. Shall the People? The Kingdom would then cease to be successible, and become elective. 

4 Cyropæd. Lib. VIII. Cap. VII. § 3. P. 543. Edit. Oxon. 1 For the younger will, some Years hence, be as old as the eldest is at present; and consequently, may then have as much Undertaking and Con-
XIX. Whether

a

Crown

by

Part

of

the

Inheritance.

7 See EURIPIDES, in his ION, (v. 72, 73, 578).

Grotius.

8 And had ORGYES died without Issue, ELECTRA

had succeeded him in the same Kingdom of ARGUS,

as we learn from EURIPIDES' Taurica Iphigenia,

(v. 681, 682, 699.) So the Crown of Cythia came
to ETHEOCLES, Creon's Son-in-Law, AEGIS' Crown
to his Son-in-Law MILES, as APOLLODORUS
tells us, and fulfils this Reason for it, be-
cause there was no male Issue. Grotius.

Our Author says the Kingdom of THEBES fell to

ANTIGON, the Daughter of EDEUOS; but it is not
certain whether he means, that that Prince's actual-
ly inherited the Crown, or only, that it of Right
devolved to her. The former is not agreeable to

ancient History; for we know that CREN feized 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 intro-
duces CREN saying to OEDIPUS, after the Death of

ETEOCLES and POLYNICES, that ETEOCLES had given him
the Sovereignty of that Country, as a Portion with
ANTIGON, who was to marry IOMEN, the Son of
CREUS. Plut. t. 1980, &c. See also o. 764, &c.

I know not in Verite of what Crown 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 alluded 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 ancient Fabrics are only so many
Histories mingled with fabulous Circum-
stances, 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 Norms and Practice of those Times; which
is sufficient in Regard to the Application made of
them by our Author.

XIX. (1) In aecent 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

The Author might very well have spared this De-
cision, which goes farther than he pretends; as it
appears from the Subject there considered, and from
the very Words of the Pope. They are addrested
to ANTOINE II. King of ARMAGY, who refused to go in
the Crusade, in the Holy Land, in the Personage of a
Vow made by his Father, the Execution of which
he engaged him at his Death. But without enquir-
ing in this Place, whether the Pope had thus a
Right to dispone of CROWNS by his own Authority,
under such a Pretence, and whether a Prince, on

failing to execute the last Will of the Deceased,
forfeits his Right to the Succession, when the De-
cesed has not appointed him heir on that Condi-
tion, which does not appear in this Case. Without
making these Enquiries, I say, it is sufficient to ob-
serve, that the Succession in Question depends 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
ful, and that the Succession is not forfeited.

2 Most Fiefs pass only to the Males, the Fe-

males have no Share in them, though they may
be equally Heirs to all the other Goods of their
common Father. When the Vaill died without
Issue, or leaves only Daughters, the Fief passes to
the collateral paternal Relation; tho' they had no
Right of inheriting the other Goods; pro-
vided they be in the Line of Defendants from
him who had the first Inheritance. And according
to the Feudal Law, a Son indeed ought necessarily
either to refuse or accept of both the Inheritances;
but the collateral Relation, (adogatus) who suc-
cceeds on the Default of Issue, may retain the Fief,
and refuse the Inheritance of the other Goods,
Lib. II. Tit. XCV. An adogatus, vel Filius patris
restitue Patrum, republica herebat. (IV. 54,
Edi. Caput.) See CEGAS on that Title, as also
46, &c. TRETULIUS, F. I. II. Dij. XII. Thes.
IV. ANTHONI CONTULIUS, Method. de Fendis,
Cap. VIII. § 7, &c. CVDARRONUS, Var. Refil
Lib. II. Cap. XVIII. Num. 45, &c.

3 Concerning the Nature and Origin of the
Right to a Lease, see PUFENDORF, B. IV. Chap.
IX. § 3. As this Right is founded on a private
Agreement made between the Proprietor of the
Leads and the Leasee; when the Leafee 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 Qefion, and the
Foundation of the Decision of those whole Opin-
ion of our Author follows, as GALLIUS, G. A. L.
Lib. II. Cap. XXVIII. Num. 17. But the con-
trary Opinion seemed better grounded, according
to the Principles of the Civil Law, as ANTHONI
II. Cap. IV. which is followed even by
BACHOVIOUS, (Not. & Animad. in TRETULIUS,
Vol. II. Dij. XII. Thes. IV.) who on all other Oc-
Casions 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.
alone, it is certain, that the Proprietor treated only with the first Purchaser of the Lease, and that he had the Right independent of that of the Deceased. The Clause, For him and his Children, is inserted in the Contract in favour of the Proprietor, that, the Children dying, the Estate may return to him; whereas otherwise it would pass to the collateral Relations, and even to other Heirs, according to the Practice and Custom of granting Leases. But, as such Persons would have no Right but as Heirs, so the Children can only in that Quality pretend to any Thing by Virtue of the said Clause, which makes no Alteration in the Estate 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 Leffee 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 Senie 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 Assigndatio Liberti. But he, who thus became sole Heir of the Right of Patronage, could not confer it on a Others, and if he died without Children, this Right reverted to the Patron's other Children. The Son was disbarred by his Father, this did not hinder the Father from affigning him the Right of Patronage, and even, tho' this was done after such Patronage, the Donation was not always thereby annulled. Dig. Lib. XXXVIII. Tit. IV. De assigndatis libertis, Leg. VIII. and Leg. I. § 6. 7. See the Interpreters on the Institutes, Lib. III. Tit. IX. whereas it appears, that the Right of Patronage was conferred as distinct from the Inheritance of the other Goods. The same may be said of Ecclesiastical Patronage, which resemble those of the Roman Law, only in Name.

5. Jes preciuit, as it is termed by the Lawyers, and antient Latin Authors. See Brasso's Law Dictionary. It is when one of the Coheres has a Legacy, which he may take before the Division of the Estate. According to the Roman Law, such a Cohere may renounce his Share in the Inheritance, without quitting his Preciuit. Digest. Lib. XXX. Dig. 2. 14. and Lib. LXXXVII. 7. See Jurisprud. Tom. IV. Opp. Edit. Faux-briet, and a Dissertation by the Late Mr. Herius, De Pragatis, § 15. p. 321. Et, Tom. II. of his Comment. C. Quat. 6. See my fourth Noe on Pufendorf, B. VII. Chap. VII. § 12.

7. Our Author cannot here speak of the Affectees 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 whole Perfection the Deceased is supposed to testify his Gratitude to their common Father, as has been said, § 9. Nam. 5. It must be acknowledged, however, not only that the Expression is obscure, but that the very Natural Order of the Words is reverted in the Original, where a acceptance beneficium are placed before ob caritate; 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. Barbyvrc adds, that his Verison may remedy this Want of Exactness, Et [at] Regni Paffiff, &c. Como auxi pour avoir leau de le promettre que le Prince regnant auront plus de foin de fon Royaume, &c et descendront encore plus d'Ardeur, dans l'Espece de le laiffer aux Perennes qui lui font les plus cheres, ou par la Tendreffe naturelle, qu'il a pour elles, ou par un Mortif de Reconnaissance. Which may be thus englisch'd, As if they then may have Room to persuade themselves, that the Prince on the Throne will be more carfull of his Kingdom, and defend it with more Vigour, in hopes of leaving it to Perfons who are myfli dear to him, either by natural Affection, or on a Motive of Gratitude.

XX. (1) Medium. This Word signifies an Estate posfified 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. Thomasius's De Iuris Historici, Juris Feudali, § 4, &c.

2. An Infeofment doth not in itself imply a Change in the Order of Succession. It is sufficient that the succeeding King pay Homage to the Prince to whom the Kingdom is become feoffidary; and that the Crown falls to him in Case of Felony, or on Default of Heirs. Persons who enter into baronial恩 engagements, like this, are, and ought to be, supposed to subject themselves as little as is possible, and it is incumbent on the other Party to see every Thing clearly expressed, which doth not necessarily follow from the Nature of the Thing.
the fame Manner as that of Freetholds did, at the first Establishment of the Kingdom.

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 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 Invention. For the Goths, Vandals, Germans, Franks, Burgundians, English, Saxons, and all the German Nations, which by War possessed themselves of the best Parts of the Roman Empire, have every one of them their own Laws and Customs concerning Things held in Fee, as well as the Lombards.

XXII. But there is also another Kind of Succession much used in some Kingdoms, not hereditary, but what they call Lineal, in which is observed, not that Right which is termed Reprepreentative, but a Right of transmitting the future Succession, as tho' it were already defended; 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 to Things due from a conditional Sipulation, so that this very Right necessarily paffes 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 Deceafed, it shall pafs to fuch as are defcended from them, observing again

Thing idel; of which Sort is the Order of Succession, which may, and really doth, vary, according to the Difference of Places, or the Circumflances between the Lord and the Vassal who received the first Invention.

XXI. (1) That is, even when the Kingdom ceafes 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 fuppofe, that when the Kingdom was delivered from the Infection, 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 none one is necessary. In a Word, the Order once once established is not to be altered in this manner; except it be tranfmitted by fuch who beinthefe whose Bufines is it to do it; and consequently, in Cafe of a Doubt, the Prefumption is in favour of the old Manner of succeeding, whatever it be.

XXII. (2) See Cardinal Tusclus, Præd. Carol. LXXXVIII. Verh. Regni Successio. William de Montevray, De Successum. Reg. His Book is in the Ocean. Jurif. Peregrius, De Jure Fjei, Lib. I. Tit. XI. Num. 44. and Lib. V. Tit. I. Num. 105. See Instances of this a Succession in the Kingdom of Norway, in that learned and most excellent Author John Pontan, Hift. Daniei, IX. Confuet. Norman de Propriogii, Hertel. John Serran. in Ladeo. Graff, super. cont. Bono. Argent. Hift. Hift. Lib. VI. Cap. IV. In Successions, the Children of the eldest Son, whether Male or Female, and in Cafe these eldest die without Issue of their own Bodies begotten, then the Issue of the next eldest do in a Succession to Fees, by Right of Primogeniture, represent the Persons of their Parents, and come to transfe the Right of Succession and Primogeniture, in the fame 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 afore-mentioned Laws of Fees, and Customs, a Daughter succeeds in Fees, whether Dutches, Earldoms, Peerages, or Baronies, how great and noble ever fo; and this is what was practifed too in Arisii, Champagne. "Thomps. and Brillagon." Such an Order of Succession was prescribed the Marquifate of Mantua, by the Emperor Sigifund, Anno 1452, and by the Emperor Charles V. and Philip II. in their respective Kingdoms and Principalities, Anno 1574. and 1584. 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 Precedence. Whereas in the lineal Succession under Consideration, the Deceafed is supposed to have alrready married his Brother by Right of Elternship, and thus to have transferred the Crown to his Descendants. See 36.

3 As it is in Legacies, Quærunt dies eíus, non vestri. Grotius.

By these Legacies the Roman Law underfandeth 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, paffes to the Heir; whereas, when the Legacy is conditional, as before the Accomplishment of the Condition, Does Legati non cedit, if the Legatee dies, he transfers nothing to his Heirs. Diglot. Lib. XXXVI. Tit. II. Quæsitis dies Legatwm vel Fidei commissorum civilis. Leg. V. Præsec. & § 2. See likewise Ulpian, Tit. XXXIV. § 51, with Mr. Schulting's Notes. In Regard to the Difference between Legacies left on Condition, and conditional Stipulations, see Cujas on Law LVII. of the Title of the Diglot. De verborum obligatioibus, p. 1233, 1234. Tom. I. and Olfoers. XII. 32. XVIII. 1, as also Mr. Joanna Avranii's Interpretationes Juris Civilis. Lib. II. Cap. XVI.

the
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 Transmigration, 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 Cofsell, and so is the Right of Majorino in 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 in publick Affembles. 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 Cognatic, because the Females, and their Children, are not excluded, but only postponed in the same Line, so that if in Cate the nearer Relations, or the males, who are in other respects equally related, or the Descendants of those Males should fail, then the Succession returns to them. The Foundation of this Succession, as it differs from an hereditary one, is the Hope and Expectation of the People, that those who have the justest Pretensions to the Crown, will have the best Education; such as those whole Parents would have succeeded, if they had lived.

XXIII. There is also another lineal Succession, called the Aquatic, a Succession of Males only, who are descendent of Males, which from a Custom of the illustrious Kingdom of France, is therefore commonly called 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 in some Places also, where the Succession in the Male Line fails, they allow that of the Female in its Room.

XXIV. Other Methods of Succession may also be introduced, either at the Pleasure of the People, or of him who holds the Kingdom by such a patrimonial Right, that he may alienate it if he will; as for Example, he may fo let it, that they who are nearest related to himself, at any Time whatever, may succeed.

XXV. What the lineal Aquatic Succession is.

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 Siting there, with their Dignity, to their male Children.

XXIII. (1) An ancient 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. xlix. 3. Grotius.

After Solomon, we find Abijam succeeding Rehoboam, though not the eldest of his Sons. See § 27. Note 3.

2. As in the Province of Narbonne. See Seranus in his Life of Charles VI. 'Twas by such a Law I prate that Theoderici dying without Issue, his Sister's Son Thibalius succeeded him, and I am apt to think, that this did formerly occur in Aragon. Grotius.

XXIV. (1) In Ethiopia formerly Sifters Sons succeeded their Princes, as Nicolas Damascenus reports, and that was customary with the Picts, and that the Relations by the Woman's Side did always succeed. And Tacitus speaking of the Germans, Sifters Sons had the same Right from their Uncle, as they had from their own Father. And some look upon this to be a more sacred and frizzler Tye of Blood. Obemus and several others inform us that 'tis so among some of the Indian People. Grotius.

2. This by Giseric's Will prevail'd in Africa. Procopius, Pandal. 1. c. 4. 5. 6. 11. 15. 26. A little while after, Giseric, pretty much advanced in Years, died leaving a Will, by 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 Giseric, was also the eldest of all the males in the same Degree. Jornandes: Giseric 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 others, 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 Utriusque. Lib. XI. To whom all of the Grand-Jans, as being the eldest of them, the Crown, according to King Giseric's Confutation, did principally belong. Here, it is, in this very short account, that all along regarded. Now it is a Question whether Giseric took this way of Succession from Africa, or not who he laid filled the Throne, that is all along regarded.
ceed in the Kingdom; as it was formerly among the Numidians, where for the fame
Reason the Brothers of the last King were preferred before his own Children. The
same was practiced in Arabia Felix, as we find in Strabo; and the Modern Writers
4 tell us the fame of Taurica Cimmeria; 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 Trufi, left to a Family, is the
more likely Opinion, and agreeable to the 7 Roman Laws, tho’ some Interpreters
writ them otherwife. Thes things being well understood, it will be easy to decide
tall Controversies concerning the Right of Crowns, which the different Judgments of
Lawyers have made so intricate and difficult.

XXV. The first Question is, whether a Father may disinherit his Son, so that he
shall not succeed in his Kingdom. Here we must diftinguish between Crowns which
are alienable, that is, patrimonial, and fuch as are not alienable. For in 1 alienable
ones, no doubt of it, difinheritting is valid, because such Crowns do not differ
4 from other Goods and Chattels; and therefore what is eftablished by Law or Cust
tom in Regard to Difherition, ought to be observed with Respect to a Prince difhin-
heritted 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 subliftiing. Thus was

where we told you in the Text, that it was in force,
or whether from some of our Northern People. For
among the Lombards, though King Vences had left
Sons behind him, yet none of them was to succeed
him, but Riulfphus his Nephew; as is certifid by
Procopius, Gith III. And Nicetas Chroni-
tes de Reb. Manuell Lib. IV. fays that when
Eneas 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 Patriarches, and obferved by Roman
Prefcriptions, and Coflantine Polyphrygen, de Admi nationals. Imper-
vis, Cap. XXXVII. may be refurred hither too.

Crantziius, Danic. IV. and Sadic. V. reports,
that the fame was obferved in Denmark. So Julius
immediately defcended of Alcmus, Anna’s elfeft
Son, did not succeed Anna in Abo, but Sylvisus
anther of Anna’s Sons. Grotius.

The fact lately mentioned is recorded by Dio-

Nyssus of Halicarnassus, who fays, The People de-
fined in Favour of Silvius, clofe by his Mother
(Lavinia, Annae’s fefond Wife) and is, therefor the
Kingdom, King of, &c. Lib. II. Rom. II. p.
555. 56. Edit. Oxon. See also the Treatife, De Origi-
ne Gentis Romana, acribed to Aurelius Vic-
tor, Cap. XVII. In anther Part of this Note, where our Author fpeaks of the Succession to the
Kingdom of Hungary, he has written Iueta instead
of Geiga or Geuer; for the Historian there quoted
meant him. Besides, the Example is not quite to the
Parole; it being well known that the Kingdom of
Hungary is not Successive, but Elective.

3 That Author fays, That in Arabia Felix, Bro-
thers are preferred to Children an account of their
Age, and that thofe of the (Royal) Race reign
and are inf¢ved with the other public Offices. Geograph.
Lib. XVI. p. 1129. Edit. Angl. (783; Parali.)

4 See M. de Trous, Lib. LXVII. Tom. II.
p. 150. Edit. Francez. It is the Country of Preche
or Crime, in the Piffer Tartary.

5 Livius, of Marfinus: Whilft he was engaged
in War for the Carthaginians in Spain, his Father
died: (his Name was Gla) The Crown went to OE-
facles, the king’s Brother, fuch as the Cumian in Numi-
dia. See Mariana, Lib. XXIX. where he fays the
fame of Mauritania: From hence among the Sa-
vacini, who were come from Africa into Spain,
Brothers were preferred to Sons till Abraham’s Time,
Rodericus Tolet. Hift. Arab. Cap. VI. Thua-

num, Hift. 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 obferve from the His-
tories of thofe Places, that this kind of Succession
prevailed in the Kingdoms of Mexico and Peru.

Grotius.

As to what concerns Mexico, fee Lopez de
Gomara, Gen. Hiftry of the Wett Indies, B. II.
Chap. LXVII. and B. III. Chap. XXII. The fame
Author speaks of Peru, B. V. Chap. LXXVII.
as doth Graciillas de Laverca, B. IV. Chap.
X.

6 That is, if the Deceased leaves Cveral Chil-
dren, or several Relations in the fame Degree, the
Feoffment of Trust ought to pass from one to the
other, and not to the Children of him who had it
fiirt.

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 Ten-
tor) may be admitted to demand it: Or after the
Death of all fuch Persons, thofe who bear the Name
of the Tenator at the Time of his Death, fhall be al-
ways the Preference to the neareft Relations, which
the Tenator has exprifly extended his Will to thofe in a
more remote Degree. Digeft. De Legatis & Fidei
Com. II. Lib. XXXI. Log. XXXII. § 6. See
Cujias on this Law, Recit in Digg. Tom. VIII.
Opp. Edit. Fabr. p. 1206, 1237, and Anthony
Faure, De Erroris Prognostic. Decad. LVI.
Err. VII.

XXV. (1) It is of fuch a Kingdom we are to
understand what Baldis fays, Pream. Decretal.
Grata. That a King may chufe which of his Chi-
ildren he pleafes for a Successor. We have also an
Influence of this Kind in the History of Mexico.

Grotius.

3 That is, in Regard to the Power of alienating:
in the other Repetits there is a wide Difference.
A Kingdom, how Patrimonial forever, is still a State,
that is a Society of Men subject to one and the fame
Government, for their own Advantage: The King
therefore cannot absolutely dispose of the Kingdom,
at Pleasing, to ftill 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.

Reyen

Of the Rights of
Book II.
Chap. VII.

War and Peace.

Reuben for his Midianitish 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 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 to 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

3 He had defiled Bathsheba, his Father's Concubine. See Gen. xxxvii. 22. 23. 4.

4 This was not the Case 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. xxiii. 9, 10, 11. Besides, we find in the whole Sacred History that the Kings and their Successors during their own Life, usually involved 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 Reaon to disapprove of this Opinion. However the Son may have behaved himself, it would be hard to look on him as a Heir to the Crown, when his Father has not expressly disinherited him. Even though it does not appear that his Father has pardoned him, that alone does not ground a sufficient Prefumption of disinheriting him. It was in the Father's Power to patent 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 a Heir very different from this. The first supposes a Man, Who, two Years before his Death, disinherits his Eud, Men, disinfects their usual Maintenance, and afterwars 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 queried, whether a Fiefdom in Truth is due to the two Prefons 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 Comm. II. Leg. LXXXVIII. § 11. In the other Law, we have this Case and Question proposed. A Woman left her Son in Law a certain Tenure by Will, After which the Son in Law accuses the Testator of endeavoring him to kill his Husband, the Legatee's Father. 5. She died before the Judges gave their Opinion, who pronounced her Injust. But while the Case was depending, she made a Codicil, in which she did not revoke the Legacy left to her Son in Law. It is required, if her Heirs are obliged to pay her Debts. Lib. XVII. De usufructibus, § 13. See also Legat. & Fidei Comm. II. De Legat. & Fidei Comm. II. Leg. LXXXVIII. § 11. In the other Law, we have this Case and Question proposed. A Woman left her Son in Law a certain Tenure by Will. After which the Son in Law accuses the Testator of endeavoring him to kill his Husband, the Legatee's Father. She died before the Judges gave their Opinion, who pronounced her Injust. But while the Case was depending, she made a Codicil, in which she did not revoke the Legacy left to her Son in Law. It is required, if her Heirs are obliged to pay her Debts. Lib. XVII. De usufructibus, § 13. See also Legat. & Fidei Comm. II. Leg. LXXXVIII. § 12. Here Obrecht says, that the Consequence drawn from this tacit Revocation of the Legacy, in the Codicil, is, that the Son, before he died, had disinherited him in that of a Son, whom it does 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 stating the Difference of the Cases in Question. I say therefore, that the Patrons, by disinheriting the two freed Men, and discontinuing their Maintenance, plainly expressed their Disposition of leaving them nothing for their Maintenance, and excluding them from the Number of those to whom they had given his Allowance. See Cujus, Recit. in Digest. Tom. VII. p. 39, 40 and in Resp. Secund. Tom. V. Part II. p. 155, 156. 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 forming a Prefumption, that, how general forever the Expiration 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 American to disinherit him, especially in Regard to his Succession to the Crown. As to the Mother-in-Law, the Legacy he left to her Son-in-Law, became null of its self, from the Moment such a heinous Accession was brought; and that by Virtue of a Prefumption, authorized by the Laws; which suppose a Testator must necessarily change his Mind in Regard to the Legatee, when some Cause of great Equity arising, after the Will is made.

6 So that, he can neither dispose of by Will, nor leave the Crown to an adopted Child. See Maria, Hist. Lib. XI. (Cap. XX) concerning the Pragmatica Sanctorum, the Laws of Successions in the Nearer. Lib. XXXIV. Tit. IV. De edendi vel transferendi legatis. Leg. XXXI. § 2. Here Obrecht says, that the Consequence drawn from this tacit Revocation of the Legacy, in the Codicil, is, that the Son, before he died, had disinherited him in that of a Son, whom it does 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 stating the Difference of the Cases in Question. I say therefore, that the Patrons, by disinheriting the two freed Men, and discontinuing their Maintenance, plainly expressed their Disposition of leaving them nothing for their Maintenance, and excluding them from the Number of those to whom they had given his Allowance. See Cujus, Recit. in Digest. Tom. VII. p. 39, 40 and in Resp. Secund. Tom. V. Part II. p. 155, 156. 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 forming a Prefumption, that, how general forever the Expiration 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 American to disinherit him, especially in Regard to his Succession to the Crown. As to the Mother-in-Law, the Legacy he left to her Son-in-Law, became null of its self, from the Moment such a heinous Accession was brought; and that by Virtue of a Prefumption, authorized by the Laws; which suppose a Testator must necessarily change his Mind in Regard to the Legatee, when some Cause of great Equity arising, after the Will is made.

7 Mr. Vitriarius, Insct. Jur. Nat. & Gent. Lib. II. Cap. VII. Num. 58. makes a Restriction in this Case, after other Authors, e.g. When the Publick good requires it; as when the King's Son is engaged in a Conspicuous service to the Publick in the State; in which Case it is extreemely presumed that the People consent to his being excluded from the Succession.

3 Q. himself;
himself; but whether he can for his Children, is not so easily determined, but this too is answer'd by one and the same Definition. 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 Tranmission contradict this: For that Tranmission is, as to the Parents, of Necessity, and not left to their Will and Discretion. The Difference between the Children born before the Abdications, and those who were born after, is this, those who were born after had not then acquired their Right; and therefore it might be taken from them by the Will of 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 Purport is what I advanced above concerning Dereliction.

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 considered with all its Circumstances. 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 oblige his Successor. For the Succession to the Crown is not under the Power of the Crown, and therefore Disputes on that Head are to be decided as in the State of Nature, in which there was no Jurisdiction.

2. Yet if the Right of Succession be disputed, those who lay a Claim to it would do prudently and well to agree upon Arbitrators, of which we shall treat in another Place; but as for the People who have transferred all their Right of Jurisdiction to the
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 rife 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 fame as those who lived formerly, unless it does plainly appear that the People who lived formerly, and by Virtue of whose Will this Right was obtained, were directly of another Mind. Thus did King Euphaes permit the Mefienians to determine which of the Royal Family of the Ephydite had the best Title to the Throne; and the Dispute between Xerxes and Artabanazes was debated before, and determined by the People.

XXVIII. To proceed to other Questions; that he who was born 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 dignifies nothing when they were got. He then, who

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 Title. The People's foregoing Expression, Me'rely referred 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 confider'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 fecious 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, has ever made a better Prafure, and feiz'd on the Crown, why should it not be in the People's Power, if they have an Opportunity, to dispofel the Usurper, after they have deliberately examined and discovered the Right of the other Pretender? In fine, as to the Subsidence of the Question, I think the Author ought to have decided it as we do, for the same Reason which he elsewhere gives why the People should have the Regency of the Kingdom in the Interim, while their King is detained a Prisoner. See B. III. Chap. XX.

§ 3. Num. 2.

Either in a General Assembly of the States of a Kingdom, as is practiced in England and Scotland. See Camden on the Year 1571, 1572, or by Deputies, as was done in the Kingdom of Aragon, according to Mariana, Hist. Lib. XX. Grotius.

5 The Latin Translator hath Regnum populi arbiter permittit. And I find that the learned Mr. Bovin, in a Differtation written professedly for examining what pas'd on Occasion of that Election, has not even disputed any Fault in the common Version; for that he pretends the Senec of the Greek Historian in French. C'est Euphaes qui a leiflé point d'envoûter, il choisit par fon Successeur celui qui voulut être le Peuple Mefien. [As Euphaes left no Children, he appointed the Pretender, whom the Mefienians should choose, for the Successor.] Diderot, for an Fragment of Diomode de Sisile, p. 133. Tom. III. of the

Memoriae de Litterature de l'Academia Royale des Belles Lettres, Edit. Amft. But I am much mistaken if the Greek does not give us a very different Idea. The Words are these: ἣν πάντας εἰς τὸν πατρων, τὸν ἄλλον δὲ τὸν οἰκεῖον θείον ἀνεβάζεται. That is: A Euphaes had not Children, it was the People's Business to choose him a Successor. Lib. IV. Cap. X. It is evident from the Sequel of the Discourse, that the Historian speaks of what pas'd after the Demise of Euphaes. Besides, the very Construction of the Words will not allow of our Author's Translation. The Mistrake arises from not observing this Way of speaking: καλεῖται τὸν αἰωνίαν, &c. ἐστίν τῷ ἀνέμοις: Reliquum erat, &c. dicimus à Popula habere Imperium. [It remain'd that the Person chosen by the People should have the Crown.] Cesaro and Cazes have said Relinquere sit, &c. in the same Sense, as might be shown, 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 Mefienians; but that the People made use of their Right in this Case. Thus the Example is nothing to the Purpose.

6 Our Author here follows Plutarch, whom he quotes in the Margin, De Amne frivolis, p. 488. Tom. II. Edit. Wtch. But Justin, whom the like-wise quotes, says that Xerxes and Artimines (for so Artabanazes is called by others) refered the Decision of the Matter to their Uncle Artaphernes. Lib. II. Cap. II. Num. 9. And, as the learned Gronovius observes, according to Herodotus, Lib. VII. Cap. II. Darius himself determined the Dispute between his Children: So that here are several Variations, which will not allow us to lay any Stress on this Example.

XXVIII. (1) The Question may be underflood of the Children of a King, who was the frift of his Family that was chosen to reign in a State, where the Crown is for ever the right 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, it that Time he has Children, they without doubt are considered as his first Successors, and not those who may be born after, but whose Birth is uncertain. So that, unless there is an express Clause in the fundamental Law of the Succession, importing that it belongs to the future Children of the Prince elect; they can have no Right to the Crown, but after the others. See Huber, De Jure Civit. Lib. I. Sect. VII. Chap. VII. § 24. &c.

in
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 Infeftiture. So too, in a linear 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 cogitate 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 Perfix, between Cyrus and Artaxeh; * for under Xerxes 2 Antipater the Son of Herod the Great, and his Brothers; in Hungary when Gelfa began his Reign, and in Germany (tho' not without War) 3 between Olib I. and Henry.

XXIX. But that, as we read, it was otherwise in Sparta, is owing to the peculiar Law of that People, which 4 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 Infeftiture. If, for Instance, the Sovereignty be granted in Fee to a Vaffal, and to the Heirs of his Body that shall hereafter be born. Upon the Strength of this Argument it was, that Lewis Sforza did chiefly rely in the Dispute between him and his Brother Galati about the Dutchy of Milan. For to as Perfix, 5 that Xerxes obtain'd the Crown to the Prejudice of Artabazanes, was, as Herodotus observes, owv-

2 Who was afterwards called Artavrazes Mace-
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 Judas among them; declared that, after his Demise, the Crown should de-
agree with 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, Antisp. Jud. Lib. XVII. Cap.
VI. and VII.

4 See Flavius Blondus, Hist. Decad. II.
Lib. VI. and Michael Rittius, de rebus Hungar.
Lib. II. as quoted by Horatian, Grufit, or Giurza,
of whom I have already spoken, Not. 2. on § 24,
was the second of that Name. He acceded to the
Throne in 1144. on the Demise of Belio II. his Fa-
ther, furnished the Blind.

5 See Stobæi (in Chron.) and the Notes of
Henry Milbourne on the third Book of Witt-
kind's Annals. In the Turkish Empire, Bajuwet
and Gimus defparged the Succession, the former was
the Elder; but Gimus was born in his Father's Reign.
Bajuwet carried his Point. Mariana, Hist. Lib.
XXIV. Confinatius Ducatus left the Empire to his
three Sons, two of whom, Michael and Andronicus,
were born of Eudoxia before he was Emperor; and
Constantine, the third, was born in the Persis, 10th
year. [For which Reason he invested him with the
most splendid Marks of the Imperial Din-

3 XXVII. Grotius.

6 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 Suc-
cession 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 before or after his Father was created with the senatorial Dignity, or before. Diglit. Lib. I. Tit. IX. De Senatorib.
ing more to the Power of Atossa, his Mother, than to the Justice of his Cause. For in the same Perista, when a like Dispute arose between Artexerxes Memnon and Cyrus, the Sons of Darius and Parzadanes, Artexerxes as the elder, the born when his Father was a private Perfon, was yet declared King.

XXXI. 1. It has been no lefs a Dispute, both by Wars and single Combats, whether the Son of the elder Brother should be preferred before a younger Brother; but this in a lineal Succeffion admits of no Difficulty; for there the Dead are reputed the Living, in that they are able to transfer a Right to their Children; and therefore in such a Succeffion, the Son of the Deceafed shall certainly be preferred without any Objection to his Age; may, where the Succeffion is cognate, 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 thofe Countries, where the Right of Reprefentation is not observed, as formerly among moft Nations in Germany; for it is but of late Days that Grandchildren have been admitted to Succeffion as well as Sons. However, in any Cafe of Doubt, it is to be presumed that this Vice-Succeffion takes Place, as being the more agreeable to Nature, as we faid before, [§ 6.]

2. And where by the Civil Laws of a Country, the Reprefentation is formally authorifed, 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 Succeffion. The Reafons produced from the Roman Law for this, are not very conducive, as will appear to any one that looks well into them. But the beft Reafon is this, That in a favourable Subject, the Senfe of Words muft be extended to whatever they can signify, not only according to common Ufe, but alfo according to the Ufe of Arts; fo that under the Name of Sons may be comprehended adopted ones; and under that of Death may be included a civil Death, (thofe that are dead in Law) for the Laws generally fpeak thus. Wherefore he may thus be juftly called the next of Kin, whom the Law puts into the Degree of the next of Kin. But in hereditary Kingdoms that are indivifible, and where this Right of Reprefentation is not excluded, neither is the Grandfon always, nor alfo the younger Son preferred, but as among ft Equal, becaufe by an Effect of the Law they are put in the fame Degree, he will have the beft Title who is the elfed. For as I faid before, in hereditary Kingdoms the Prerogative of Age doth not pass from one Perfon to another. Among the Cornithians, O oupere tool] a dei 7 'ovaros, The elfed of the deceased King's Children proceeded in the Throne, as George the Monks has proved out of the fifth Book of Diodorus Siculus. So among the Vandals, it being ordered, he who was next in Blood, and the elfed, fhould be Heri; the

4. Herodotus gives it as his Opinion, that The Darius had not declared for Xerxes, he would have reigned, becaufe Atossa was in Condition of being what the played, Lib. VII. Cap. II.

XXXI. 1. About the Year 942, a great Dispute arose on this Question in Germany. The Emperor Otho I. attemped the States of the Empire, in Order to decide it. As they could come to no Agreement, the Decision was put on the little of a Duel. The Conqueror was he who maintained that the Right of Reprefentation took Place, and therefore the Nephews ought to divide the Succeffion equally with their Uncle. Wruthkind, Hift. Lib. II. Sigebert, Chronic. Otho I. at the Year 942, as quoted by Hotoman, in the Place fpccified in the Margin.


3. See § 11. Note 1. For which Reafon formerly in the Polonians, Report the younger Brother was preferred to another of the fame Name, defended of an elder Brother. See Renkino, Lib. 1. Clavi IV. Cap. XVII. Num. 35. Grotius.

4. See Chap. XVI. of this Book, § 10, 12. But this Distinction is of no Ufe here; and our Author's Explanation is very well grounded, independently of any Support from the Right of Reprefentation, considered in itfelf. For wherever that Right is established by the Laws of the Country, the Perfon who reprefents his Father is the nearest Relation; becaufe, by Vertue of the Law, he is reckoned the fame Perfon as his Father, fo that as his Father, if alive, would have been the nearest Relation, he is fo too.

5. I own, they are not in the fame Degree, if we consider natural Proximity; for the Grandfon is one Degree farther removed from the deceased King than the younger Son. But by Vertue of the Right of Reprefentation, authorised by the Laws, the Grandfon, who reprefents his Father, is therefore by reckoned the fame Perfon, as is before obferved; and thus he is in the fame Degree with his Uncle.


3 R younger
of the Rights of
Book II.

youngere Son was, on the Account of his greater Age, preferred to the Elder's Son. So in Sicily, Robert was preferred before his elder Brother Martel's Son, not properly, for the Reason suppos'd 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 a Genius; 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 depending on the Heraclids, they made the Succession like this, agnatic. And therefore Areus, the Son of the elder Brother Cleonymus, was preferred before his Uncle Cleonymus. And so in the lineal cognatic Succession the Grandson (shall be preferred. As in England, John, King Edward's Grandchild by his elder Son, was preferred before Henon 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 substantiates the Child in his Father's Room; because natural Equity leads us to this, I mean as to Estates that come by Ancestors. Neither is it any Objection, that Julius, calls this Right of Brother's Children, HOMERUS, *A Privilege: For this he does, not in Respect to natural Equity, but to the antient Roman

6 It was Homer, (or HEMERUS) Son of Gnaeus, who was preferred to Gensamond. See the Notes on § 24. on Occasion of such an Order of Succession. GRUOTUS.

In the Text Homer is put instead of Homerius, or Homerius; which was certainly a Fault in the Impression. But our Author makes more than one Mistake in this Place. First, Homer, or Homerius, was Gnaeus's younger Brother, not his Son, and died before him. Secondly, Gensamond, on the contrary, was Gnaeus's Son. Thirdly, it ought therefore to have been said, conformably to the Truth of History, and to make the Example to the Purpoze, that Homerius, Gnaeus's younger Son, was preferred to Gensamond, the Son of Gnaeus his elder Brother. Bodin, De Repub. Lib. VI. Cap. v. 1145. It is also mistaken in making Homerius Grandson to Gnerius, 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. Pandal.

7 Com. Victorius, Vit. Hen. VII.

8 Homer, Lib. 3. Cap. 62.


7 The learned GRONOVUS 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 intimate this, in the Life of Pyrrhus, p. 400. Tom. I. Edit. Wach. Ed. 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 this, according to the Law, the Son of an elder Brother deceased succeeded, preferably to his Uncle, appear 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 Charibus. GRONOVUS farther accuies 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 GRUOTUS supposes was established in Lacedemonia. But this only proves, that our Author design to speak here of an irregular lineal Succession; as he intimates both in this and the foregoing Paragraph.

8 See De serres, Inuent. de Phij. de France, in the History of Charles V. summoned The Wife, 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 Content between Sanches, Son of Alphonso, King of Castile and Leon, and his Grandson, tells us, that the States declined 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 Honen. See Polydore Virgil, Hist. Ang. Lib. XX. and the Extrait of The publick Acts of England, in the Bibliotheca Chresto. Tom. XXXVI. p. 1, &c.

XXXI. (1) See De serres, Inuent. de Phij. de France, in the Life of Philip Auguftus, 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 Duchy of Brabant, Vies de Philippe de Valois, et de Charles VIII. (p. 165, 166, 422.) GROTIUS.

2 Nova.CXVIII. Cap. III.

3 According to the old Roman Law, Nephews succeeded.
Roman Law. Let us now run over the other Questions proposed by Emanuel Cobbe.

XXXII. He says, that the Son, or even the Daughter, of the deceased Brother, is to be preferred before the King's Uncle; which is true, not only in a lineal Succession, but even in an hereditary one in such Kingdoms, where the Right of Representation is admitted; but not in Kingdoms, which in express Words have Respect to the natural Degree; for in those the Person who has the Advantage of Sex and Age is to be preferred.

XXXIII. He adds, that a Grandson by the Son, is to be preferred before a Daughter. It is true, upon the Account of his Sex; but with this Exception, unless it be in a Country which regards among Children only the Degree.

XXXIV. He also adds, that the younger Grandchild by a Son, is to be preferred before the elder by a Daughter, which is true in the lineal cognate Succession, but not in the hereditary, unless authorized by some special Law. Neither is the Reason alleged for this sufficient, Because the Father of the one would have excluded the Mother of the other; for this Exclusion would have been on the Account of a Prerogative merely personal, which passes no farther.

XXXV. As for what he subjoins, as appearing to him the more likely Opinion, that the Grand-daughter by the elder Son lets aside a younger Son, is not allowable in hereditary Kingdoms, tho' the representative Succession be admitted there; for this only puts her into a Capacity of succeeding; but among those who are capable of succeeding, the Prerogative of the Sex must carry it.

XXXVI. And therefore in the Kingdom of Aragon, the Sister's Son was preferred before the Brother's Daughter.

XXXVII. And after the same Manner, in hereditary Kingdoms, the Daughter of the eldest Brother must yield to the King's younger Brother.

succeeded only when there was no Brother nor Sister of the deceased remaining. See Code, De Jurem. liber. Leg. III. and Leg. XIV. § 1.

XXXII. (1) For the Uncle of the Deceased was already excluded by the Proximity of the Line of the Deceased, in which the Decedent's Nephew is, in Cafe 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 reclassified in the same Degree with the Decedent.


XXXIV. (1) Mariana, Hist. Hist. 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 Berengre, 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.


2. In this 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 to close to the lineal Succession, that a Sister's Son was preferred to those who defended 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 Aragon, preferably to the Sons of Ferdinand, and that even his Grandsons by his Daughter should be preferred to the Daughters of Ferdinand in Cafe of a Failure of male Heirs.

Lib. XXIV. Thus, he adds, the Right of the Crown is frequently altered, according to the Fancies of Kings. See the same Writer, XXVII. 3. Gratiani.

CHAP. VIII.

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

I. T H E 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 is.
is that Acquisition which is obtained by the Right of War; but of this we shall speak more reasonably 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 4 Right of Nations, which we are now treating of: But are either to be referred to the Law of Nature, not indeed to that which flows purely and firmly from Nature, but to that which takes Place in Consequence of an establifhed 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 17 many other Nations round about them; which I rather believe, be-cause those Laws or Customs came originally from the Greeks, whole Institutions, as Dionysius Halicarnafenus and others observe, all Italy, and the neighbouring Na-
tions 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 Tranquility 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 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 Greek Laws, so then the German, were generally received, and as are yet in Force. Now the first Way of acquiring a Thing by the Right of Nations, as the Roman Lawyers call it, is the 4 Seizure or Possession of Things that have no Owner: Which Way is certainly according to the Law of Nature, in the Senfe I mentioned, now Property is establifhed, 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. And to this Head, in the first Place, is referred the Catching of Beasts, Birds, and Fish. But how long all these may be paid to be no Body's, admits of some Dispute. Nerva, 'tis the Son, was of Opinion, that Fish in a Pond were our

I. (1) That is, to that arbitrary Law, establifhed by a tacit Consent of Nations, which our Author supposes, without any Foundation. See B. I. Chap. I. § 14. Note 3. But, as has been observed, the Roman Lawyers understand no more by the Law of Nations, than what the modern Interpreters call Jus Naturale accidentum. See what I have said on this Subject, B. II. Chap. III. § 23. Note 3; and the Second Edition; and Mr. Nooder'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 ancient Lawyers. For we acquire the Domino 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. Infin. De Diflione rerum, &c. Lib. II. Tit. I. § 11. So that our Author's Criticism is just, only as it throws that certain Decisions of the Roman Law-

yers are not founded on the true Principles of the Right of Nature common to all Nations; tho' they give them as such.

2 Nations agree, tho' we know not certainly whence this Agreement arises, about other Cu-
toms, 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. XVII. that the Ionian Characters should be used in Wir-
ing. Ibid. Cap. LVIII. 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. Lib. LX. of the religious Respect paid to the

Knees of a Person, Lib. XI. Cap. XLV. and the Custom of adorning Lighthening with Clapping of the Hands, or a certain Motion of the Tongue, Lib. XXVIII. Cap. XLV. Grotius.

3 The original Words are, Neque enim pertinent ad ius Naturale gentium inter se Societatem. The Author expresses himself in Terms still more clear and strong, at the Close of the Chapter, Ab his (Juristic-bus) quae Societas humanae vinculum continent, I make this Observatior to shew that his Ideas of the Nature of his Law of Nations, are not very clear, nor very certain. He defines it as arbitrary Law; but what is necessary for maintaining Society among all Nations, is not an arbitrary Thing: they are in-
dependably obliged to observe it, by Virtue of the Law of Nature, whether they are willing or not.

4 Wild Beasts, Birds, and Fish; that is, all Animals which are produced in the Sea, in the Air, and on the Earths, as soon as they are caught by any one, immediately begin to be his by the Law of Na-
tions. For what before was no Man's Property, is granted to the Occupant by natural Reason. Infin. Lib. II. Tit. I. De diflione rerum, &c. § 13. We may here observe, that jus gentium, and Naturale Eo est, are the same Thing, according to the Ro-
man Lawyers.

II. (1) Digest. Lib. XLI. Tit. II. De aquisquir, vel ammittendo passus. Leg. III. § 14. Quae in Sylvia circumanfiquis vagantur. But we ought to read, in Sylvia non circumfiquis; which makes a Senfe directly contrary to what is commonly found in the Words, and such a one as is agreeable to our Author's Opinion. See Now I. on Pufendorf, B. IV. Chap. IV. § 11.
own, but not those in a great Lake; and wild Beasts inclosed in a Park, but not those that had the Liberty to range in Forests, tho' those Forests were fenced in. Whereas Fifih is no less inclosed in a private Lake than in a Pond, and Forfts which are fenced in, do secure Beasts as well as any of the Parks, which the Greeks call πανεπιφανείας, 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 we have too a Property in, not only Beasts in private Forests, but Fifih inclosed in Lakes.

III. The Roman Lawyers fay, that we lofe our Property in wild Beasts, as soon as ever they recover their natural Liberty; but in all other Things the Property acquired by Possession does not cease with the loss of Possession; nay, it gives us a Right even to claim and recover our Possession. And whether they be taken away from us by another, or get away of themselves, as a fugitive Slave, it is all one. Wherefore it is more reafonable to fay, that our Property is not loft merely because the wild Beasts have made their Escape, but from a probable Conjecture, that by Reafon of the difficulty of purifying 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 τινας τύχας, Marks 4, or Crepundia, Bells, upon them, as has been often done to Stags and Hawks, whereby they have been known, and reforted to their Owners. Now to gain a Property in Things, it is requisite that we fhould have a corporal Possession, and therefore it is not enough to have wounded the Beast, as it was rightly decided against Trebatus. Hence comes the Proverb, Αλίκι λεγομεννο εξετίλθη. 8 You have flarted the Hare, but others run away with it. And Ovid tells us, in his fifth Book of Metamorphoses, that 9 It is one Thing to know where a Thing is, and another to find it.

IV. Now this corporal Possession may be gained not only with our Hands, but with Instruments, fuch as Traps, Nets, Gins, &c. that provided these two

III. (x) Inlfnt. Lib. II. Tit. II. De dirjijjme rerum, § 12. See Pufendorf, B. IV. Chap. VI. § 12, and the Notes on that Place. 2 See what I have faid on Pufendorf, in the Chapier last quoted, § 1. Note 1. It muft be observed, with OHRECHT, that the Roman Lawyers admitted of the Preemption on which our Author grounds this Rule, concerning inclosing a wild Beast. This appears from the very first Words of the Paragraph of the Inluftrations, referred to in the foregoing Note. It is presumed to recover its natural Liberty, when either it is out of your Sight, or, the flill in your Focus, cannot be pursued without Difficulty. But I do not find they lay any Thing as they ought to do in Order to reafon conclufively concerning the Exception of a stronger Preemption, founded on Marks set on a wild Beast, from which there is Reafon 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 improbable, especially when the wild Beast is grown a little tame. So that it is a vain Pretence of ZIEGLER, that from the fingle Confideration of the Beast being wild, it is fupposed 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 Posseffion of it.

III. 4 Cepfandia in the fame Sene. Apolog. (p. 64. Edit. Praec.) GROTIUS. 5 See the Notes on Pufendorf, B. IV. Chap. VI. § 2, 9, 10. 6 HARMEN GPULUS fays, that he who has wounded a Beast does not become Mafter of it till he catches it. Lib. II. Tit. I. (Num. 26. Edit. Cinth.), GROTIUS. 7 The Question was propofed, whether a wounded Beast, which is fo wounded that it may be taken, is immediately underftood to be our Property? Trebatus declared in the affirmation. Most of the Opinion that it did not become our Property till we took it, because feveral Accidents may prevent our taking it, which is true. Dift. Lib. XII. Tit. I. De adfuar. rerurn Domini. Leg. V. § 1. 8 In PETRONIUS ARBITER we have this Expression, Βίοι, quod aliis Lopemor ecatiri? Do you adjure that I have flarted a Hare for the Life of others? (Cap. CXXX.) Ovid alludes to this proverbial Way of speaking (in De Art. amni. Lib. III. ver. 660, 661.)

Crepand a fuerat, alioque gaudia carpent, Et lipois hic alis exsigitis erit.

By the Laws of the Lombards, whoever killed, or wound a Beast which had been wounded by another, had a Claim to a Shoulder and four Ribs of it; the Remaider belonged to the Person who had wounded it, provided it was not more than twenty-four Hours from the Wound was received, (Lib. I. Tit. XXIII. Leg. IV. GROTIUS.)

9 Metamorph. Lib. V. ver. 310. But the Poet is there speaking of a different Thing, as I have observed on Pufendorf, B. IV. Chap. VI. § 3.

Note 1. 3 S

Circumstances
Circumstances go along with it. First, That those Instruments be in our own Power; and Secondly, that the Beaf be so secured as that it cannot get away. And thus must we decide the Cafe of * the Bear in the Tail. 

V. These Things are then only to take, Place, where no Civil Law intervenes; wherefore our Modern * Lawyers are very much mistaken, who think those Rights to be fo natural, as that they cannot be changed; for they are not purely, and simply natural, but only with Regard to a certain State of Things, that is, if it be not otherwise provided. Thus the People of Germany consulting about making some Allowances to their Princes and Kings to support their Dignities, 1 very wisely thought it proper to begin 2 with such Things as might be given without Damage to any one; such are those which no Perfon could lay particular Claim to; which I find that the Egyptians also practiced: For there the King's Intendant, 3 whom they called λάτες, feized on all such Things to the Use of the Crown. The Law indeed could of itself transfer a Property in those Things before Possession, 4 since the Law alone is sufficient to create a Right of Property. 

VI. After the same manner as wild Beasts become our own, 5 so do also other 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 Defart 6 City of Acanthis adjudged to the Chalcidians, who first enter'd it, not to the Andrians who had first thrown a Dart into it. For the beginning of Possession is joining Body to Body, and this in Moveables is done usually by the Hands; but in Immovable, by our Feet. To know where a Thing is, 7 is not finding it itself, as we have it in Ovid Metam. Lib. V. 

VII. Among Things that have no Owner, are reckoned Treasures, that is, Money, whose Owner is not known; 8 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; 9 yet not so, but that * Laws or Customs may order it otherwise. Plato 1 would have Notice given to the Magiftrates, and the Ora-

IV. (1) That is, not that they be always our Own Property; for we may make use of such as we borrow, with the Proprieter's Consent; but there is no Impediment to our using them where they are placed. Consequently, the Place must either belong to the Perfon who would hunt in it, or it must be publick; or, if it be an Efteate belonging to another, it is necessary that the Proprieter should conform to the Action. 


2 See Pufendorf, B. IV. Chap. VI. § 5, 6, 7. 

3 The Perfon mentioned by Strabo, as quoted by our Author in the Margin, was not an Intendant of the old Kings of Egypt, but an Intendant of the Roman Emperors, eftablifhed after that Country was reduced to the Form of a Province. The Geographer calls that Office, ἴδιον κάθε, and CASAUNO judiciously observes, he was the fame as the Digest calls Præcator Cæfaris, or Rationalis. See that between the Writings of MANPI RDIUS, Alex. Sever. Cap. XLV. and on Caspuli nus, Maxim. dub. Cap. XIV. What led our Author into this Mistake was, that it is faid a little lower, that these Magiftrates were the fame, even under the Kings. But he did not observe, that this relates only to the Magiftrates of the Country, but & ὀφειον διαφωνη, spoken of juft before, who are clearly distinguished from the Officers eftablifhed by the Roman Emperors. The Pullige in Quetian funds thus, There is another Officer, called ἴδιον κάθε, to whom (as Strabo fays) was to demand juft Things as had no Mafter, and consequently ought to fall to Cafer. Lib. XVII. p. 1148. Edit. Anmty. (197. Parvi.) So that when Egypt was go verned by its own Laws, the Kings might not have had the fame Right over Things which had no Mafter, as the Roman Emperors fince had. 

4 Cesar. in C. poecatam. part 2. § 8. 

VI. (1) In Portugal the Whales that come a-fhore belong to the King. GEORG. DE CAVEDO, Dufc. Lafiian. Part II. Decal. XLVII. GROTIUS. 

2 The Author makes an Illand of this Maccobion City, which lies near the Sea, toward the Gulf of Strymon. The Fact is related by Pla TARCH, Quafl. Grec. XXIX. p. 298. Tom. II. 

VII. (1) See Pufendorf, B. IV. Chap. VI. § 13. 

2 The People of Bibha had a Law, forbidding the carrying off what had not been put in the Place where it was found. APOLLONIUS of Tyfes approved of this Maxim, as we are told by PHILO STRATUS, in the Life of that Philosopher. GROTIUS. 

The Law mentioned by our Author belonged to the Stagirites. See Aelian, Var. Hift. Lib. III. Cap. XLVI. The fame Author relates indeed, that the People of Bibha, a City of Phoenicia, followed this Maxim in Practice. Lib. IV. Cap. I. p. 320. Edit. Periuran. But fays nothing of a Law among them for it. As to what is obferved in Regard to APOLLONIUS, I do not know that PHILO STRATUS has any more than what will be presently mentioned in Note 4, and which relates to a very particular Cafe. 

War and Peace

Chapter VIII.

The Question turns on a Difpute between a Seller and a Buyer, who had found a Treasure in the Field he had purchased. The Philofopher in that Occafion fays, 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 deflaff hisefhimfelf of the Land, if he have the Treasure into the Hands of the Purchafe, had not the latter been a Man of better Morals than the former. Vit. Apoll. Tyian. Lib. II. Cap. XXXIX. Edif. Olar. To which the Author adds, that his Decision was received, and the Treafure defired accordingly. A Decision which fows that Philofopher's theological Notions were not more just than what he entertain'd in Ref- gard to the Law of Nature.

5 This feems to have been praftifed at Rome, in Ptolemy's Time; in the time of his Son the Younger, makes Callixtus fay, that He bought a House in which he knew there was a Treafure, with a View of delivering it safe to his Friend, who had depofitated it there, being fensible It would be judicious to belong to the Purchafe of the House, (Trinum. Ad. I. Sacn. II. v. 141, &c.) See also Adv. V. Sacn. II. v. 22. Grotius.

6 This is not certain. See my fecond Note on Puffendorf, B. V. Chap. III. § 3.

7 See the Infliftors, Lib. I. Tit. II. De rer. Divifione, &c. and the Commentators on the Place; as alfo James Godefroy on the Tra- velfes Canon, Lib. X. Tit. XVIII. De Trafuris, Tom. III. p. 435, &c.

8 See what Tacitus relates, Annal. Lib. XVI. (Cap. I. &c,) concerning the Treafures laid to be found in Africa, which Nero deftroyed in Imagina- tion, on the falfe News he had received of that Affair. See likewife Phifoctrratus, where he feeks of Atius the Rhetorician. Vit. Sophyl. (Lib. I. Tit. I. p. 2. Ed. Olar.) Grotius.

9 See the Relation of Sallustian, Cap. XXXV. Confiltat. Sacn. Frideric. Lib. I. Tit. LVIII. and CIII. The fame was praftifed among the Githa, King Thdriftes fays, in Cifcadone, that It can-

not be called Courteous to take what an Inproprietor complains he has left. Var. Lib. IV. Cap. XXXIV.

The fame Prince elsewhere gives the following Direc- tions to his Officers, Let thyfelves depofited Money, which by Length of Time have left its competent Moflers, be, by your Care and Diligence, thrown into our Treafores; as we permit all our Subjects to retain in quafe Poffeffion of what it is their own, they ought carefully to leave to us what is no Man's Property. For he fuffers no Damage by not poffeffing what is left, who does not left his own Goods. Lib. VI. Cap. VIII. Grotius.


Grotius.

2 Dig. Lib. 41. Tit. I. De adquir. rer Dom. Leg. 7.

2 They hold that the Bana and the Rivers thence- fiover are of publifh Ufe; fo 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 pre- tend, that The Property of such Banks belongs to the Owners of the adjacent Lands; and confequently the Trees growing on them, are likewife the Property of the fame Perfons. Infift. Lib. II. Tit. I. De di- ftrifian rerum, &c. § 4.

3 Ibid. § 23. The Roman Lawyers fuppofe that the People took Po-ffeffion of the River only as fuch, and as neceffary for publifh Ufe. Dig. Vit. lib. XI. Tit. I. De adquir. rerum dominio, Leg. XXX. § 1.

4 Infiftit. as above quoted, § 22.

5 Dig. ubi fup. § 5. & cod. Tit. Leg. 50. Leg. 38.

6 See B. III. Chap. IX.

Was confider'd at that Time, the Land was confider'd as having changed its Form, and becoming the Bed or Channel of the River, ibid. § 23, 34. See Mr. Nooder's Probabilia juris, Lib. I. Cap. I. and his Traeitie, De nifi frueta, Lib. II. Cap. XI. p. 621, &c.

Eflate.
Of the Rights of the People.

Estate. Now I do not deny, but all this might be introduced by the Civil Laws, and with the advantageous Prospect of making People more careful in securing their Banks; but that it is so by natural Right, (as they seem to imagine) I can by no Means allow.

IX. 1. For if we regard what 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 said Lands as the Inhabitants do afterwards among themselves dicinging it 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, Condition or Lot. It is by some of these Means, that the People inhabiting Arpinum and Tufculum came to have those Lands which are now called theirs; and the same may be said as to private Mens Estates. And Dian Prus- scens, amphasperus, &c. 4 There are many Things to be found, that the Publick does in general claim for its own, the parcelled out into particular Shares. Thus too Tactitus of the Germans, The Lands: (per Vices occupantur, it is a Midlake to read it Vices) are parcelled 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 parcelled by the Publick, and not afterwards divided, must be supposed to be still the Property of the Publick; and as in a River that belongs to a private Person, any Island that shall be cast up, or the Channel that shall be left dry, becomes that private Person's: So in a River that belongs to the Publick, both of these are the Publick's, or his to whom the Publick has granted them.

2. What we have here been saying of the Channel, 6 holds good also 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 a River did formerly arise, by Reason of the Lowness of their Lands, the Greens of the Rivers, and the Neernees 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 Domain or Property; as were also the Channels of the Rhine and the Maas intirely left by the Waters, as has been often adjudged, and grounded 7 upon very good Reasons.

7 See a Passage of Cassius, in Aggenus Ur- bicus (Comment. in Frimin, and in Boettius. (De Geam. Lib. II.) Grotius.

The Passage, to which our Author refers, is in Cassius LONGINUS a famous Lawyer, whose Opinion concerning Allusions paid into a Law. The Question was proposed on Occasion of the frequent Inundations of the Po, and the Diffusus occasioned by them among the Proprietors of the adjacent Lands; which he solved in this Manner, on a Supposition that the imperceptible filling of the Side of a River, is frequently occasioned by the Negligence of the Proprietors of the Lands on the other Side; whereas when the Water overflows on a sudden, such Inundations are the Effect of a Violence, which they could not prevent, p. 56, 57. Amo. Rea Agrar. Edit. Gass. See also Stilicus 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 Office. Lib. I. Cap. VII.
4 Orat. Rhodius.
5 Per vices &c: non per vices. The Emendation here proposed by our Author, had been made by Quintus Pecquera, and receiv'd by others. The learned Gronovius 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 Tractat. De marit. German. Cap. XXVI. Num. 2.
6 This is praiied in France. See the Book intitul. Santos des Eaux, &c. Tit. B. II. Chap. I. Grotius.
7 Our Author here, in the Margin, quotes some Laws of the Dieff, 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 farrd 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. XII. Tit. I. De adopt. rurum dom. minimis. Leg. LXV. § 4. In § 1. Pufius, the Lawyer, maintains that even the Banks of an Island, belonging to a particular Person, are publick; in the same Manner as the Sea Shores and the Banks of a River, which border on Lands of the Continent. In the other Law, it is determined that the new Channel, made by a River (in Lands belonging to particular Persons) thither becomes publick; it being impossible that a Bed made by a publick River shou'd not belong to the Publick. Lib. XIII. Tit. XI. De Pfun- nis, &c. Leg. I. § 27. Mr. Van de Water, in his Observat. Jur. Rom. Lib. I. Cap. VII.
3. For the Roman Lawyers themselves do allow, that an Island which floats in a River, held up perhaps by some Shrubs growing there, belongs to the State; because, as they say, 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 allow, 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, that if the Lands were limited, the Island would belong to the prior Occupant. This indeed would be so, if neither the River nor the Channel with it had been in the Possession of the Publick, as an Island formed in the Sea belongs to him who shall first seize on it.

X. 1. Neither ing the Law, first mentioned in this Note, ascribed to Labes, makes it appear, in my Opinion, that we ought to read Paulus, and join the left 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, § 1, and is to be understood only of floating Islands. But this does not appear to 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, as Part of it belongs to the Publick, which relates to a particular Case; whereas the Ob- jection is general. Secondly, there is no Information, that the Lawyer speaks only of floating Islands; the very Terms clearly expects 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 Companion with Buildings raifed in a publick Place, shews that the Islands, of which he speaks, are not of the floating Kind; for Buildings are not raised in the Air. Fourthly, The Argument seems to require that we here understand all Sorts of Islands form'd in a publick River. It comes to this. Whatever is found in a publick Place, whether it is naturally formed, or is raised there, as a Building, ought, according to Law, to be of the same Nature with the Place itself: But the Islands in a publick River, as a Seafarer they be, are form'd in a publick Place. Therefore an Island 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 Labes's Opinion, or rather against the received Opinion of the ancient 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 confute Labes. The major, or first Proposition of this Sylogism, is not generally true, as it ought to be, according to the Principles of the ancient Lawyers. For Things, which are form'd naturally (in toto) in a publick Place were indeed considered as publick; such as Trees, Plants, Minerals, &c, but not Buildings, the Ufe 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, on ly by Adjuration, because, when the Property is supposed to remain in the Hands of private Per- sons; for on that Foot, the Conclusion would be different from the Premisses. 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 Anfwers, which might easily have been made. For, as Mr. Van der Water justly maintains, according to the received Notions of the Roman Lawyers, the Bed of a publick River, considered in itself, is reckoned part of the Banks; so that as soon as the River leaves it, and it thus ceases to be necessary for publick Use, the Malters of the adjacent Lands, to whom the Banks belong, only enter into Possession of their own. Hence it follows that the Islands, which are form'd in the Bed of the River, belong to them; for then the Cafe is the same in Regard to those Islands, as if the River had left its Bed, and only the Ufe of the Banks in publick, in the same manner as it is in Re- gard to those which touch the Lands bordering on the River. Whence it appears further 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.

10. See Note 9 on this Paragraph.

12. See Chap. III. of this Book, where the Na- ture of such Lands and others is explain'd.

13. When the Romans distributed any Lands to a Colony, or Number of People, it was at a River, sometimes made Part of the Extent assigned to such and such Persons: Sometimes the River was reckoned among those Pieces that remained, after the Lands had been measured and divided into Acres, and was then said to be subjectus; and sometimes it was expressly refered to the Roman People; as we learn from Suetonius Flacco, De conditione aerei, (p. 18, 19, Edit. Gais.) See the excellent Remarks of Salmasius concerning these Subjectus, in his Exercit. in Solidum. [To which add those of Mr. Vander Gores, in his Antiquitates Agrariae, where he has examined these Things better.] Conten-
X. 1. 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 'tis some of the Quality be changed, yet the Substance is not changed at all, no more than that Part of a Field is, that is devoured by a Lake, the Property whereof, as the Roman * Lawyers with Reason acknowledge, is not changed. Nor is that by any Means natural which § they say, that Rivers, like the ancient * Receivers of Land, Taxes, sometimces take from the Publick to give to private Persons, and sometimces from private Persons to give to the Publick. Much better did the Egyptians understand and manage this Matter, as Strabo reports of them, * "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 great 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."  

2. Hereunto agrees what the Roman Lawyers have delivered us, that whatever is ours, coejes not to be ours, but by our own Fact; add, or by Virtue of some Laws. 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 Premise, 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 * 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 ancient 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, or joined them to his own Domain, or gave them others to drain, and only referred a Share of them to himself.

Cem. Rivers and Additions made by them in general consil. ROSENTHAL. De Jure Fratrum, Cap. V. Coroll. XXIII. SEETNUS, DE REGALLS. Cap. II. Cap. III. CAPOLA, De Servititis. jurifd. pr. fad, Cap. XXLI. &c. GROTIUS.

X. (1) Nor do the Roman Lawyers make the Change of Lands overflowed, and the Difference of the Inundation confit in this; for they acknowledge that 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. VIII. Tit. IV. Quibus multa infir fuerunt, &c. Leg. XXIV. § 2. But they reason on this Principle, that the River having left its former Bed, has open'd itself another in the Lands overflowed, which that become the Channel of the River; whereas, when the River remaining in its Bed, only overflows its Banks, the Bed being fill 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. XI. Tit. I. De aqua. De aquarum dominia. Leg. XII. Lib. XXXIX. Tit. III. De aqua. & aquarum hospes arcans, Leg. XXIV. § 3. See also Lib. XVIII. Tit. I. De contras. emiptios, Leg. LIXIX.

3. Digest. Lib. XLI. Tit. I. De aquis. rerum dominia. 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, takes one from, and gives to another. [Var. Lib. III. Cap. III.] GROTIUS.


6. There is nothing in this contrary to the Principles of the Roman Lawyers, as OrERER 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 freezing in of the Sea, or any other Means, it does not change its Banks; No Man ever said that the Nile, which overflowed the Country of Egypt, thereby changes or enlarges its Banks; for when that River returns to its former Manner the Banks are to be repaired and fenced. Digest. Lib. XLIII. Tit. XII. De Flaminibus. &c. Leg. I. § 7.

7 Digest. Lib. L. Tit. XVII. De Deferr. regul. juris. Leg. XI.

* L. vi. 15. 23. D. quibus nulius usfr. omitt.
XI. Improvement made by 

Digs. if in Difpute, belong to the Publick.

War, and Peace.

Chap. VIII.

XI. Improvement made by 

Digs. if in Difpute, belong to the Publick.

Whatever Improvements the Floods make; that is, whatever little Par- 

cels and Bits of Land may be added, which, because it is not known when 

they came, can be claimed by no Body, (for otherwise the Property could not 

naturally be changed) must certainly belong to the Publick, provided the Publick 

has the Property of the River, which is always to be supposed in a doubtful Case; 

if not, they belong to the prior Occupant.

XII. 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 one, that is, the River itself. And here 

that Distinction which the Roman Lawyers make between Lands bounded and Lands 

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 Dipple) are presumed to be 

(arecisions) 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 

contained in a certain Measure, as most suitable to their Nature.

But yet we do not deny, but that the People may aiffign their Land, with 

the same Right as they themselves enjoy it, that is, as far as to the very River; 

which if so, then is any Addition that shall be made in this Manner, theirs also, 

as it was adjudged in Holland, some Ages since, of Lands bordering upon the Ri- 

vers Ijfel and Maas; 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 Allu- 

vion; which is also mentioned in the Roman Laws, and generally practised.

XIII. What 

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.

§16. 

DIGL. Lib. XIX. Tit. I. De adfint, empti 

& venditi. Lib. XII. § 14. This Law, which 

our Author quotes in the Margin, proves indirectly 

what he infers from it. The Cave is this: A Man 

sells a Piece of Land for a certain Sum of Money, 

affirming the Purchaser that it is comprised in a hundred 

Acres, on which the latter descends, as on a Clue 

of the Contract. The Land, however, is but ninety 

Acres; but before the Extent of it is measured, 

the neighboring River, by retreating from it, makes 

an Addition of ten Acres; and thus the whole Number of Acres is complete, Re- 

lative to the Sale. It is asked whether the Sell- 

er is thereby excused from indemnifying the Buyer, 

on the Account of giving a false Account of the 

Extent of the Land fold; an Indemnification, which 

according to the old Roman Laws, arose to twice 

as much as was to be abated of the Price, in Proporti-

tion to what the Buyer fays less is found. (See 

the Receptio 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 con- 

cluded from Law II. of the Title, Empti & venditi. 

The Difficulty is founded on tis, 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. 

(Digl. Lib. XVIII. Tit. V. De prival. & com- 

med. rei vendita. Lib. VII.) Which, as appears, 

fripps that though a certain Measure was flippu- 

lated, this Limitation makes no Alteration in the 

Right of Alluvion; because the Land was not fold 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 whe- 

ther the Seller sincerely believed his Land contain'd 

a hundred
XIII. What we have said of an Alluvion, does also hold good of that Part of the Shore or Channel which the River forsakes; for where there is no Owner, the first Possessor has the best Title: In Rivers that are theirs, it belongs to the People, or to them to whom they themselves, or such as are empowered 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, 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 shows his taking Possession of it. So it is also in the Districte of Furt, if a Man on Foot can with his Sword's Point touch the rising Ground. But it is most natural, that if the Passage be generally by Boat, it should be looked upon to be entirely separate, and therefore belonging to the Publick.

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 Perfon 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 Perfon to his own Estate; because those Lands were antiently either the People's or the Prince's, or at least drained by the Prince; and if so, then without Doubt, to whatever the Prince or the People did enjoy, those Vassals have as good a Right. Thus we see in Zeeland, that even those Vassals who establisht Judges only for Civil Matters, pay a Tax for the whole Bulk of their Lands, which they afterwards levy upon each particular Perfon, in Proportion to the Value and Big- nesses 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 whole 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 Fec, we must see what the Nature of the Land is, as I said before. For if it be Arctinious, 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 unifoine

XVI. The Roman Lawyers, in order to prove the Laws used by them to be those of Nature, often allege this Saying, That it is most agreeable to Nature, that

a hundred Acres, or whether, knowing it did not, he designed to deceive the Purchaser. But this is nothing to our Purpose. See Cutler, Recl. in Dig. Tom VI. Opp. p. 813. Asafllo Anthony Fawre, Ratiuac, Tom V. p. 483.

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 ancient Custom among the German Nations. P A U L Warnefrid, speaking of Authoris, King of the Lombards, tells us, that Prince, being on Horseback, passed 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. SIEO, the Grammarians, Lib. X. and other Authors, give us a Story of the like Nature concerning Obbe the Emperor, who threw a Lance into the Sea, to mark the Boundaries of the Empire, in the Baltic Gulf. Grotius, Saxo, the Grammarian, does not say that Obes threw a Lance into the Sea, with a Design of marking the Boundaries of the Empire in the Baltic Gulf, but of leaving a Monument of his Expedition. See p. 164. of that Historian, Edit. Francet. 1576.


XVI. (4) This is indeed one of their Maxims, Digi. Lib. L. Tit. XVII. De diversi Regulis juris.
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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 whenever it makes any Addition it should be mine. But this Rule does not hold, unless where the Benefit arises from what is my own, but here it arises from the River, which belongs to another. And it is natural, that whatever Loss there is, the Owner should bear it. Besides, what they allege is not universal, as may appear by the Exception of limited Lands. Not to inuit upon what often happens, that a River makes some Persons rich and others poor, according to Lucan, when the War unfurled, a not inferior Man; and what was his, his Rura colonis Accedunt donante Pado. Some gain, some life, just as the incompetent Po Thinks fit to leave, or to overflow their Lands.

XVII. But as to what they say, that a publick Road does no Ways hinder the Right to such Alluvions, it has nothing of natural Reason in it; unless the Ground belongs to some private Person who is obliged to provide such a Way.

XVIII. Among those Means of Acquisition, which are called Means that the Right of Nations allows of, one consists in the Breeding of Animals, wherein that which the Romans, and some other Nations, have decreed, that the Young should go along with its Dam, is not natural, as I have said already, but only as the Sire is generally unknown. But if the Sire could by any probable Means be discovered, there can be no Reason given, why the Young should not belong to him as well as her; for it is certain, that whatever comes into the World, is Part of him that begets it. But whether the Male or Female contributes most to its Production, is not yet agreed upon amongst Naturalists. Plutarch speaks thus of it, 'it φόνος πιλνον δι της, &c. Nature does fo mix our two Sexes, that taking a Part from each, and blending them together, the returns which is born common to both, in such a Manner that neither of them can distinguish or disclaim that which was theirs, from that which was the other's.' And this is what the antient Laws of the Franks and Lombards copied after.

XIX. If any Body had formed a Thing out of another's Materials, the Subti]re gave the Property to him who gave the Materials, but Procurius to him who had given the Form, because he gave to a Thing an Existence which it had not.  

2 Charles the Bald follows their Decision, Cap. XXXI. Edit. Pijfif. Grotius.  


4 The late Mr. Cocejius, in a Disputation, De Jure Seminis, Sect. I. § 10. Lys, 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. Pat. L. C. 61, 62. Edit. Thodoricus. Reg. C. 65, 66. But there is something after the last Quotation, from which we Author might have inferred, that those antient Peo- ple did not always follow the Principle of the Roman Lawyers: For Theodoric there orders, that the Mather of one of those Slaves which were called Originarius, or Accessit, should have two Thirds of the Slave born to that Slave by a Woman of the same Condition: and in that Case the Mother's Matter had much the smaller Share, viz. one Third, Cap. LXVII. In the Disputation before quoted, our Author is opposed upon the Sub- stance of the Quetition; but with Reafons not al- ways very forcible.

XIX. (1) Ininit. Lib. II. Tit. I. De adquir. ver. dom. § 25.

3 U not
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 Conatus does not like this, and is for having us consider, whether the Work or the Matter was worth most, that so that which was of the greater Value, might carry the other of less Value; an Argument fetched from what the Roman Lawyers have said concerning an Accessory.

2. But if we consider the true Principles of natural Right, as by 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 must it naturally be common, in Proportion to the Value of each Part; for the Form is a Part of the Substance, and not the whole Substance; which Ulpian saw when he said, that the Substance was almost lost by the Alteration of its Form.

XX. But, tho' it be not unjustly ordered, that he who takes, with a bad Intention, another Man's Materials, shall thereby lose his Labour, and forfeit all that
that he would be otherwise entitled to, yet since 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 the of herself take away any one's Property for his Offence.

XXI. And to say that the Thing of a leffer Value, must be carried by that which is of greater Worth, upon which Commonness builds, tho' it be natural in Respect of Fact, yet it is no fo of Right. Wherefore he that has but the twentith Part of an Estate, has as much Right in that Part as he who has the other nineteen has in his Parts. And therefore what the Roman Law has in some particular Cases decreed, or in some others may decree, concerning an Accessory, on the Account of superior Value, is not allowable by the Law of Nature, but only by the Civil Law, for the better Disparce of Bufines; 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 Mifhakes of Lawyers are so many and different as in this. For who can allow, that if Bras and Gold were mixed together they might not be separated, as Ulpius writes; or if Metals were folded together they must needs be confounded, as 

Paulus;

larger Reparation of Damages, and may even indict the other of Theft, which in this Case would be in obli"ing the Offender to pay double the Value of the Matter. The Truth is, that, as the ancient Lawyers were not agreed on this whole Question, and the Notions of each different Party were not well connected, very plain Traces of them are extant in the Compilation of Tertullian; and some modern Doctors ingeniously 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 lies his Property, because they are supposed to be voluntarily alienated, if he knew he built on another Man's Land; and therefore, if the House be demolished he cannot claim the Materials. Lib. II. Tit. I. De dispositione rerum, &c. § 70. See Digest. Lib. XLII. Tit. I. De adquir. rerum dominii, 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, be not entitled to have such Goods for which he attempted to appropriate to himself unjustly? It is 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 Niceron, Marchetti, and Janus A Costa, on the Paragraph of the Institutes last quoted, and thro' which precede it; as also the late Mr. Voss's Commentary on the Title of the Digest, De adquir. rerum dominii, § 31.

But, as PRUDENTIUS observes (B. IV. Cap. 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 afflicted himself to the Loss both of his Labour, and all he may have given of his own. The Roman Lawyers rest on 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 Satisfied, because his Labour is done; yet we can demand any Thing for the Expense he has been at, bureau, by gathering what he had no Right to, he is supposed to have been the Charges ofathering. Digest. Lib. IX. Tit. I. Ad Leg. Apuli. Leg. XXVII. § 25.

XXI. (1) That is, he, to whom the smaller of two Things joined together belongs, is commonly forced to return to the Matter of the larger; either because the latter is stronger, or because the former is not in a Condition of paying him the Value of his Part; because it would not be very advantageous to him, or because he cannot make the same Use of his Goods, as he might otherwise have done.

2 Digest. Lib. VI. Tit. I. De rei vindicata, Leg. V. § 1. Some Expositors, as JANUS A COSTA, (in Instruct. De dispositione rerum, &c. § 26.) tell us, that in those Days Workmen were acquainted with the Art of separating those two Metals; especially considering the Aqua Regia was not then invented. Another Law which belongs to CALLISTRATUS, is unaccountably alleged against this; for that Lawyer speaks only of Silver mixed with Bras. Digest. Lib. LII. Tit. I. De adquir. rerum dominii. Leg. XVII. Now the Secret of separating Silver from Bras might be known, which is a Reason of his 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 ULPIUS only meant, that Gold cannot be separated from Brass without destroying the Bras.

3 Digest. (Callinus) § 25. etiam quod fuerit secutum institutum in juxtae ordinis brachium fidem, unum majoris partis causam: "Quod enim alienum (factual) est, etiam inde ab eo, in parte prorsum dominium non pugnum. Non inde enim, quod ad placitum fidem, quae fuerint seque rerum in hac aedem materie faciit confusione: plumbatura non idem efficit. Digest. Lib. VI. Tit. I. De rei vindicatione, Leg. XXVIII. § 7. The Lawyer here distinguishes two Sorts of Solder, one made with a Matter of the same Kind as the two Bodies folded together; the other of a Matter of a different Nature. He calls the former Ferrum naturale, the latter Plumbatura. See on this Point the Opuscula of Lutinatus Juris confutatorum veterum, published in 1711, by Mr. Ducker, p. 238. (L.). According to this our Sort of Solder confounds the two Bodies fold'er'd together, so that the whole by acclivity 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 fold'er'd to a Slate, be broken off. But if the two Parts were equal,
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Paulus; or that there 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 

what is planted or sown should go along with the Soil, is also a
domina, for this Reason, because they are nourished by it. And
therefore it is a Distinction about a Tree, 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 Sacred.

XXIII. Nor does Nature allow him, who has got another Man's Goods in his Poffession, though it were honestly and without Fraud, to appropriate the Profits of them to himself, but only 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 Satisfaction be not made him of other Way.

XXIV. The same, I think, may be said of him, who is unjustly poss'd of another Man's Goods, where no penal Law intervenes. 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. The last Way of acquiring a Property which is said to be by the Law of Nations, is a formal Delivery; but we have said above that a Delivery is not by

so that one could not be consider'd as an Accesory 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. XI. Tit. I. De adquir. rerum domin. § 2. But when two Pieces of Silver, for Example, are folder'd together with Lead, or two Pieces of different Metals are folder'd together, which was termed Plumbatura; the Laws held in that in that Cafe there was no Mixture; and that therefore the two Bodies thus folder'd together still belong'd each to its own Matter, whether one was more or less considerable than the other. We see no solid Foundation for this Distinction; for two Pieces of Silver folder'd together with Silver remain as really distinct one from the other, as if they were folder'd with Lead, or a Piece of Iron was folder'd to a Piece of Silver.

2 Digest. Lib. XII. 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) Inst. Lib. II. Tit. I. De divers. rer. &c. § 33. See the Chapter of Pufendorf last quoted, § 5, with the Notes.

2 Cod. Lib. III. Tit. XXII. De rer. vindicta. Leg. XI. See also the Titles of the Institutes so often quoted, § 31.

3 Dig. Lib. XIII. Tit. I. De adquir. rer. dom. Leg. IX.


2 But see what I have said on Pufendorf, B. IV. Chap. XIII. § 3. Note 1. of the second Edition.

3 On this Question see the Speculum Saxonicum, II. 26.

XXIV. (1) I think not: Such a Poffessor, barely by laying out his Money on the Improvment of what he knew was not his own, subjected 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 in such a Manner, as to improve them. Hence it follows that the unjust Detainer ought to have no Right to demand anything for his Expences, as he can allege 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 Poffessor deferred to lose; and this Gain may be consider'd as a just Indemnification for his being for some Time deprived of the Poffession of his Goods by the Injustice of the Detainer. See § 20. Note a.

2 Dig. Lib. V. Tit. III. De Hered. petition. Leg. XXXVIII.

XXV. (1) Those Things likewise, which became 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, desiring to transfer his Property to another, should be ratified. Digest. Lib. XII. Tit. I. De adquir. rerum domin. Leg. IX. § 3, where we may observe that the Laws of Nations, spoken of by the Roman Lawyers, is no other than the Laws of Nature. Thus in the Institutes, De rerum diversa, § 60, 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 Domain, which it does only when preceded by Sale or some just Cause. Digest. as above quoted, Leg. XXXI. See on this Subject Pufendorf, B. IV. Chap. IX. § 6, &c.
the Law of Nature required in the transferring of a Property, which the Roman Lawyers themselves do own in some Cases; as when the Thing it self is given away, but the Profits refer’d, or when it is made over to him, who has it already in his Possession, or keeps it when he only borrow’d it; when a Thing is thrown amongst a Multitude for the first that catches it. Nay, a Man may transfer his Property even before he is feiz’d of it himself, as an Inheritance, Legacy, Things given to Churches or Places dedicated to pious Uses, or to Corporations, or in

2 It is not indeed requir’d. By the Laws of the Wigliths a thing was looked on as delivered, when the Donor 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 at & libram). See Varro, De Ling. Lat. Lib. VI. (p. 82. Ed. III. H. Steph.) Festus Pompeius, in the Word Redux; Ulpian Instit. Tit. XIX. Boethius, Ad Top. Curr. Grotius.

What the antient Romans called Res-mancipi, were Eilates in Lands, Houses, and all other Possessions situated in Italy, or in some privileged Place of their Provinces, with the Rights of Servitude annex’d to them; as also Slaves, and Beasts of Burthen. Every thing else was Res non Mancipi, though Pears perih were excepted. The Res Mancipi, which they confider’d as most useful and most confiderable, 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 to much Force and Excent as that of Res Mancipi. See Vindiciae pro recepta de Manu. Leuwen Kasper, in the Case mentioned, by the learned Hands of Vanders Goes, printed at Leyden in 1646, p. 61, &c. where he confiders several Opinions of the antient Salammusius on this Subject; as also Mr. Schultzing, on the Title of Ulpian, quoted by our Author; but more particularly the illustrious Mr. Byssand, in a Treatise published, under the Name of Opioula variis Argomentis, printed in 1719, to which he seems not to have been, 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 Mancipi, regularly received, was called Dominium Quiritarium, or Juris Quiriti, or Legitimum & ille, 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 Buitarium, or Naturale, or Juris Gentium. The Word dixi, to give, was commonly used for transferring the former; and that of tenderers, to deliver, for transferring the latter; though both were performed by the same corporal Act, in respect to the Thing alienated, and the whole Difference consist’d in the Formalities to be observed for acquiring that full Right of Civil Property over the Res Mancipi. See the Probabilis Iuri, by Mr. Nooty, 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 (Tradition) is sufficient for transferring the Property. This Distinction of Res mancipi, and res non mancipi was abolished by the Emperor Justinian, as appears from the Code, Lib. VII. Tit. XXV. De nudis juris Quiritii tollendo.

3 This is a Constitution of Theodosius the Younger, on which see James Godfrey, in Cod. Theodos. Lib. VIII. Tit. XIX. Tom. II. p. 621.

4 Dig. Lib. XLI. Tit. I. De adquire. vide. don. 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. Nooty’s Probabilis Iuri, Lib. II. Cap. VI. Num. 5.

6 Institut. Lib. II. Tit. I. De rerum divisione, &c. § 46.

7 All the Rights of Inheritance are acquired the Moment the Heir acts as such, though he be not yet in Possession of the Goods, and though he is not considered as a Possessor in Regard to the Effects 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 here quoted pass directly from the Person who bequeathed them, to the Person to whom they are bequeathed. Digest. Lib. XLVII. Tit. II. De Fortis. Leg. LXIV. Hence it is that, if the Legatee dies, provided it be after the Death of the Testator, the Legatee pays his Heirs, as if he had actually received them, Digest. Lib. XXXVI. Tit. II. Quando dies Legati, videlicet, sedat. Leg. V. priv. § 1.

9 If therefore an Inheritance, a Legacy or Gift of Trust is in the forer-mentioned, or a Downtonable Sale has been made of whatever Things movable, immovable, 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 Sacrisficiis Erudi- tioribus, &c. Leg. XXIII. In this Law it is 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 Doctores, however, as Wissembach, in Cod. p. 7, and in Institut. Diff. X. § 56. 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 sacrisficiis (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 fuch. On the contrary I see a considerable one against taking that Liberty. The Constitution in Questian is a Law made at the Request of the Ecclesiastics of Emesa, or Emesa, a City of Syria, who obtained it of Justinian by Surprize, as Sobras observes, and as the Emperor himself acknowledged by correcting the Term of the Prefcription, which he reduced to forty Years instead of a Hundred. Novell. IX. and CXI. See my fifth Note on Puffendorf, Hist. IV. Chap. XII. § 2, the Inference
"In Confederation of a Maintenance, and Goods that we have agreed shall be shared and used in common.

XXVI. These Things we have thought fit to observe, left a Man often finding the Term of Right of Nations, among the Authors of the Roman Law, should very much 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 Diffusion between Natives and Strangers, there also Foreigners shall enjoy the same Right, and if they be hinder'd in the obtaining of it, it is such a Wrong as may give a just Occasion for a War.

is easily made. A Privilege thus granted, is not given by Halves, it is parted 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 does not discharge that Obligation; The Donor may then not only revoke the Donation, by bringing certain personal Actions, allowed by the Roman Law, but also redeem 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 Cujus Recit. in Cadic. Tom. IX. Opp. p. 1401.

11 In a Partnership, all the Goods which belong to the Partners immediately become common; because, tho' no particular Delivery intervenes, a tacit one is supposed. Dig. Lib. XVII. Tit. II. pro facis. Leg. I. § 1. and Leg. II.

XXVI. (1) But, in my Opinion, the same way of restricting ought to be employed here, as was before used against our Author's Opinion, on Chap. II. of this Book, § 22.

CHAP. IX.

When Jurisdiction and Property cease.

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 cease. And first, that they may cease, by being abandoned and deferred, 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, 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 obstruct it).

1. (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 Virtue of a new Title. 2 See Puffendorf, B. IV. Chap. VI. § 14. B. VI. Chap. III. § 11. and B. VIII. Chap. XI. § 1.

2 By the Roman Law, all the Goods of Persons dying intestate, and who had no legal Heirs, belonged to the Treasury; and consequently Slaves, who were reckoned among Goods. Code, Lib. X. De heris vacuatis, &c. Leg. I. See also Digest. Lib. XLIX. Tit. XIV. De jure Fisci. Leg. I. § 2. and Cujus, on the Code, Lib. VI. Tit. LI. De Caducis rebus, 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. XI. Tit. VII. Pro Derelictis, Leg. I. and Leg. xii. Unless the Master thus deprived himself of his Right, by inhuman Avarice,
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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 Heracleitus said, (Plato cites him in Cratylus, and Seneca in the above-aided 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 going. Nor does the bare Name only remain, but also that Diposition, which Conon defines, 12 ἡ χώρα τοῦ ποταμοῦ, The Habit of the Body that keeps its Parts together. Plutarch, 13 ὁ ποταμὸς ὁ θεῖος, 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, &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 Cufptom of Speech, that when we are addressing our Diocuric 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. viii. 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 Paffion 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 ancient Glory, but had not made them another People. Nor was he himself ignorant of this, when he objects against the same Athenians, how unsuccessful they had formerly been against the Macedonians, and how cruel and barbarous to the Subjects of their own State. But as an Alteration in small Parts does not make a People cease to be what they were a thousand Years ago, and above; so neither can it be denied, but that it is possible for a People to be ut-

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L. quid tamen, D. quis multis usus fructus amitor. 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 dilatant Times; but the Cafe is quite otherwise, if it be pulled all to Pieces, and to rebuilt. L. qui res, § occurs. D. de Sclavis- nibus. PLUTARCH IN THOYS, 10 § παλαις ετε. The Vefit with thirty Oars, in which he (The- leus) with some young Gentlemen, made a voyage, and returned to Safe, the Athenians preferred even to Demetrius Phalaris's Days, by taking out the old decayed Wind, and refitting it with such as was new and new; so much that this Ship became a Precedent to Philofo phers, when they were confidering whether a Thing injured and repaired was fill the fame, fames declaring that it was, others that it was not. In this Cafe, fo covert and illuftrous, the Civilians have very judiciously preferred the affirmative Side. And TERTULLIAN, who perfectly understood the Law, in his Book, De refor- tratione Carnis, We have often seen a Ship torn by a Storm, or rotten with Worms, by leaving all its Parts refitted and mendic, fill the fame it was in before, and even knowing no Account of its new Re- pairs. But you must suppose, that the Keel or Bottom remains entire, which indeed the Word Re- fi data in Paulus's Explication does imply. L. inter fipulcalum. § barum. D. de verb. obig. And this is confirmed by what precedes in TERTULLIAN,
terly extinct. And this may be done two Ways, either when the Body of the People is destroyed, or when the Form or Constitution (which I mentioned) is entirely gone.

IV. The Body perishes either when all its Members, without which it cannot subsist, are at once destroyed; or when its 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 Atlantis, according to Plato; 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 Infiances of such in Seneca, 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 they had as private Persons; but not what belonged to them as a People: And this is also to be understood of any Community.

V. The Frame and Constitution of the Body is dissolved and broken, when the Subjects, either of their own Accord are dunned on the Account of a Peftilence, or a Sedition, or are by Force so scattered, as that they cannot more re-unite, which often happens in War.

VI. The Form of a People is gone when they lose all or some of those Rights which they had in common; and this is done, either when every single Person is brought into Slavery, as the Myceanens, who were fold by the Argives; the Olibianens by Philip; the Thebans, by Alexander; and the Brutians, made publick Slaves by the Romans: Or when, 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, and that a Governor should be sent from Rome, to

Prison, but also, in regard to the other Shares, succeed to the Right of him who delivers the ransomed Slave; that is, as Anthony Faure explains it, Jurifprud. Papian. Tit. XI. Princ. VIII. Illat. XIV. till the rent 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 misunderstanded by our Author, Lib. XLIX. Tit. XV. De Capito & pellimin. Loc. Leg. XII. § 12.

V. (1) Philo, in his aforesaid Treatise, De Mundus, tā quâs ús disposuit, &c. Bodies composed of different and distant Members, such as Flocks, Herds, Choruses, Armies, as well as those that are made up of compacted Parts, are dissolved by Dissolution and Separation. See what is said above about a

Ship. Grotius.

VI. (1) See Diophorus, of Sicily, Lib. XI. Cap. LXV.


4. We have this Fact from Aulus Gellius, Lib. X. Cap. III.

5. See Festus, upon the word Prefedura. Vel- leius, 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 Prefedura, or Government. Add to this the Examples produced in the Text and Notes, at B. I. Chap. I. § 8. Grotius.

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dispense Justice among them. And therefore Cicero, in his first Oration to the People against Drusus, says, that Capua had 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 subject to another People, as Byzantium was to Perinthus, by the Emperor Severus; and Antioch to Laodicea, by 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 Cartaginians, in the third Punic War; if the Form, I mentioned, continue, they do not cease to be a People, much less if only the Walls of the City be thrown down. And therefore, when the Lacedemonians refused to admit the Mysians to swear to the Peace of Greece, because their Walls were demolished, it was carried against them in the general Assembly of the Allies.

VIII. 1. Nor does it signify much, under what Government they are, whether Monarchical, Arithocratical, or Democratical. For the Romans were the same People under Kings, Consuls, and Emperors. Nay, tho’ the Government be never so absolute, yet the People are the same they were, as when they were free, whilst he who rules, rules as the Head of that People, and not as the Head of another. For that sovereign Power which is in the King as Head, rests still in the People as in the Whole, whereof the Head is a Part: So that if the King, being elective, should die; or if the Royal Family be extinct, the Sovereignty reverts to the People, as we have shewed already. Neither can that of Aristo of be objected against me, who denies that it be the same State, where the Form of Government is changed, no more than the Mufack is the same, when it is altered 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 Command, and another of 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 Bufiines, 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 another Consideration; that is, a Consideration belonging to another Science; which Aristotle would not confound with Politics, lest what he blamed in others he should be guilty of himself, μηδὲν ὡς ἄνθρωπος, Skipping from one Subject to another.

3. A Debt contracted by a free People, ceases not to be a Debt, because they are at present under a King; for the People are the same, and they still retain a Property in those Things that belonged to them as a People, and hold the Sover-
reigny 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 an Assembly of Confederates, who has newly taken upon him the Supremacy over a People who were before free; and that is, the fame Place or Rank that the People themselves were entitled to; as Philip of Macedon took the Place of the Phocians in the Council of the Amphictyones. So on the other Hand, the Place or Rank which formerly belonged to the King, the free People shall have.

IX. But if two Nations be united, the Rights of neither of them shall be lost, but become common, as the Sabinis 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.

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 Sovereignties in the Room of one, which shall each of them possess its own peculiar Right and Authority over its respective Parts; but if any Thing were held in common, it shall either be enjoyed in common, or proportionably shared among them. Hither also may be referred that Separation which is made, when People by one Consent go to form Colonies. For this is the Original of a new and independent People, so that the Gufts [G]i, the 8° of the Athenian, all of them are now in common,] [Lib. i.]. For they are not set out to be Slaves, but to enjoy equal Privileges and Freedom, says Thucydides. And the same Author tells us, that a second Colony was dispatched by the Corinthians to Epidamnus, Æoli to Æolis, All upon the same Foot. And King Tullius, in Dionysius Halicarnassensis, [Lib. 3.] says, τοί δ' αξίων ἐν φαντα- τιγμις, &c. For our Part we look upon it to be neither Truth nor Justice, that Mother Cities ought of Necessity, and by the Laws of Nature, to rule over their Colonies.

XI. 1. There is also this famous Question, among Historians and Civilians, to whom now those Things and Dominions belong which were once Dependencies on the Roman Jurisdiction; several are for having them belong now to the Kingdom.

7 There is no Mention of Rank in the Decree of the Amphictyons, preferred by Diodorus of Sicily. It is only said there that Philip was to have two Votes in the Assembly, as the Phocians bad. Biblioth. Hist. Lib. XVI. Cap. LXI. p. 742. Edit. H. Steph.

IX. (1) As the Cidibii, according to Diodorus, were formed of the Celaen and the Iberi. See if you have an Opportunity, Revising upon this Subject. Lib. I. Chap. IV. Cap. XVII. Num. 95. and what is cited there. Grotius.

XI. (1) See Pufendorf, B. VIII. Chap. XI. § 6. Chap. XII. § 7. It is well known that the present Colonies always remain dependent Members of the State, from which they are font.
2 But yet with all due Respect to the Mother States, of which Respect we disdourd, B. I. Chap. III. § 21. Curtius, Lib. IV. The Tyrians founded Carthage, and therefore were always honoured as their Parents. Grotius.

See Pitres's Note on this Passage.
3 The same Historian, speaking of the second Colony, sent by the Corinthians to Epidamnus, says, They fired the Fifth Notes to be given that such as were willing to go thither should enjoy the same Rights and Privileges as those who flourished at home. Ibid. Cap. XXVII. Edit. Oxon.

XI. (1) Our Author has been very much criticized on this Article, and it must be confidered not without Reason; for several Objects may be formed against him. Some have even accused him without Ceremony and with some Sharpness, of having startled and decided the Question in this Place only with a View of making his Court to the Pope, and the Prince in whose Dominions he composed and published his Book. I hope I may be allowed to pass a more favourable Judgment of him, and reject Suspicions so little suitable to the Character of this great Man. Waving all Intereft of a Translator and Commentator, I am persauded 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 flatten the Pope, he says what cannot but offend him very much, viz. That he ought to be considered only as the first Citizen of Rome; a Notion far removed from his ambitious Presumptions, 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 cenured 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.
as it was formerly filed, 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 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 Roman Empire. And for my Part, I think, that we ought not to preclude 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 refided and suffibted. For whatever the Roman People had a Right to do formerly, before they had Emperors, they had a Right to do the same 4 upon the Demise of any Emperor, before the Succesor was establisht. And the Election too of an Emperor belonged to the People, and was frequently made,

2 This Reason would prove only, that the Emperors of Germany, Succedants to the Roman Emperors, had a larger Extent of Lands in old Germany under their Jurisdiction. But, as in Order to succee in the Roman Empire, it would not have been necessary that they should polis 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 Maffers by Virtue 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 ancient Roman Empire; but for Proof of this, he ought to have said, which however will he not acknowledge, that when the Roman People submitted to Chars-magus, the first Emperor of Germany, they had long before left the Rights of their ancient Empire. This Argument was not confuted by the Commentators.

3 It is indeed the fame, if considered simply as a Body of a City; but nor in Regard to the Rights of their ancient Empire, which have been long extinct. Thus when that fatal Period is found, we may grant our Author all he says of the Times before it, without any Advantage to his Cause.

4 Our Author has already said, B. I. Chap. III. § 10. That the Roman Empire was elective. And it is certain that, as the first Emperors infeitively feized 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 Army, and consequently on the Law of the Strongest. After the Death of Nero, as Tacitus obseveth, The Secret of State was discovered, that the Emperor might be chosen elsewhere than at Rome. Hist. Lib. I. Cap. IV. Num. 2. Nor that the People had really deprived themselves of their Right in faavour of the Army; but they made no more Use of it, than if they had had none; and if they approved of the Army in their way of selecting them, 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 Inflences of Elections, either made or approved of by the Senate, in Adri-anus, Sulpicius, Julianus, Sabinus, Mucinius, Julianus, Aurelianus, Tacitus, Florianus, Probus, in Dion, I.

Spartianus, Capitolinus, Lampridius, Vopiscus. Before Aurelian, the Empire was fix Months without a Prince, and the Souldiers did feize the Empire to choose an Emperor. There is an eminent Letter of Albinus in Cap-itolinus, 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, Exceps, &c. The Army had chosen me, till I knew your Pleafure, and if it be as agree-able 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 different Choice of the Army, has the Senate made victorious, and Probus, in the fame Vopiscus, The last Year, most ignifluous Fathers, by a juft Prerogative, did your Godfads give the World a Prince, one of your own Order, who are the Princes of the World, always have been, and always will be, in your latest Proflity. And Majorinus in his Address to the Senate, mentioned in the Novelle, You must acknowledge, most ignifluous Fathers, that I was created Emperor, as well by your free Choice, as by the Proclamation of an invincible Army. Gro-novius.

The learned Gronovius, in a long Note on this Place, makes it appear from the Circumstances of the Creation of each particular Emperor, that not one of them was raised to the Empire by a free Election of the Senate, and that the Approval of that was generally, or at least, before the Choice of the Senate, made효. so that all the fine Speeches of some Emperors here related, and others of the like Sort, are only to many empty Gracims. In this I agree with him; but still it may tence be inferred, that the Emperors themselves acknowledged the Roman People had not divested themselves of the Right to chufe themselves a Matter. Besides, the Commentator justly points out some Failures in Point of Excufes 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 Tetricus. See Vopiscus, in Aurelius, Cap. XII. and in Tacitus, Cap. II. III. And this Example is sufficient to show how much the Soldiers were in Possession of the Election of the Emperor; for the Senate always sent them back the Ball, till after Aurelian's Death, and well before the Army did raise him: and therefore the Senate送往ly received Emperors chosen by the Senate. Secon-dly, what our Author calls a Letter of Albinus, is a Speech made to the Army, Concis, in which he declares acknowledge the present Right of the Senate. See Chap. XIII. of that Emperor's Life, where Capitolinus, the Letter of the Senate concerning the Gordians, quoted by Capito-linus, in Maximin. doub. Cap. XV. only says that
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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 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 *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 Colonies, municipal Towns, and Provinces, where the People were drest after the Roman Fashion, that is, they were made capable of receiving the Honours, and enjoying the Privileges of real Citizens of *Rome*; not that 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 leffen the Right of the Roman People, that their Emperors afterwards chose to keep their Court at *Constantinople*, rather than at *Rome*; for even then also the Election, which was made by

that the Senate acknowledged the two *Gordians*, Father and Son, who had been proclaimed in *Africa*, as appears from the same Author, in *Gordian*, Cap. XI.

6 *Puffendorf*, in a *Dissertation, de Interregnis*, which appears in the Collection of his *Dissertationes Academicae*, § 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 the Legions not being fix and determined Bodies, a Continuity of 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, Liti. I. Tit. I. De *fato nomum*, Leg. XVII. See the excellent Treatise of Baron *Spanheim*, intituled, *Orbis Romanus*. The Colonies had indeed the same Privileges as the Roman Citizens, in what related to Marriages, Wills, Infrachissement and other private Affairs; but not a deliberative Voice in the publick Assemblies, nor a Right of standing for the Offices in the City of Rome. See the Author just quoted, Liti. I. Cap. IX.

8 *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. XII.

9 *Provinciae togatae*. What the Roman called *Toga*, was, according to some, a round Garment closed on all Sides, and without Sleeves; which was worn for this, after having patted the Head, the right Arm was thruf out, and the other Side of the Garment lay on the left Shoulder. But the learned Father *Montfaucon* is of Opinion in that it was open before. See *Antiquity explained and Illustrated* by *Fenner*, Tom. III. B. I. Chap. V. p. 16, 17. Whatever becomes of this Question, the Use of this Garment was so peculiar to the Romans, and they esteemed it so highly, that the bare Allowance of wearing it forfeited a Grant of the Right of a Roman Citizen. For this Reason the Appellation of *Galba Toga* was given to *Galba Calidus*, and not, as *Gronovius* says, to *Galba Natherensis*, which, on the contrary, was called *Galba Bracteata*, on the Account of a very different Drefs. 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.

10 *Un Jure Quiriniun*. This is not the same as *Jus Lawis*, as *M. Spanheim* heus, *Orb. Rom. Exercit. I. Cap. IX.

11 The Senate in Favour of *Gordians*, in Herod. *exhibit* the Provinces, *petitio* *pro adjunctio de decreto* *et qui processit in utriusque filia* et *aurum in urbe animo*. To obey the Romans, is whom the Empire had for so many Ages belonged, and to whom other Nations, by an ancient Right, were in Submission and Friendship. And in the same Author, *Maximus*, in his Speech to the Soldier, *qui* in *actis et itidem*, &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 reposes in this City. We are only obliged to have with you the Care and Administration of the publick Concern.

*Claudian*, speaking of *Rome*.

Armorum legumque parentes quae fundint in omnis Imperium.

*Fonder of Arms and Laws*, that ever all

*Grotius*.

12 There was more than a bare Change of Resi
dence, it was manifestly a Communication of Rights. The Name of *New Rome*, given to the City of *Constantinople*, with all the Laws, and all the Privileges of the Old, particularly the Censalship divided between one Consul at *Rome* and one at *Constantinople*, sufficiently shew that the Source of the Empire was from that Time no longer at *Rome*. See the learned James *Goderoff* 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 Perfons 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 reigned at *Rome*, was to be confirmed by that of *Constantinople*; without which his Authority was not considered as lawful and well established. See *Gronovius* on this Place.

3 Z
luch of their own Body as dwelt at Confanitopole, (whence Claudian 14 calls the Constanstopolitans, Romans) was to be ratified by all the People; who preferred a very considerable Mark of their Right, 15 in the Prerogative of their City, and the Honour of their 16 Constitute, and in several other Instances: And therefore all the Right that thofe, who lived at Confantinople, could pooffibly have in electing an Emperor, depended altogether on the Will of the People of Rome; and when 17 they, 18 contrary to the Mind and Custom of the Roman People, had submitted to the Dominion of a Woman, the Emprefs Irene, to whom they had taken an Oath, as Zonaras has it; not to mention any 19 other Reafons, they justly revoked that Confeffion, which they had either 20 expreffly or tacitly made, and by themfelves choofe an Emperor, and proclaimed him fuch, by the Mouth of their 21 Chief-Citizen, 

14 In Eutrop. Lib. II. Ver. 135.
15 Zonar. says, that Rome had the Preference, because the Empire came from thence. Amianus, 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 Luribus juxtae Potissimitas Exultat, Imperiimque fatis a fimuis errat?

How long fould Petuer thus baffle Home, Pray tell me, how long will fovereign Rule Abroad thus wander, and fly its native Court?—

Grotius.

16 For one of the Caesars 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 Diftinction, as to the Subfance, the Source as well as the Seat of the Empire was in the East; and Confanitopole enjoyed real Privileges. Such is the Policy of Princes, that they know how to feed with Smoke fuch 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 after the Clofe of the Fifth Century, and during the Year 476. Odoacer, King of the Heruls, a People of Scythia, gave the fmiling Bow to the Empire of the Weft by taking Rome, and making himself Master of Italy? And that the fame Prince was vanquifh'd and difpolifh'd, three Years after by Theodoric II. King of the Goths, whom Succeffors reigned in Italy near a hundred Years? The Roman People therefore had been conquer'd as lawfully, as they themselves had conquer'd to many other Nations; fo that they were no longer the fame People, according to the Principles laid down by our Author, § 6. And after the Goths had been driven out of Italy by Juffinian, 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 Confan- tinople. They afterwards had Exarches, or Governours, as a Province of the Eastern Empire, fo that their ancient Right had been long extinguifh'd, when Confantragaus made War on the Lombards, who had driven out the Exarches, and made themfelves Masters of the greatest Part of Italy. 18 Nor, 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 difeare both Senate and People. Pudens in Excerpt. Legat. On § 32. Saenius, or Condor in "De imperio urur," contra de opif. For the Sovereignty of the Roman Empire does not belong to Women but to Men, Lam- pridius, after the Death of Hiliogabalus, It was particularly provid'd, that no Woman should ever enter the Senate, and that whoever should attempt to introduce one should be scour'd to the Pit of Hell. Trebellius Pollio, in Horenianus. Zenonis obferving these Things, kept the Government in her Hands much longer than a Woman ought to have done. Grotius.

19 It was the Pope, who engaged the Cities of Italy to make off the Yoke of the Emperor of the Earl, and the Reafons or Pretences by them used, and which it Author leaves us to guess. On one Hand, the Tyranny of the Exarch of Ra- venna: On the other, the Zeal, which the Emperor Leo fliewd against Images; a Reafon very proper for the irritating the ignorant and fuperstitious People, whofe Grovelly and Bigrey 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 Popp, Charlemagne's Father, very well understood how to make his Ad- vantage of it; for by the Pead and with the Appro- bation of Pope Zachary, he got King Charles's, condemned to pass the Remainder of his Days in a Monastery, and engaged the Princes to acknowledge him for their King, as more worthy of the Crown, of which he before had the whole Authority under the Title of Chief of the People: In Return for these and good Offices, Popp, who was the Son of the Emperor, made him the Exarchate of Ravenna, with a Sot of Temporal Power. See Note (8.) on B. I. Chap. III. § 13. Charlemagne inherited his Father's Sentiments in that Refpect, when he had driven the Lombards out of Italy, and conquer'd the Kings in by them eflablifh'd.

20 This Confeffion being a gratinf Supputation, as appears from the proceeding Notes, the Revoca- tion is so too.

21 Our Author means the Coronation of Charle- magus 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 Confedion of the Thing, and only acquired a dazzling Title, which represented the Dignity of the ancient Empe- rors of Rome, with which however he was not in- volved in the fame Manner, and with the fame Ex- tent. He was far from succeeding to all their Rights; these Rights were exculpated from the Rights of the People. The People were become dependent on the Emperors of Confan- tinople, as was before observed. Charlemagne himself ac- knowledged that Dependance, by his Transition with the Emperors Irene, 2 Transjufion, which was rather in the Name of Falkophons, than Prince's Name. See Eginhart, De vita Caroli Magni, Cap. XXVIII. with the Notes of the Commentators, which
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Citizen, that is, their Bishop; as in the Jewish state, the first Person, when there was no King, was their **25** High-Priest.

3. Now this Election was personal **25** in regard to Charlemagne, and some of his Successors, **45** who very carefully distinguished their Right of Sovereignty over the Franks and Lombards, **3** from that which they had over the Romans; as acquired by a new Title. **46** But the Nation of the Franks being afterwards divided into the Western, who now possess France, and the Eastern, who have Germany, (Otho Brijingenis calls them the two Kingdoms of the Franks) when the Eastern Franks began to elect themselves Kings (for tho’ till that Time the Succession to the Crown of the Franks was, as it were **37** agnostic, 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 Affluence 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 Referve **38** of a Right, either to approve or disapprove the Election, so far as that Affair had any Relation to them.

4. And this Approbation of theirs used to be declared by their Bishop, and was solemnly notified by the Ceremony of a particular Coronation. And therefore, tho’ he who is elected by the seven Electorial 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 Hiftorians often call him, **9** King of

which may be seen in Mr. Schwaner's Edition; **as** also the Life of Charlemagne, by Boeckler, in Tom. II. of his Dissertations, p. 2111. &c. and in III. p. 21. &c. and Puffendorff, De Origine Imperii Germanici, Cap. I. p. 90. &c. with the Notes in the late Mr. Tischendorff Edition.

22 Supposing this true (for were not the Judges the first Persons in the State, before the Institution of Kings?) it doth not thence follow that a Bishop ought to be the first Person of his City, or that the Ecclesiastical Order ought to hold the first Rank in a Civil Society. Under the Law, the High Priests had, beside the Rights relating to Religion, some Authority in Civil Affairs; it was a political Establishment. But the Cafe is not the same under the Gospel; and the Ecclesiastics have found Means to abate 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 Son Emperors, without confounding 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 Rule of a Delight they had long encouned, 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 Pons-ven among the Capitularies of Charles the Bald, and Rụillius, Lib. III. of Charles the Great. Grotius.

25 They had Reason to make this Distinction; for they reigned over the Franks, and had conquered the Kingdom of the Lombards, before they acquired the Title of Emperors. But that Title gave them no Rights over any others; for 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 WITHKIND, Lib. I. and Meriomius'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 BIRMONDUS. Wibo 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 Exemp. Legat. and by Reginon, ad Ann. DCCXVI. 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 False, and expressly attested by Wibo, in his Life of Conradus Salicinus. Grotius.

The Fact is very far from being certain; and this pretended Referve is no where to be found. The particular Approbation of the Roman People might have been requisite for giving that Dignity of the Emperor of Rome was difficult 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 the Election, than the Coronation performed at Aet la Chapelle of Frankfort gave the Inhabitants of that City a Right of rejecting the Person named by the Electors. See HERMANN CONRING. De Imper. Rom. German. Cap. VII. § 21. &c. and Boeckler, in the Life of Otbo I. p. 221. &c. of Tom. II. of his Dissertations.

29 Thus the Pope, in his Emcomium of the Emperor Henry IV, name the Kingdom of the Teutonic, and that of Italy, distinctly. See Otbo's Privilege granted to Aldranus, published by Merlinomius, after Withkind's Synodic; and CHANTRENSIS, in Otbo's Oath, which Gratan has inserted in his sixty-third Distinction, I will in Rome make no Decree or Order about any Thing that belongs to you (the Pope) or the Romans,
Of Italy; and by Virtue of that Title, he becomes Lord of all that did formerly belong to the Roman People, and has not passed from them to the Jurisdiction of any others, either by Treaties, or by Seizure, upon the Presumption of its being abandoned, or by Conquest. From whence we may easily apprehend by what Right the Bishop of Rome, when the Throne becomes vacant, grants the Infeiture 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 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 Cyprian and Raymond, that if the Roman Emperor, by Sicknes or Captivity, be incapable of discharging the Offices of his Government, it is in the Power of the People of Rome to appoint one in his Stead.

XII. That the Person of the Heir is to be looked upon to be the same as the Person of the Deceasled, in Regard to the Continuance of Property, either publick or private, is an undoubted Maxim.

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

Chap. X. Of the Obligation that arises from Property.

I. 1. HAVING declared what Right we have over Things or Perfons, as much as be intricate to our Purpofe, let us now see what Obligation to us does from thence arise. Now this Obligation arises either from Things now in Being, (un-
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, * that he who has in his Hands what belongs to me, should endeavour all he can, to have it come into my Possession; all he can, I say, for he is not obliged to an 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, * 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 * which arises from a Crime, is different from that which arises from the Thing itself. The * Lacedemonians had cleared themselves indeed of the Crime of breaking the Articles, by condemning Phœbidas, who, contrary to their Treaty with the Thbeans, had seized the Fort of Cadmea; but they were * 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 * Xenophon has remarked. Thus Cicero * blames M. Graffius, and Pl. Hortensius, for holding Part

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 upon a natural Equity, as upon a Passage in Deuteronomy xxii. 3. St. Chrysostom, 1 Cor. v. 8. ταχω τι ει τω Ισασε, &c. Even human Laws allow us to seize on our own whatever 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, * the it belongs to some Body else, and cry, GOD gave it me, and to whom may I restore it? * But let them understand, that it is a Crime very much like Torts, not to return what one has found. St. Augustine, in his eighth Sermon upon the Apostle’s Words, If you have found any Thing, and not restored it, you have fake 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 Cauf. XIV. Quoij. V. Gratiius.

The Passage there quoted, and attributed to St. Jerome, belongs to Origen, and is translated from his Hom. IV. on Leviticus vi. as is observed in Pithou’s Edition.

And the same St. Austin, De Fide & Operibus, At the Right of holding Estates, he who is in Possession of another Man’s Lands, is very justly required 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 Felon, and shall justly termed a Rogue and a Villain. To this Purpose is a Law of the Wigginus, 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 Cafe of a Slave who runs away. Nero ordered all those Goods to be restored which Domitian unjustly taken from the Owners, so as we are told by Xiphilinus. And Belisarius, in Procopius, Gothici. II. Qvinta 8 & vlla 7, 8c. For my Part I think, that he who gets upon him and robs him, and he who has got what is his Neighbours, and refuses to give it him again, are all acc. Gratianus.

3 That is, if he knows not the Matter, 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 fifth 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 retained them, knowing them to be such, renders himself, moreover, subject to Punishment.

* Plut. in Pepl. 6 So thinks Diodorus, Lib. XV. Plutarch, in his Life of Aspasia, To whom nearest, &c. He preferred the City to take upon them the Injustice, and to detain Cadmea for themselves. You have such another Action of Bozeman, in Regard to Nicopolis, mentioned by Leucipplius, Lib. VI. Gratianus.

It appears from the Passage of Diodorus in Sicily, to which we are here referred, and that quoted from Plutarch, that those Authors argue on a Supposition that Phœbidas had acted of his own Head, or at least the Thbeans had no Proof of the contrary. So that Mr. Cocceius, late Professor at Fransfort, on the Oder, in an academical Dissertation, De Jusamentis Principium, Sect. II. § 14.) charges our Author wrongfully with contradicting himself; because the Lacedemonians were as culpable as Phœbidas, who had acted only by their Orders; so that, in condemning him, they only condemned themselves.

7 He says they were punished by the very Persians on whom they had practised this Perfidy. Hift. Graec. Lib. V. Cap. IV. § 1. Edit. Osm. 8 Certain Persians brought a forged Will, attributed to L.MINNUS, a Man of a good Estate, from Greece to Rome. To make it pass more softly, 14 A thy
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 univerfal 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 hence receive an Exception. And this gives us some Light into that Passage of "Tryphoninus, A Rogue deposes what he had stolen from me, in Senus's Hands; who knew nothing of the Fellow's Villany; now should Senus restore it to the Thief, or to me? If we reject the Giver and the Receiver only, it is but just to restore the Thing entrusted, to the Person who delivered it. But if we regard the Equity of the whole Affair, and the Quality of all the Persons interested in it, the Thing ought to be restored to me, from whom it was taken by a detestable A SJien. And then he very judiciously adds, And I agree that it is just to give every Man his own, yet in such a Manner as not to keep from any other Person what he has a just Title to. Now he must needs have the just 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 Truth, which he afterwards perceives is his own, is not obliged to restore it. And the Cæfe which the same Author puts just before, concerning Things depofited by him, whole Goods are conficrated, is better determined by this Principle, than what he there mentions about the Usefulness of Punishments.

5. For it is nothing to the Effence of Property, whether it arifes 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 Martius means, when he says, that by the Right of Nations a Man may bring his Action at Law, and recover his Goods from the unjust Possiflers of them. Hence comes that in 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 anything, for finding it. All the Profits of another's Goods are likewise to be returned, with a Deduction only of reasonable Charges.

II. Where we have not the Things by us, or they are not in Being, we are obliged to restore what we have gained from them; this is illustrated by several Examples.

They put down M. Craffius, and Q. Hortenfius, Cohorts with themselves, two very confiderable Persons, of the fame Age; who fuppofting the Forgeries, but being confum'd of no Fault committed by themselves, did not refute the Advantage arising from the Crimes of others. But is this fufficient for clearing them from the Imputation of Guilt? I think not. De Offic. Lib. III. Cap. XVIII. Here our Author feems to me to confufe M. Craffius and Q. Hortenfius at firft believed the Will to be genuine, and that having afterwards fpofited it to be forged, they however took the Advantage of it, under Pre- tence they had no Hand in the Forgeries. Thus the Example may make to the Purpofe; as it thows it is not fufficient to have at firft acquired the Possiflion of another Man's Goods, bond fide, as these two Romans had done, by taking as Heirs to what they believed fell to them by Virtue of the Will; but that as they ought to have left it to the lawful Heirs, as foon as they conceived the Cheat; so every Possiflor, bond fide, ought to restore what he has in his Hands, as foon as he knows the true Propoflor. So that our Author may thus be ferved from the Criticifm of Pufendorf, in the Chapfer quoted, anfwering to this, § 4.

L. Falso. D. de furit.

9 See what I have faid on Pufendorf, ibid. to Cond. If this refers to the Subfivities of the Roman Bar. See the Debate on this Law in Question, between Anthony Faire, De Erro- rib. Pragmatic. Decad. LXXVIII. Er. IV. and Reinf. Bachovius, Chilid. Errorum, or Exer- citiones. P. 53, 54.

II. (1) In my Notes on Pufendorf, B. IV. Chap. XIII. § 5. 6 &c. I have examin'd our Au- thor's Principles concerning this whole Matter; and when I knew which the new, I think sufficiently, that the Possiflor, bond fide, has as much, and while he remains fuch, the fame Right as the unknown Propoflor. Hence arise Decifions widely different from thefe of our Authors, in regard to the Obligations of fuch a Possiflor. Mr. Thoma- fius, who in the main is of the fame Opinion with Grothius and Pufendorf, owns in his Notes on Heuer, De fur. Civil. P. 535, That: when the Question is whether a Possiflor, bond fide, is en- rihed by the Possiflion of the Thing itself, or by the Enjoyment of the Profits arifing from it, is an Erquy Subject to infinite Difficulties, and which it is almost impoffible to satisfy.

that every Man might enjoy his own. It is against Nature, says 8 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, 9 upon the Spoils and
Ruin of other People.

2. There is so much Equity in this Maxim, that the Lawyers have made Use of
it to decide many Cases on which the ancient Laws had not prescribed any Thing;
and they have always appealed to this Principle, as to a Rule whereof Justice is of
the greatest Certainty and Evidence. A Contract made by a Slave, who is em-
ployed as a Factor, 1 shall oblige his Master, unless he has before given public Notice,
that no Body should trust him. But if such public Notice be given, and the
Slave has any separate Interest in that Contract, or if it turns to his Master's Ad-
vantage, such Notice shall be deemed a Fraud. For I think, says Papinian, 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 Communciation against the Defendant, because indeed he did not properly
act for him, but only engaged himself on the Account of the Mother. But how-
ever, 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 the may by Law demand
again, has a personal Action of Recovery against him, or a real indirect Action
upon the Thing that was purchased 10 with that Money: Because, says Ulpian, it
cannot be denied, but that the Husband is the richer for it; and the Question is,
what Goods he possesses which belong to his Wife.

So again, if you have spent 11 any Money which my Slave has stolen from me,
thinking it to be his own, I have a personal Action of Recovery against you, as
having acquired the Possession of my Goods without a just Title. Minors are not,
according to the Roman Laws, obliged to pay what they borrow; but yet if the
Minor be the richer for it, 12 an indirect Action shall lie against him.

Thus, if another Man's Goods are pawned, and the Creditor sells them, the
Debtor is discharged from the Creditor, to the Value of the Money received for

8 De Off. 5. L. fure Nature. D. reg. Juris,
8 De inter. 
2 Cassiodor. XI. 16. We now-a-Days con-
5 fider that it is something very foolish, for one to be
inviolated by another's Misfortune.
3 But, not to extend it too far, it must be con-
3 fidered whether he who makes Profit at the Expec-
tation 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.
L. Si quis mancipiat. D. de Infit. aet.
4 See Note 2 on Fupendorf. B. VI. Chap.
11 § 8.
5 He who of his own Head thus undertook the
5 Defence of absent Persons, was obliged to give Secu-
6 rity for the Payment of all Cofts if he was caft. See
6 Inf. Lib. IV. Tit. XI. De Satisfacationibus, § 5.
7 See Digest. Lib. III. Tit. III. De Procurato-
7 ribus & Defensionibus.
8 On Account of the Pelvian Jus maximus, con-
8 fusion, according to which a Woman could not enter into
an Obligation for another, either mediately or imme-
9 diately.
9 See Cujas in Papinian. Quaest. Tom. IV.
9 Opp. 81. and Anthony Faure, Rationa-
9 lib. Tom. IV. p. 326. 327.
10 Altius utiliss: an indirect Action. This is when
10 the Cofe, 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 Inter-
pretation, false to the Rules of Equity, and con-
sequently in an indirect Manner. Thus the Law-
yers call the opposite Action direct, as arising
from the Terms and strenght of the Law. See
11 Inf. Lib. IV. Tit. III. De Lege Aquilia, § 16.
12 He proposes a Cafe, where the Husband is
12 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.
13 Tom. V. Opp. p. 1088, 1089. and Anthony
15 as also De Erroribus Pragmaticis. Deced.
16 LXXXI. Err. X. with the Cateniun of Baco
17 hius, in his Chilias Errorum. &c. on this Place.
18 According to which it is to be said, that you
18 should take away, and spend the Money which that
18 Slave had stolen from me, not knowing it to be stolen,
but supposing it Part of the Peculum of such a Slave;
I am allowed a personal Action against you on that
Score, as having taken Possession of my Goods without
a just Title. The Question here turns on a Slave
which the former Master had sold with his peculium,
and from whom the new Master, making Use of his
Right, had afterwards taken the stolen Money,
which he, bona fide, believed to be Part of the pe-
culium acquired with the Slave. See on this Law
20 See what I have said in my Lectic of Plei,
them;
Of the Rights of

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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.

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 called 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 Cautious, in this Affair.

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 indictable, not only for the Thing itself, but punishable for his having it) is not obliged to make any Restitution, of the Thing be gone; because he neither enjoys the Substance, nor any Benefit by it.

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 'Labour and Industry, thou' without that Thing there had never been that Produce, yet does it not any Ways belong to the Thing itself. The Reason for he who is the Owner of the Thing, is naturally the Owner of all its Produce.

V. Thirdly, Whoever has honestly got Satisfaction, not only for the Thing itself, but Produce be spent and gone, if it appear what is another's, is obliged to give Satisfaction, not only for the Thing itself, but Produce be spent and gone, if it appear

III. (i) Indeed, when the Question turns on a Thing bought or acquired with any other burthenous Title, the Possessor, bond fide, will be so far from gaining, that he will lose by it; because the Produce 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 Difficulties.

IV. (1) According to the Roman Law, the Decisions of which are grounded on Principles the same with those of our Author, a Possessor, bond fide, lawfully appropriates to himself both the Proofs 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 Puffendorf, already quoted.

V. (1) He is not obliged to it; because, as Puffendorf, bond fide, he had in mind, that the Thing is the real Proprieter, as the very End and Practice of Property require. See the Notes on Puffendorf, who on this Occasion adds the following

13 Dig. Lib. XX. Tit. V. De distractione pig- narum, &c. Leg. XII. § 1.

14 This Reason doth not fail on what immediately goes before, but on the first Part of the Period. For the Quittance is not here about a Creditor, who, for the Interest of Money lent, receives the Rent of an Estate which the Debtor polleffed, bond fide, as his own; as the learned Gronovius 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 Decission 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 Dig. Lib. XX. Tit. I. De Pignorab. & Hypothecis. Leg. XXI. § 83. 15 That is, the Creditor has given that Debtor Orders to lend it to a Third. See Dig.: Lib. XII. Tit. I. De robus creditis, &c. Leg. XXXII.
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confided 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, because to those to whom he restored their Crowns, he also restored the Revenues of them that were in Arrears.

VI. Fourthly, That he is not obliged to make good the Fruits, or Produce, which he neglected to take, because he has neither the Thing itself, nor any Thing else in its Room.

VII. Fifthly, If such a Possessor shall give to another what was given him, he is not obliged to satisfy the Owner for it, unless it appear, that if he had not given him, that must have given as much some other Way; for then the parler of his own Stock will be reckoned a Matter of Gain and Advantage to him.

VIII. Sixthly, If he bought what he has sold, he is obliged to return no more than the Overplus of what he had sold for; but if what he sells was given him, he is obliged to restore what he gets for, unless, perhaps, he has squandered away the Money, which otherwife he would not have been so lavish of.

IX. 1. Seventhly, That another Man's Goods, tho' he honestly paid for, are to be restored, nor can he demand a Reimbursement of his Charges; 2: To which Rule I think it proper to add this Exception, unless where the Proprietor could not, in all Probability, have recovered the Possession of his own, without some Expence, as, suppofe it was in the Hands of Thieves and Pyrates. 3: For in this Cafe, what

following Restitution: Unless the Possessor, bona fides, cannot indemnify himself by a Remedy against him, whom he has sold the Thing. 2: Caligula made this Restitution either out of Caprice, or vain Oellation, or for some other Reason of the kind. For after he had reinstated Antigonus, the Perfon here mentioned by the Historian, in the Possession of that Part of Syria, called Comagenis, which Tiberius had reduced into the Form of a Province, he took it away again from Antigonus. See SPANHEIM's Orbis Romanae, 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, bona fide.

VII. (x) But that which he has dispofed of, equally belonged to him, when he gave it away.

VIII. (1) He is not obliged to restore either the Overplus in the first Cafe, or the Full Price of what the Thing was sold for; in the second; for the Reason already often alleged. Besides, our Author had in his Margin quoted a Law of the Digest, which decides this Affair, if the Maker of a Thing stolen, knowing the Thief it has taken, 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 Matter of such a Thing cannot not look on the Money as his own. Lib. XLVII. Tit. II. De Furibus, Leg. XLVIII. § 7. The Deign of this Quotation is probably to show that according to the Roman Lawyers, the Money, which the Possessor, bona 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, PUFFENDORSE seems to confume our Author, in the Chapter fo often quoted, § 11. Note 3, as if he intended to imitate 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 N. 1. on the Chapter in PUFFENDORSE, so often referred to.


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, blot it off by saying, What is it to me? Did you lend me the Money? Was it done by my Orders? What had I to do to pawn my Daughter without my Consent? As for that, Chremes, the old Saying is true, You may have much Laws on your Side, and but little Equity. Where also see EURIPIDES. This Piece of Justice is approved too by the Rabbies, and by the Wisest, Lib. I. Tit. IX. Cap. IX. and Cap. XV. A. III. Prof. XXIX. Menoch. V. Prof. XXIX. Num. 26. Strach. Part. II. Num. 18. GRÖTtUS.

3: Bat 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 lower it may be received by the Lawyers and Moralphils, 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 Cus- toms 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 public Authority; Things pawned in the Hands of the Lombards; Old Closains 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 Matter, but on receiving what they cost him. This our Author himself thaws in his Introduction to the Law of Holland, written in Fleming, Lib. II. Part III. Num. 13. As doth also LARTS, N. 49. LEG. Tit. De rei vind. cap. 8. Coro Tuo Dominus; X HUBER observat, Prac. in Pander. Tit. De adquir. rerum Dominis, Num. 2. See likewise VOET in Tit. De rei vind. Num. 1.
the Owner would have gladly spent it have to it again, may very fairly be deducted. Because the actual Possession, especially when not to be recovered without Difficulty, is capable of being rated at a certain Value, and the Proprietor, when reinstated in it, is judged to be on this Account proportionably the richer. And therefore, tho' according to the ordinary Course of the Law, it signifies nothing to pretend to buy what is already our own, 4 all such Bargains being entirely void; yet does Paulus affirm, 5 that such a Purchase is binding, if it be first agreed upon, that we shall pay for the Possession of what another has of ours in his Hands. Nor do I think it at all material here, whether the Thing was bought 6 with a Deed to ref tore it to the Owner, in which Case some are of Opinion, there does an Action for Coft arife; but others deny it, since an Action for Buinesüs 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 Expenses 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 Buinesüs, not so much with a View to serve me, as for his own Profit, and has been at some Charges about it, he shall have his Action 10 against me, not for what he laid out, but for what Advantage I have made of it. Thus too, the Owners of such Goods 11 as in a Storm are thrown over-board, to lighten the Ship, come in for a Share with them whose Effects were by that Means preferred: Because he who has saved what would otherwise have been lost, seems to be so much the richer for it.

X. Eightlys, He who buys another Man's Goods, cannot return them upon the Hands of the Seller, and demand his Money back, because as soon as ever those Goods came into his Power (as we have said already) there commenced in him, an Obligation to restore them to the Owner 1.

XI. Ninthlys, This 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 Cunitn in many Places very wisely established. The Reason is, because by the Laws of Property, none but the Proprietor can claim a Right. And to the Party here concerned, the not appearing of any Owner is the same as if there really were none.

XII. Lastly, That by the Law of Nature, whatever is taken either upon a diffuse Account, 2 or for an honest Piece of Service, which, however, he was of himself obliged to do, is not to be restored, tho' such a Restitution is what some

4 Digest. Lib. XVIII. Tit. I. De contrabandis emptiss. Leg. XVI. 7 vid. Leg. XXIV. § 4.
6 It is grounded on a most evident Maxim of natural Equity; viz. That he who does another Service ought not to suffer any Damage from it. Now this would be the Case, if we refused to reimburse the Expenses which a Man has made for our Ufe, at a Time when we could not attend our own Affairs. The Good of Society, and the Interest of each Member of it, require, that if during a Person's Abfence, some Buinefs 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 Pratitches (receptum) and add that, No one would undertake this, who was not to be allowed an Action for his Expenses. Inb. Lib. III. Tit. XXVII. De obligations, quas ex contratu, § 1. So that unless he who has taken Care of the Affairs of a Person abfent, did not plainly declare he designed to charge himself with them out of pure Liberality, and place the Necesary Expenses 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, & fumptibus funerrum, &c. Leg. XIV. § 13.
9 This is laid on Occasion of a Person, who being charged by the Will of the Deceased to bury him, acquires himself of his Commiffion, notwithstanding the Prohibitions of the Heir; and thus cannot have an Action against him, as for doing Buinesüs. But even according to the Maxims of the Roman Law, He who is at the Expenses of a Funeral, is justified 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 giftis. Leg. VI. § 1.
11 Digest. Lib. XIV. Tit. II. De legi Rhaebis, &c. Leg. I.
12 (X. (I) 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:

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. The Case indeed will be otherwise, if there be any Vice in the Manner of taking it; as for Instance, if we exerted it by Threats, or by Violence: For this is another Principle of Obligation, not to our Purpose now.

XIII. Let us also add, that Medina is mistaken when he afferts, 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 Virtue of some Law or Custum, 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 Impollibility, just mentioned, such Equivalents are not to be allowed of.

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

XIII. (1) That is, if such Things fall into any one's Hands, and he has not consumed or expended them, he is not left 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.

C H A P. XI.

Of Promises.

1. WE now come in the Order of our Subject, to treat of Obligations arising from Promises; where we presently meet Francisius Connensius, an eminent Scholar, opposing us. He maintains this Opinion, that those Agreements which include no Contract are not binding, either 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.

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. 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 Obligation, than a real Intent to perform them. And lastly,
Of the Rights of

Book II.

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, 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, he would have the Party not engaged to execute what he had promised, but only to make the other Person Amend 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 infected, 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 (Connunus) taken so generally, as he expresses it, cannot be confentent. For, First, it would thence follow, that the Articles of Agreement made between Kings and People of divers Nations, so long as there was nothing performed on either Side, were of no Force, especially in those Places where there are no few 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 People (and so they are called by Aristotle and Democedes) 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 fame Thing, especially in a Cafe 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. And to this do wise Men agree; for as the Lawyers say, Nothing is more natural, than that the Will of the Proprietor, desiring to transfer his Title to another, should have its intended Effect: In like Manner it is said, 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, tho' there was no other Will of alienating one's Goods, is sufficient for transferring the Property of them on the Person in whole Favour that will have 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 Transliteration 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 depreding it this, according to the Law of Nature, which Justinian re-establishes in its whole Force, is sufficient for transferring a full Right of Property; whereas before his Time, none but what were called Res Monetae, could be thus alienated. See Chap. VIII. of this Book, § 27, Note 2.

5 The Passage shall be quoted in Chap. XVI. of this Book, Note 2.

6 That is if the Person, to whom the Promise was made, has entered on the Performance of what he engaged to do in View of our Promise.

7 The Laws are not, properly speaking, Covenants, though they are the Redit of human Establishment, grounded on Covenants. See Puffendorf, B. I. Chap. VI. § 2.

8 Oniz I. dicoeris arisignity, p. 492. Ed. Bult. The Passage is quoted at Length in the Digest. Lib. I. Tit. III. De Legibus, &c. Leg II.


10 Infomuch that the Hebrews maintain that Silence, in an Affair that will not admit of a Delay, has the Force of a direct Engagement. Bara Kama, Cap. X. § 4. Grotius.

See on that Question the Commentary of Constantine the Emperor.

11 Inflitut. Lib. II. Tit. I. De divinæs rerum, &c. § 49. Thence Words do not signify, as it may seem on first Sight, that a bare Declaration of a
Reafon alledged why it should be due, but the free Confeit of the Promife, is laid to be agreeable to natural Equity. And Paulus, the Lawyer, fays, "that he does naturally become a Debtor, who by the Law of Nations is obliged to pay, becaufe we relied upon his Credit. Where this Word Obliged implies a certain moral Neceffity, or an indispenfable Obligation. Neither may we allow what Commorns fays, that we are then reckoned to rely upon a Man's Credit, when the Thing promifed ceales to be inteire, or has something of it already performed by one Party. For Paulus, in that Place, was treating of a perfonal Action, brought for a Thing paid where it was not due, " which is entirely void, if the Payment was made upon any Agreement whatever. 16 becaufe then, even when the Money was not yet laid down, and confequently, when the Thing was as yet entire, one was oblidged by the Laws of Nature and Nations, to discharge one's Promife; the the Civil Law, to prevent the Occasions of litigious Suits, gives no particular Encouragement to demand it.

5. And M. Tally attributes so great a Power to Promifes, 17 that he calls Faithfulness the Foundation of Justice; which alfo 15 Horace calls The Sifter of Justice; and the Platoniff often term Justice, Afnoma, Truth; which Apuleius 19 has translated Fidelity, or the being as good as one's Word. And Simonides 19 makes Justice to confiff not only in returning what we have received, but alfo in speaking Truth.

6. But to make this plainer, we must carefully diftinguish 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 firft Degree, or Manner, is a bare Afffertion, 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 prefent Time we think, but not that we continue in that Thought. For the Mind of Man has not only a natural Power, 3 but alfo a Right to alter a Design; and if there be any Fault in the Change, as it often happens, that is not effential to the Change, but proceeds from the Subject of it, because perhaps the firft Opinion was the better.

III. The second Manner, when the Will-determines itself for the Time to come, is by giving some positive Token, that sufficiently declares the Neceffity of its Perfeverance. And this may be called an imperfect Promife, 1 which fetting afide the

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14 Digg. Lib. L. Tr. XVII. De diversis regulis juris, Leg. LXXXIV. § 1. De formalin indign. See Digg. Lib. XII. Tit. VI.

16 Thus, for Example, a Creditor could not demand the Intereft 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 the Intereft thus promifed, he had no Action at Law for recovering it, as no due, provided he gave the Money on the Foot of Intereft; for otherwise, the Sum received by the Creditor was reckoned into the Principal. Digg. Lib. XLVI. Tit. III. De solutinis et liberationibus. Leg. V. § 2.

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


II. (1) On this Difference see Putendorf, B. III. Chap. V. § 5, 6. The late Mr. Hertstus obferves, that our Author borrowed it of Dominie de Soto, Lib. VII. De judicibus et jure, Ques. II. Art. I.

2 That is, when we have not laid ourselves under a Neceffity of not changing our Mind, and there is nothing without us, that impofes that Neceffity on us. See Putendorf, B. I. Chap. VI. § 6.

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II. A bare af¬fertion does not lay one under an Obligation.

III. That an im¬perfect Promife does naturally oblige, but no Right arises from thence to the Perfon who receives it.
Civil Law, obliges either absolutely or conditionally; but yet gives no Right, properly so called, to him to whom it is made. For it happens in many Cases, that we may lay ourselves under an Obligation, and at the same Time give no Right to any other over us, 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 Promis 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. 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 Promis. And this is a compleat Promis, as having the fame 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 God himself, who cannot be obliged by any Law imposed by another, would act contrary to his own Nature, not to perform what he promised, Neb. ix. 8. Heb. vi. 18. and x. 23. 1 Cor. i. 9. and x. 13. 1 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. 3 Add to this Solomon's Judgment in the Affair, Prov. vi. 1. 2. My Son, if thou hast been Surety for thy Friend, thou hast tied up thy Hands to a Stranger, thou art enrolled by the Words of thy Mouth, thou art taken by the Words of thine own Mouth. And from hence it is, that a Promis is called by the Hebrews יָבֵן, a Bond, or a Chain, and is compared to a Vow, Num. xxx. 4. 5. 6. And so is the Original of the Word συμβόλον, observed by Ennius, upon the second of the Illiad, ἄλητος γὰς τὸν ἀργόν καὶ καθαύνη τὸν κατφθότας η ἡν ἐπορίσαλος ἄφετος. He who receives the Promis, seize upon, and binds the Promis: Which is very well expressed by Ovid in his second Book of Metamorphoses, where the Promis fays to the Promised, Vox mea facta tua est, My Word is become yours. 4.

2. These Things being premised and understood, we may easily answer Comma- rius's Arguments. For what the Lawyers say of a bare Promis, has Respect only to what was introduced by the Roman Laws, which made a Stipulation in

—Temerarius, disert:

Vox mea facta tua est.

Metamorph. Lib. II. ver. 59, 51.

Which signifies, The very Respect you have made flows 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,

—Temerarius, disert:

Vox mea facta tua est —

6 It is very judiciously observed by PAULUS, Sum. Lib. XI. Tit. XIV. If there be only a bare Promis to pay Interest, it signifies nothing, among the Roman Citizens, a bare Promis bears in Action.

Grotius.

A German Lawyer, in an Abbidgment of our Author, has maintained, that the Reason why the Roman Lawyers say, a bare Promis doth not bear an Action at Law, is because there was no such Thing as a bare Promis; all Promises having a Relation to some Contract, or to some Agreement authorized by the Laws. KUPT, Coll. Grat. Exercit. VI. Cap. ii. 6. in Not. Chrest. in his Notes, approves of this Thought; but it has been confuted by a Lawyer of the fame Nation. See the Paramenis Juris Germanici, by the late Mr. HERTS, Lib. I. Cap. VIII. § 2, 3. To which add what Mr. BYNGERSHORST lays in his Differency,
Chap. XI

War and Peace.

7 In Form, an undoubted Sign of a deliberate Mind. Nor do we deny but that such Laws are in Force among other Nations. What Law does oblige us to perform a bare Promise? says Seneca, speaking of a human Law, and a Promise under no seclusion Form.

3: But

Diflertation, De Patris juri et usu contradistinus in continuis adjutis, Cap. I.

7 See Mr. Nooy's Treatise De Patris & Tranfibitiniis, Cap. X. In order to enter better into our Author's Nooseas, it will be proper here to fet down a few things delivered in his 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 void; such a Force of obliging, as that the Perfon 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 justice in them is acknowledged 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 Permittal, but a Right to perform a Point, 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 Legislators do not act at all, when they do 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 authorizes a Man to keep a Thing honestly acquired by Precipitation. The Question is, which of the two takes Place in Promises, and Agreements made without a Stipulation in Form: Whether the Civil Law only hides a Man from suing for what is due by Virtue of such Engagements, or whether it more in 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 Perfon to break his Word in the Case under Consideration, they yet do nothing contrary to the Law of Nature. For in Crime a real Right to break through them? and is, 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 Permittion to contract the Debt: In Order to enter upon the Principles, the Person must not be in a Liberty to engage himself: To make an Alienation valid, a Man must have the full and whole Property of the Goods to dispose of. Now the Civil Laws, without clashing with the Law of Nature, and even in a Manner approved of, and advised by the Ancients, but not enough, on each Man's natural Power of entering into an Obligation, either to the Advantage of the Promiser, or for the public Good. Thus a Vow made by a Daughter, without her Father's Consent, was by Gadmiral voided. Numbr. xxx. 5. And Natural Equity requires that some Sort of Restraint should be laid on the Force of a Contract given by Promises of weak

Judgment and easily surprised; as is declared in the Roman Law, in Relation to the Guardian-ship of Minors. Digl. Lib. IV. Tit. IV. De Minoriis, &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 dispence 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 is 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 preferable certain Forms for obligatory Promises, to hinder too hasty Engagements, and in some Measure caution Men to think well of what they do. The Perkin in the Manner in Relation to Wills, in Order to prevent Surprises, to which some Perons are exposed from the Practice of the crafty and artful, &c. Part II. Epit. XII.

Thus our Author. I grant that the Civil Laws may take away the Right of suing for the Performance of a Promise, which is valid by the Law of Nature, and thus annul the Obligation, as much as in them lies. But, in my Opinion, this doth not hinder such a Promise from being valid in itself, when the Promiser, being well assured it would not stand good in Law, did not decline making it; for he thereby renounced the Benefit of the Law. The Case is not the same in Regard to Wills. The lawful Heir has made no Renunciation; and besides, the Design of the Law, in requiring certain Formalities as essential for rendering a Will valid, is at least as much to refrain the Liberty of disposing of one's Goods by Will, as to prevent Frauds and Surprises. 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 as prescribed by the Laws; and consequently that the lawful Heir has 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 renounce the Benefit they afford him. Common Sense, which has gind in my Discourse, On the Benefit of the Laws, p. 21. &c. Edit. Amyl.

8 Thas is, not ratified as the Law directs in such Cases. So in his nineteenth Epistle he makes this Distinction, Jam non promittuntur de is felipendit. They mean de isti promittent tis expeditis. A Stipulation and an Engagement is called by Paulius, A Salomonia of World, Lib. V. Sent. and by Cajus Tit. De Obligabantibus quin ex confectioni sunt. Gro- tyus.

I doubt whether Seneca speaks of any but the Roman Laws in the Paffage here quoted. It is to be observed that for a long Time, every Promise made with Stipulation, though in Jelt, was valid in Law,
3. But there may be naturally other Signs of a deliberate Mind, besides this Sti-
pulation, 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 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,
who 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 Agree-
ments are to be underflood; but now let us see what Conditions are required to
make a Promiss perfect.

V. 1. First, it is required that the Promizer should have the Use of his Rea-
son; therefore the Promizes of Madmen, Idots, and Infants are void. But the
Cafe of Minors is not the same; for 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. 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 gene-
l Custom of every Nation. Among the Hebrews, a Lad after thirteen Years
of Age might oblige himself by any solemn Promiss, and a Young Woman after
twelve. In other Places the Civil Law, for very good Reasons, declares many
Promizes 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.
And some they qualified by the Benefit of a Refinition; but these are the peculiar
Effects of the Civil Law, and therefore have nothing common to the Law of Na-
ture and Nations, unlefs it be that where they are received, there it is natural that
they should be observed. 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 Cafe, if the Bargain was made either upon the Seas,
or in a defect Island, or by Letters between Perfons at a Distance. For such Con-
tracts are to be regulated only by the Law of Nature; as also such Agreements as
pass between Sovereigns, considered as such. For what they do in a private Capa-
city may by the Laws be made void, when it is in their Favour, but not when
they will be Sufficers by it.

VI. Whether a Promiss given, abd Misfate done naturally oblige us, and how far it does
so.

Law, and produced its full Effect in the same Manner, as if it had been made seriously. See Mr.
Noddv, Jol. 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 Content,
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 casting 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 lose Words.
DiggoD. Laint. Liv. V. § 39. But our Author
here had his Eye on Stobusus, Seam. XXIV.
Where there is an Extract taken probably from
Theophrastus, Treatise of Laws, as appears
from the Title, under which Stobusus has placed
that Extract.

V. 1. See PUFFENDORF, B. III. Chap. VI.
§ 3. &c.
2 Tho’ a Person is not endowed with all possible
Prudence, and Judgment; if he has Understand-
ing enough to know what he does, and to de-
termine 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
Perfon, to whom the Promiss is made.

3 See S I L D E N, De Securifobus in BonA de-
fandtane, Cap. IX.

4 See PUFFENDORF, 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,
for that, according to the Law of Nature and its
Confidence, he is always excused standing to his
Promiss. See Note 5, on PUFFENDORF, as last
quoted.


3, VI. (1) See PUFFENDORF, B. III. Chap. VI.
§ 6, &c.
deal
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 Perfon injured, either to repeal or reform them. But most of these Distinctions come from the Roman Laws, as well from the old Civil Law, as from the Prætorian, and some of them are not perfectly true, or well digested.

2. But in Order to find out the natural Truth, it will be proper to apply here a Maxim concerning the Force and Efficacy of Laws, which has been ever allowed by the general Consent of all People, viz. that if 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, the whole Foundation of the Law falls 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, that in Cafe a Promife be made upon the Presumption of a Fact, that is not really so as the Promiwer believed, that Promife is naturally of no Force; because the Promiwer did not give his Consent to the Thing absolutely, but upon such and such Conditions, as are not verified by the Example. To which we may refer that Question in Cicero, De Oratore. 1. of him who falsely believing his own Son to be dead, had made another his Heir.

3. But if the Promiwer were negligent, in searching out the Truth of it, or in expressing his own Sence, and thereby caused any Damage to the other; the Promiwer shall be obliged to repair it, not by Vertue of the Promiwe, but on the Account of the Damage occaoned through his Fault, of which we shall treat more by and by. But if there were a Mistake in the Promiwer, and yet that Mistake was not the Occasion of the Promiwe, the Act shall be valid, because there was nothing wanting of the true Consent; but in this Cafe also, if the Perfon to whom the Promiwe was given, did by any Fraud of his Occasion that Mistake, he shall be obliged to repair any Damage that shall arise to the Promiwer from that Mistake, from that other Principle of Obligation. But if the Promiwer was but in Part caused by a Mistake, the Promiwer shall as to the Rest stand good.

VII. 1. There is no less perplexing a Question about a Promiwe made through Fear, for here too People generally distinguish between Fear, that is extremely great, either absolutely, or with Regard to the Perfon apprehensive, and that which is light and inconsiderable; whether occasioned justly or unjustly; whether by the Perfon who receives the Promiwe, 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, which, as on a Thing, which could not fail; it is his Fault and not ours; as well as when a Man has not expresed himself with sufficient Clearness. For it was his Business to call for an Explanation of what he said 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 is it the Business sometimes of one of the Parties, and sometimes of the other to speak with the utmost Exactness, or examine every Thing.


4. Seneca, De Benef., IV. Cap. XXXVI. He is a Man that founds on a Mistake. Grotius.


6. We must distinguish here between Promises of pure Generosity, and Agreements, where a Promiwe 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 Promiwer is responsible only for his Sincerity. As nothing but his own Will engages him to promise; so nothing obliges him to examine all Things with the utmost Exactness. Acts of Kindness would certainly be too burdensome, were Men obliged to pay, as it were, Fine, whenever designing to do another a Favour, and thinking himself able to do it, he is disappointed of his Hopes. If therefore the Perfon, to whom the Promiwe 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 expresed himself with sufficient Clearness. For it was his Business to call for an Explanation of what he said 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 is it the Business sometimes of one of the Parties, and sometimes of the other to speak with the utmost Exactness, or examine every Thing.


VII. (1) See Puffendorf, B. III. Chap. VI. § 9. &c.
Of the Rights of

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2. For my Part I wholly agree with them who hold that, setting aside the Civil Law, which sometimes quite takes away, and sometimes lefrens the obligatory Power, he who through Fear has promised any Thing, is obliged to perform it, because his Confcnt here was absolute, and not conditional, as in the Cafe of an Error. For, as Ariftotle has well observed, 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 loft; but upon Confideration 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 Perfon to whom the Promise was made, did caufe not a just but an unjust Fear, and this a very small one too, yet if the Promise was, upon this Motive, made, he is obliged to discharge the Promise, if he deifie it; not that the Promise is in itself void, but on Account of the Damage unjustly caufed by cxerting the Confcnt. But what Exceptions the Law of Nations allows in this Cafe, shall be explained below, in its proper Place.

3. But that some Acts are made void on the Account of Fear, which Fear was occasioned not by him with whom we were dealing, but by another, is an Effect of the Civil Law, which often nulls Acts, tho' freely done, if the Doer be of weak Judgment, or leaves it to his Choice, either to fland to or go from his Word. And here what we have faid before, concerning the Force and Efficacy of the Civil Law, we would have again remembered. But what Force Oaths add to the Confirmation of Promifes, fhall be fhewed hereafter.

VIII. 1. To

2. The Civil Laws, precisely fpeaking, never hinder a Man from obflying himself validly in Conti- nence, and according to the Law of Nature, when he had a ferious Intention of fo doing, and there are none of thefe Defects which naturally make the Obligation void. The vacating of the Contract, and the Reftitution, which they grant, is but a Favour, which may be renounced; and a Man is fuppofed to renounce it, whenever, being unacquainted with the Law, he made a fercious Bargain concerning the Things for which that Favour is granted. So that, supposing Promifes and Agreements made under the influence of Fear really forced by the Law of Nature, the Civil Law, which declares fuch Engagements null and void, and relieve thofe who have contracted them, do not remove the Obliga- tion in Confinience of standing to them.


4. But, if the Promifer has really given his Confcnt, what fignifies enquiring, whether the Fear be just or unjust? No Wrong is done to the Perfon who confents. Besides, this ulcner Circuit of our Author fhews how far his Ideas are from being just. See what is faid on Pufendorf, as quoted in Note 1.

5. In this Book, Chap. XVIII. Sect. XVIII. XIX. and B. III. Chap. XIX. Sect. II. Groétius.

6. Seneca following Nature, Contrat, Lib. IV. Contr. XXVI. delivers himfelf thus. What is tranf- acted through Conviction and Nefcifity may be re- pealed, if this Conviction and Nefcifity was occa- fioned by the Party concerned in the Bargain; For it is nothing to me, lays he, how you are imprefled, if I don't imprefl upon you, if I am my Faus, if I am to pajf for it. Compare with this what you have lower, B. III. Chap. XIX. Sect. IV. Groétius.

7. Our Author would have his Readers remember and apply in this Place, what he has faid in the foregoing Paragraph, Num. 2. So that his Opinion is, that in order lawfully to require the Perfon to whom we have made a Promife, fliould relafe us from the Promife, which was valid, he forced; or to excuse our felves from flanding to fuch a Promife, as being really null, by Virtue of the Civil Laws, which deprive it of the Force it would otherwife have had; the Fear must be real, and not a bare Panic Fear. So that the Promifer, by the Influence of Fear, is determined to enter into an Engagement, which he would not have con-
War and Peace

Chap. X.

VIII. 1. To make a Promise firm, it is requisite, that the 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. Agrippinus being once challenged upon his Promise, answered, Nat. dixit, ei d' ei², dicavit ei, j mi, ut se mu, omeléxron d' as, 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, because the Promiser must then be supposed to be upon this Condition, that it ever be in his Power. But if that very Condition, by which the Thing is to come into the Promiser's Power, be in his Power too, then the Promiser shall be obliged to do whatever is morally possible for procuring the Accomplishment.

3. But the Civil Law, for Reasons of publick Advantage, nulls many Promises of this Kind also, which the Law of Nature would oblige us to; as that of a Man or Woman already married, who promise some future Match, and several other Promises made by Minors, and Children while under their Parents.

IX. Here it is usual to enquire, whether a Promise made upon a Motive that is naturally dishonest and criminal, 1 can be valid by the Law of Nature; as if a Man should promise any Thing to him that should kill another: That this is a criminal Promise, is plain enough from this, in that it was made designly 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 profile and extravagant Deed of Gift. Here is the Difference, as soon as ever the Gift is made, the

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 found in the Journal of the Scots. One in the Month of August, 1712. Edit. Paris. (October, Ed. 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 De Veri 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.


3 That is, when a Person, who has a full Right to dispose of his Goods, is injustically liberal, and gives without Reason, Choice or Rule. The Author explains himself in his Treatise, De Imperii Summarum Politicis circa Sacra, Cap. V. § 11. A private Man, says he, who has the full Disposal of his own Goods, has with a right Liberty given his Estate to others. This is a vicious Action; but the Action is valid. Ziegler and Tadmor, two Commentators, have ventured to advance, one by Way of Doubt, and the other in the Form of an Affirmation, that there is no moral Evil in such a Donation. It is diverting to see them infinuating in these donations, and what the Young Man in the Gospel ought to have done, whom our Lord com-

manded
the evil ceases, for a Man does not do ill in leaving to the Donate 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 Juedab, Jacob's Son, who performed his Promise to Themanar, whom he reputed an Harlot, sending her the promised Reward as her Due. But now if the Promise be occasioned by the Injustice of the Perion 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, of which we shall treat very quickly.

X. But when a Promise is made on the Account of something already due, it is not therefore the less obligatory, if we respect natural Right alone, according to what we said above, concerning our accepting what is another's. Because a Promise is a natural Debt, even when made without any Cause. But here also any Damage that arises by Extortion, or any Inequality in the Agreement shall be repaired, according to the Rules which shall be laid down a little lower.

XI. As to what concerns the Manner of promising, it requires, as I said before, concerning the transferring of Property, an external Act, that is some sufficient Sign to testify the Content of the Will, which may sometimes be done by a Nod, but generally by Word of Mouth or Writing.

XII. But we may also be obliged by what another Man does, if it appears that we have deputed and empowered him to act for us, either as our Proxy in that particular Affair, or by Vertue of some general Qualification; it may also happen, where the Commision is to act in general, that the Perion 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, in Relation to those Things which Ambassadors promise for their Principals, who by Vertue of their publik Powers and Credentials, do sometimes exceed their secret Orders.

manded to fell all he had, and give the Money to the Poor. It might easily be made appear that pietas Dominarum, with how good an Intention forever made, may be and often have been faulty in several Respect.

4. By the Law of Nature, I mean, which was the Rule that Men then lived by. C. Aquilus was of another Opinion from the Civil Law, as it is testified by Valerius Maximius, Lib. VIII. Cap. XI. Num. 2. Grotius.

The Fact mentioned by Valerius Maximus was this. A Roman, named C. Fijianus Farrus, being dangerously ill, gave his Mitrefi a Bond for a considerable Sum; that after his Death the might oblige his Heirs to pay her that Money, which he would not give her openly by Way of Legacy. He recovered, and the interelited Mitrefi undertook to sue him for that Sum promised in the Bond. Aquilus being Judge in this Case, with the Concurrence of some of the most considerable Men of the City, who were his Affiliates, diminished 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 Courtesan. But he contented himself with pronouncing on the Civil Part of the Cause, and rejecting an unreasonable Demand, and left the Punishment of the Defendant to the Criminal Judges. It is said before that as the Demand was shameful, so the Obligation was void. As to the Example of Themanar, see Pufendorf, lib. ii. p. 58.


X. (1) See the Chapter in Pufendorf, which I have quoted several Times, § 9.

XI. (1) Here also confide Pufendorf, B. III. Chap. VI. § 16.

XII. (1) This Subject is treated by Pufendorf, B. III. Chap. IX.


3 Servius, upon that Passage of the ninth Aeneid,

— Hostpita cum jungeret Alfen.

And absent joined in besetted Ties. DRYD.

fays, this was done by People sent by each Party for that Purpofe. Grotius.

4 See an Influence of this in MARIANI, XXVII.


XIII. Hence
Chap. XI.

W R A P AND P E A C E.

XIII. Hence we may understand, that an Action brought against the Owner of a Ship, on Account of the Master, and against a Merchant, on Account of his Factors, which indeed are not so much Actions, as Qualities of Actions, are founded upon the very Law of Nature; and here I too cannot but observe, that it is very ill done of the Roman Laws, to make every Man to whom the Ship belongs become wholly responsible for whatever the Master does. For this is neither agreeable to natural Equity, which is satisfied, if every one be bound for what concerns himself, nor is it advantageous to the State, for Men would be discouraged from sending Ships to Sea, if they were afraid of being, as it were, infinitely accountable for what the Master of the Vessel did. Infomuch that in Holland, where Merchandize has of a long Time mightily flourish'd, 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 further, 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, the Acceptance of the Perfons to whom it is made is no less required, than in the Cafe of transferring a Property; yet so, that here also a precedent Requett shall be judged to subsist, and to have the Force of an Acceptance. Neither does that which the Civil Law has introduced, concerning imperfect Promises, 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 Promi'e is compleat before it be accepted; but only forbids to revoke it, 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

XIII. (1) The former is called in the Original Actus exercitoria: The latter Actus infirmitia. See Digitt Lib. XIV. Tit. I. and III.

3 That is, 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 Perfon 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 Matter. Infirmitia. Lib. IV. Tit. VI. Quid cum eo contratim, &c. § 8. See HERBERT GEMMAI, and THEODOR MARCELLY on this Paragraph.

3 Digitt Lib. XIV. Tit. I. De exercitoriis Actus, Leg. I. § 35. and Leg. II.

4 If we consider the Partner one with Regard to the other, the 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 fidei one for the other. The Matter, with whom the Contract is made, represents all the Partners in general: He is no 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 paid 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, besides the Danger of some of them proving insolvent, it would be very troublesome to have as many Lawsuits as there are Perfons, who sometimes live in different Places. So that this Inconvenience counterbalances the other. And where would be the Advantage of not discouraging such as send Ships to Sea, if those, with whom the Matter 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 Cafe 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 venires to an absent Slave, that he may have his Liberty, deth 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. XII. Tit. II. De adquirienda vel ammittenda Pfaffije, Leg. XXXVIII.

2 TURTURUS, speaking like a Man who was perfectly acquainted with the Laws, fays, in his Book De Jusjumi, A View, when GOD has accepted it, is for the future as obliging 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 fays on Occasion of a promised Portion: Ch. Her Portion, Pamphilius, 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 debt not seen given. On the Andria, Aet. V. Scene. 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. Digitt. Lib. I. Tit. XII. De Publiciat. Leg. III. See what has been said, Note 1. on § 3. PUFENDORF, in the Place by me quoted, gives a different Answs 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 which they might have naturally.

5 See such another Law of the Worfenths, Lib. IV. Tit. II. Cap. VI. GROTIUS.

4 E
Law of Nations has introduced in Favour of Infants and Madmen: For in such as these the Law supposes the Intention, both of pooffessing Things which are required by Possession, and of accepting what is promised or given.

XV. Whether this Acceptance should be signified to the Perfon, promising, explained by a Definition.

XVI. Whether a Promife may be revoked, the Perfon thereof was given dying before he had accepted of it.

XV. (1) This is likewise Pufendorf's Opinion, B. III. Chap. VI. § 15. In which our two Authors follow the Decision of a celebrated Scholar, LESEUS, De Jurisct & Jus, Lib. II. Cap.XVIII. Dub. VI. whose Words Mr. VANDER MUILEN here quotes, and at the fame Time approves of the Thought. I am of Opinion, however, that the Question ought to be decided in a quite contrary Manner.

The Parties are more easily induced to promife, when it is done for their own Intereft, and in View of some other Thing they demand in their Turn; they are and commonly may be fuppofed to will the Effect of fuch a Promife, from which fome Advantage will accrue to us or ours, more invariably than that of gratuitous Promifes. The late Mr. HUBER, De Juris Civis. Lib. II. Sect.V. Cap. III. § 9, maintains, but without offering any Reason for it, that, unless the Promife has expreffly declared he meant the Promife should not have its full Force, till he knew it was accepted; it is never neceffaryhe should know it, and the Acceptance is fufficient, whether the Question turns on gratuitous Promifes, or on Agreements, in which both Parties are interefteft.

Mr. THOMASUS, on the contrary, in his Notes on that Author, p. 714, maintains that the Knowledge of the Acceptance is always neceffary, because as the Promife remains fupposed, till the Perfon, to whom it is made, becomes acquainted with it, the fame ought to be laid of the Acceptance. Suppoft, says he, that the Perfon, to whom the Promife is made, is prefent, and that he accepts of the Thing either only within himfelf, or by whispering to a third Perfon; fuch a Promife will not be binding. But the Confluence doth not hold good from the Neceffity of knowing that Acceptance. The Acceptance is absolutely neceffary, for forming an Unity of the two Wills, from which the full and entire Obligation refults. But the Moment the two Wills are thus united, 'tis that which is determined has as yet no Knowledge of the Determination of the other; nothing entitical 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 Promife in this Cafe remains fupposed till the Acceptance, it is by a neceffary Consequence of the Perfon's Abence, and not becaufe the Promifer defigned to referve to himfelf a fufficient Time for rethinking. He may indeed retract, because fomething may happen, that obliges him to change his Mind. But, in Or- der to prove the Knowledge of the Acceptance is always neceffary for having him under a Neceffity of perifling in his Will, we must always have Reafon to believe that, if the Perfon to whom the Promife is made had been prefent, he would not have promifed fo as to engage himfelf on the Spot, supposing the Thing had been also accepted immedi- ately. Whereas, the Preliminary condition of the other Side, at least in fuch Agreements, where both Parties have an Intereft. If it was always neceffary that a formal Acceptance of a Promife should be known, it would follow, contrary to what Mr. THOMASUS himself acknowledges (Jurisf. civ. Lib. II. Cap. VII. § 14.) after our Author, that even when the Promife was made purfuant to the Requeft of him to whom it is made, it would be invalid, except the Perfioner was apprized of the good Will of the Promifer. The anticipated Acceptance of the Perfioner has, in my Opinion, no more Force than the Offers of the Perfon who of his own Accord promifes absolutely, and on no other Condition than that of Acceptance. He, who made the Requeft, 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 Inference, alluded by Mr. THOMASUS, I own it seems to me but little to the Purpofe. In the Circumstances there suppoft, an Act of the Will, which either is not exprifed by any exterior Sign, or mannifefled only by a Declaration unknown to the Promifer, can by no Means be confidered as a real Acceptance. When a Man being prefent doth not clearly difplay his Disposition of accepting the Proffer to the Perfon who makes it, he feems to defire it, as he is to be fuppoft unwilling to come to a Re fu- lution of accepting it; whatever Declaration he may make of his Intentions to any but the Promifer. Generally speaking, all those who knowing of a Promife, and having it in their Power to notify their Acceptance to the Promifer, do not do it, thereby leave him full Liberty of rethinking. But the Cafe is different in Refpect to the Abient, espec- ially if the Diftance of Place is confiderable. The Abience lefself makes it impoffible for them to ac- cept of the Promife as soon as it is made. From all which I conclude, that if we judge of the Mat- ter by the Law of Nature alone, and independently of particular Proofs of a contrary Intention in the Promifer, every absolute Promife is complete on his Part, the Moment he is ferially determined to make it, and notify it in any Munter to the Perfon, in whose Favour it is made; so, that, unless he re- moves it in Time, that is, not only before it is ac- cepted, but even before the Perfon to whom it is made is apprized of the Revocation; the Acceptance makes the Promife irrevoatable; provided the Perfon to whom it was made, accepted it immedi- ately, and without Delay; for if he has taken Time to deliberate, he has thereby given the Promifer Time to retract.
tion of Ficklenes too, if it were really so intended, when first made, that it should not begin to be of Force till the Time of its being accepted. It may be also revoked, if the Perfon to whom the Promife was given die before Acceptance; because it seems to be referred to his own Choice, and not to that of his Heirs. For it is one Thing to be willing to give away a Right to such a Man, and by him to be transferred to his Heirs, and 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 Nè-

ratius answered, 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 Promife also may be revoked upon the Death of the Perfon, who was employed to signify the Intention of the Promiser, because the Obligation lay in his Words. But it is otherwise, if the Perfon sent upon this Errand were a common Meflenger 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 Confent, may be carried by any Body else. We must also distinguish between him who is reputed to signify the Promife we make, and one who is authorized by us to make that Promife himself. In the former Case a Revocation shall be of full Force, tho' it be not known to him who carries the Promife. But in the other the Revocation will be invalid; because the Right of promising depended on the Will of the Perfon commissioned; and consequently, if he know nothing of the Revocation, he commits no Fault in promising. So also in the former Case, though the Donor die, the Donation may be accepted, as being on one part completed, though subject to a Revocation, as does more plainly appear in the Affair of Legacies; in the other Case it cannot, 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 Perfon, who gave such Orders, that his Orders should have been executed, unless some great Change, such as the Death of the Perfon so ordering, should happen to interveinc. But however, there may be some Conjectures which may

XVI. (1) In Reality, a Man may promise irre-vocably, even before the Acceptance. But in Or-

duced to this he must clearly declare that from that Moment he confers a full Right on the Perfon in whose Favour he obliges himself, and refers to himself no Liberty of retracting; provided always that, if he doth not accept of the Promife, when duly notified to him, the Promiser re-enters on his whole Right. Confer this Paragraph and those which follow with what Puffendorf says, A. III. Chap. IX. § 3. &c.

2. And therefore, to avoid all Disputes, it was usually said, To him and his Heirs. Servus upon the ninth Amell, ver. 302. See too the Dig. 49 Leg. V. Tit. II. Cap. VI. Gratius.

3 Digest. Lib. L. Tit. XVII. De diversis Regul. Juris, Leg. XLIII. on which see James Godfrey's Comment.

XVII. (1) It must here be supposed that the Perfon, to whom the Promife was made, was himself acquainted with the Revocation, by some other Means, before he accepted of it. Otherwife, if the Revocation comes too late, the Promifer 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 Perfon who entrusted him with it.

3 See the Book De Tsouris Anglice, Cap. VII. Gratius.

For, though a Tettator may revoke the Le-

gecy, yet till he has actually so done, all is done that was necessary on his Side; and if he dies, no-

thing more is requisite for giving a Right to the Legatee, who accepts of it.

5 It must here be supposed that the Perfon commissioned to make the Donation, was acquainted with the Donor's Death; for if he knows nothing of it, and the Donor accepts of it, though the Donor was not alive at the Time of Acceptance, it is not by the same as if he was not yet dead. He had involved his Agent with full Power, and thus distinguished himself, as much as in his 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 inform that Clause in the Commission, unless that be done, the Donor, 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 Perfon, 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 to give him the Act stands good in Favour of the said Slave, because it doth not appear his Master charged his Mind. Digest. Lib. XL. Tit. II. De manumiff. videlic. Leg. IV. This Regulation was made in Favour of Liberty; as many others, in which
may incline us to believe otherwise, and these we ought without any Difficulty to admit, to the End that what was ordered to be given upon any religious Account may stand good. And thus may the Qeuestion, which was formerly much canvased, be answered, whether an Action upon that Order lies against the Heir. About which particular Case the Author of Lib. 11 to Herennius relates, that Dru- fas, the Praetor, decreed one Thing, and Sextus Julius another.

XVIII. 1. Disputes also frequently arise concerning the accepting of a Thing for another. In which Case we must distinguish between a Promis made to me of something to be given to another, and a Promis made directly to him to whom the Thing is to be given. If the Promis be made to myself, without considering whether I have any Interest in it, a Confideration that the Roman Law 1 has introduced, I took upon it, that by the Law of Nature I acquire a Right of accepting, that thereby the Right of demanding the Performance of the Promis may pass to another, if he also will accept of it; so that the Promis has no Right in the mean Time to revoke it; but I, who received the Promis, may, if I please, remit it. For this Senfe is not against the Law of Nature, and also very agreeable to the Words of such a Promis; nor is it a Matter of Indifference, whether another obtains a Favour by my Means or not.

2. But if the Promis be made directly to the Person to whom the Thing is to be given; we must then distinguish whether the Accepter has a particular Complication to accept it, or one so general, as may be judged sufficient to include it; or whether he has no such Complication at all.

3. Where such a Complication has been given before, there is no Occasion to enquire, whether the Person be a Freeman or no, which the 4 Roman Laws intit upon, but the Promis is complete and in full Force by that Acceptance. Because a Conten may be conveyed, and signified by any third Person, whose Will is reputed mine, if empowered by me, and be readily taken it upon him. But if there be no such Complication, and yet this third Person, to whom the Promis is not made, accepts the Promis with the Conten of the Promiser; then has the Promiser no Power to revoke the Promis, till he whom it

which for the same Reason the Ripour of the Law was relaxed. See COJNAS; the said Law, Recit. in Sulf. 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 Praetor, gave it in the Affirmative; And S. Julius in the Negative, Lib. II. Cap. XIII. Where the Enquiry turned on a Complication executed after the Deces of the Person who gave it. See what I have said on Pu- FENDORS, B. III. Chap. IX. § 4. Note 3.

XVIII. 1. Confirm the Chapter of PUFFEN- DORS last quoted, § 5.

2. See Institut. Lib. III. Tit. XX. De insit. filip. § 15.

3. Our Author, without doubt, supposes the Or- der given to the Person who promises. So that this was an unnecessary Addition made by the late Mr. HUBER. (De jure Civit. Lib. II. Secq. VI. Cap. III. Num. 18.) as if our Author never thought of it.

4. No Man can filipulate for another, except a Slave for his Masters, and a Son for his Father. Digest. Lib. XLIV. Tit. I. De verborum obliga- tionibus, Leg. XXXVIII. § 17. Whatever Stipula- tion is made by a Person under another's Power, it acquiesces the Act of the latter, as truly as if made by himself. Ibid. Leg. XLIV. But a Father, on the other Hand, could not stipulate for his Son, nor a Master for his Slave. See Mr. Norwood's excellent Treatise, De Palsi & Tranfajtationibus, Cap. XXIV.

5. The Author here puts a Cale, somewhat difficult to conceive, viz. Of an Acceptance, which how- ever gives the Person accepting no Right. Such an Ac- ceptance having no Effect in Relation to the Force of the Promis, 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, unlefs in a very improper Sense. The pretended Accepter is in Reality no more than a bare Wifem of the good Dispositions which the other then in Favour of the third Person. Our Author seems to confider him as a Sort of Security for the Con- tinuance and Execution of these good Dispositions. But neither is this Notion more juit. The Character and the Nature of a Security supposes an actual Obligation, which gives a third Person some true and perfect Right: But in the Cale before us the Person to whom another designs to oblige himself to do what has been mentioned, has acquired no Right. From which I conclude, it is only one of those half Promises, spoken of by our Author, § 111. to which he gives the Name of Pollicitation. The whole Difference is, that he there talks of a Declaration made to the very Person, in whose Favo- ur another obliges himself to perfist 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 later, 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 Promis into a perfect one, the Per- son left mentioned from that Moment acquires a full Right over the Thing promised: No other Accept- ance is necesssry till that already made by the Person be renounced. Whereas, in the other Case, the third Person having had no Complication for accept- ing, and the Promis not regarding him; it can have
it concerns shall either approve or reject it; yet so, that in the mean Time, he who has accepted of the Promis has no Power to remit it, because he was not employed to take any Right upon himself, but only to engage the Promiser's Honour, in the Performance of the intended Favour; so that if the Promiser should pretend to revoke it, he may be said to break his Word, but not invade any Man's Right.

XIX. Prom what has been said we may easily understand, what we are to judge of any burthenome Condition annexed to a Promis. For that may be done as long as the Promis is not completed by Acceptance, nor the Promiser's Word and Honour given, that it shall be irrevocable. But a burthenome Condition annexed to a Promis, for the Advantage of a third Perfon, may be revoked, as long as it is not yet accepted by that third Perfon; tho' there are some, who in this, as well as in other Questions, are of another Opinion. But to one that thoroughly considers the Matter, the natural Equity will so clearly appear, that there will be no Occasion for many Proofs.

XX. It is also sometime disputed, how a Promis, occasioned by an Error or Miftake in the Promiser, may become valid; if the Truth of the Matter being known, the Promiser be willing to fland to his Promis. The same Question may also be put concerning Promises, which are obstructed and disapproved of by the Civil Law, as being occasioned by Fear, or any other Cause or Motive, when that Cause or Motive shall afterwards cease. For to confirm thefe, 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 differing this, becaufe they cannot allow that any antecedent outward Act should be a fufficient Sign of an internal Act coming after it, require a new Promis, notified by Word of Mouth, and a new Acceptance. But the middle Opinion is nearest the Truth, which requires some outward Act, but not a verbal one, since the retaining of the Thing promised by the Perfon to whom it was promised, and the relinquishing of it by the Promiser, or some other fuch Circumftance, is enough to testify a real Contenf.

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

XXII. Nor is any Man by his Promiser that he makes for what 2 another is to do, obliged to pay Damages and Interest, provided he omits nothing that on his Part he can poefibly do, in Order to get that other Man to perform his; unlefs the Words of the Promiser, or Nature of the Affair, carry with them any firfer Ob-

Advantage to himself, or that he promises with a View of doing the Perfon, in whose Favour he engages himself, a Pleasure, and thus having the Pleasure to oblige him. Even fuppofing he do not well know why he promises, it is sufficient that he resolves to promises with an entire Freedom, and that there is no Crime in the Promiser. The Will doth all in this Cafe, as well as in Alienations. A Man is not lefs Mafter of his own Actions, than of his own Goods; to that if he is willing to lay him-

self under a Neeffity of doing something in Favour of another, that is fufficient for giving the other the full Right to demand the Effect of fuch an Engagement. This I take to be our Author's Meaning. But I do not fee where lies the Difference, which he here fuppofes, between the Rules of the Civil Law, and the Maxims of the Law of Nature. For, in the Stipulations, it was not at all neceffary that the Promiser should exprefs the Reafon why he promised. He was asked, Do you promise? He answered, I do promis. That was fufficient. On the contrary, an Agreement without Stipulation, was not therefore more valid, tho' he faid, for Example, I will give you this or that, in Order that you do fuch or a Thing for me.

XXII. (1) See Pufendorf, B. III. Chap. VII. § 10.
Of the Rights of Book II.

Of Contracts.

I. Among such human Acts as turn to other Men's Advantages, some are single and uncompounded, others are mixed and compounded.

II. Those that are single, are either gratuitous, and done for nothing, or permutatory, and by Way of Exchange: 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; no more than a Donatation, whereby a Property is transferred; for of this we discoursed above, where we treated of the several Ways of gaining a Property. Such Acts as respect the future Time, are the Promises of giving and doing certain Things, which we were just now talking of. Gratuitous Acts, with a mutual Obligation, are those which dispose of something or other without an Alienation of it; or of some Act or other, yet so 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 Expenditure, 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, 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. I. Acts permutatory, or by Way of Exchange, either regulate and adjust the Shares, or make Things common: The Roman Lawyers rightly distinguished those Acts which regulate Shares into their, Do ut des, facio ut facias, facio ut des: I give you this, that you may give me that; I do this for you, that you may do that.

I. (1) By single Acts, (Actus unius) 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 multiplex) include several Views of different Advantages.

II. (2) Aristotle comprehends all those under the Title Airactus, Of Giving, thefe, &c.

Of Selling. Gratuits.

Our Author undoubtedly had his Eye on that Paffage in the Treatife 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. Perrin. 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 Perfoon whom we have thus served, in a Manner merely gratuitous, is obliged to no more than a grateful Acknowledgment, from which no perfect and strict Right arises. What the Roman Lawyers call Management, or Administration of Affairs, belongs to the other Class of gratuitous Acts, that is, to such as are attended with a mutual Obligation. For he who transfers another Man's Affairs without his Privy, pretends only to give his Trouble for nothing; so that he has an Obligation on the other to reimburse all the Expenses 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 Prefent 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 Liberty ceases: As when we promise a Man to execute a Commiffion for him; for in that Case, we usually oblige ourselves only to give our Labour for nothing, and expect a Reimbursement of the necessary Expenses. See § 13.
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III. (1) Digest. Lib. XIX. Tit. V. De proscriptis verbis. Leg. V. where we have a fourth Class, De ut facias. I give you this, that you may do that; but it is the same at the Bottom with Facis, ut des. See Mr. Noode's Treslin, De Partis & Transactibus, Cap. IX. p. 677. Col. 2. Pupfendorf, however, pretends to find some difference between them, B. C. Chap. II. § 9. They are both right, according to the different manner of ordering the Question. It is more to the present Purpose to observe, that the Lawyer Paulus really defined the De ut facias, as a fourth Class, different from respect to the other three, the Senex given by our Author to this whole Division, is much more general than that in which the Amiens understood it. For, as he himself immediately after intimates, the Contract of Sale, for Example, and that of Letting, are not comprehended in it, thro' the former belongs to De, ut des; the latter to Facis, 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 De, 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 De, ut facias.

2. The Division of nominate and in nominate Contracts doth not occur in so many Words in the Roman Law; but we there find that of Contraæ and certae, certain and uncertain Contracts, which better expresses the Reason alleged by our Author for that Division. Digest. Lib. XII. Tit. I. De rebus creditoris, &c. Leg. IX. See Mr. Noody, De Partis & Transactibus, Cap. IX. and Pupendorf, in the Chapter lately quoted, § 7.


4. Digest. Lib. XIX. Tit. V. De proscriptis verbis, Leg. II. III.

5. Among the Hereditas no Sale was looked upon to be complete, unless there was either a real or imaginary Delivery of the Thing purchased. Grotius.

6. See Selden, De Jure Nat. & Gent. fecondum Hebræorum Digestionem, Lib. VI. Cap. V.

7. 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. Si quando licent ob eminentem dolorem defiderant, Leg. I. See also Tit. X. De obligis, &c. lib. III. Lib. II. Tit. XIV. De partis, Leg. LVIII. Tit. I. De contrahendis eminium, Leg. VI. § 23.

7. A Man might redeem what he had given for procuring a Slave his Freedom, if he retracted the Sale before the other Party had performed what he had engaged to do. Digest. Lib. XII. Tit. IV. De Conditio, caufi data, caufi non fecundum, Leg. III. § 2. See Law V. of the same Title; and on it Anthony Fauers, Ratioal, p. 249, &c. 264, &c. as also Mr. Noody's Probabilita juris, Leg. IV. Cap. V.

The late Mr. Cocceius, in an academical Discourse, De Jure pertinenti 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 Law Subjects to retraction, as settled by the Roman Law, in Contracts without a Name. He undertakes to prove his Assertion by two Reasons. First, Because the Contract, according to him, is imperfect; on the Part of him who has given something, as he did not give it absolutely; but in Order that the Person to whom he gave it, should, in Return, do such or such a Thing in his Favour; so that, while the Person receiving has performed nothing, something is wanting for completing the Contract. But this only proves, that if the Condition on which the Person gave it, was not performed, with either by the Faule of the Person receiving; or some unforeseen Accident, which has rendered the Execution impossible, he may then oblige the Receiver to restore what was not given, as to be irrecoverable. Secondly, says Mr. Cocceius, The Receiver has by the 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 to the Contrary, by the Equality which ought to be observed in Contracts like those under Consideration, where each of the
from such Contracts, the Power of Compulsion, and left them wholly dependent on the Word and Honour of the Parties concerned.

3. But the Law of Nature knows nothing of any such Distinctions; nor are those Contracts which they call Innominate, either less natural, or less antient; may Exchange, which they reckon among the innominate, is both more simple, and more antient, than the Contract of Sale. And Esylathius upon the twenty-second of the Iliad, speaking of a publick Trial of Skill, to which there was appointed a Prize, what Homer terms ἀντική<sup>1</sup> το πορισμα, he renders αννιματικον το εξυπογόν, to exchange, adding, οὐδες μανή γὰρ τι μανήν, 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 nominat and innominate, reduce all Contracts for the Regulation of Shares, to the three Sorts before-mentioned.

4. And accordingly we say, that in Cafes 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 κόσμος, Coin for Coin; our Merchants now-a-days change, or give Goods for Money, as in Buying and Selling; or the Ufe of my Goods for the Property of other Goods; or the Ufe of my Goods for the Ufe of yours; or the Ufe of my Goods for your Money, which last is termed Letting and Hiring. By 15 Ufe we mean here not only the bare Ufe of a Thing, but all the Profits and Advantages that accompany it, whether it be made over only for a Time, 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 is, at the Expiration of some certain Time, I may have as much of the same Kind, it is a

the Party has his own Advantage in View, and consequently designs, at the fame 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. This, unless the Con- tract 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 Defign to keep it, on Condition he performs what he has engaged to do, or oblige him who gave it under that Condition, to leave it in his Hands, when he is ready to fulfil the Condition; and that the other, on the contrary, should be at Liberty, either to force him to Iland to his Engagement, andeven to demand Damages and Interest, if it be his own Fault, that he cannot perform his Obligations; or to retract and recover whatever 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 Rom-an Law, which Mr. Cocceius attempts to reconcile with the Law of Nature.

9 This is plain from those Verfs of Homer, cited Lib. I. D. De contradenda emptione. Tac[ius] talking of the German, says, The more inland People follow the good old Custom of bartering one Commodity for another. De Morki German. Cap. V. Num. 5. Struvius, at the fourth Eclogue upon the Paftage,


Assigns this Reason for the Expreffion; Because the Antients used to chop one Ware for another. And upon that of the third Gorg. ver. 397. where he confutes Velleio mutatus, the Fleeces are changed, Iugenti Precis oparentur, are sold at a great Rate. For formerly every Commodity was purchas'd by Exchange: And this Caus has been confirmed by an Example in Homer. Pliny, B. XXX. 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 Sears, 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 thebes, if they are for-

fified with the Exchange. Mela, of the tame People, The Sears are between, a People of the strictest Honesty in Dealing, which they manage, the abstem, 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 in 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普热温, of the Inhabitants of Mengrelia, Epif. Exc. III. and Olau Magnus, of the Lieplanders, Lib. IV. Cap. V. Gro-thus.

See Pufendorf, B. V. Chap. V. § 1.

10 See PROCOPUS upon this Subject, in his Se-
cret Hiftory, Chap. XXV. In Italy they brought Species formerly from Scythia instead of Goods, Pliny, B. XXXII. Chap. III. Gro-thus.


cel. Lib. I. Cap. VIII. and Mr. Noote, Proboh. Juriis, Lib. IV. Cap. IV.

11 Conuf Pufendorf, B. IV. Chap. VIII.

§ 7.

12 See Pufendorf, B. V. Chap. VII.
Chap. XII. War and Peace.

Loan, and this takes Place where Things are given by Weight, Number, and Measure, whether Money, or any Thing else.

The Bargain of my doing this, for your doing that, or Work for Work, may be as various as the Actions whereby any reciprocial Advantage may be procured. But the Agreement of my doing this, for your giving me that, is either for Money, and this in Cases of daily Labour and Service, is called Letting and Hiring; but where two 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 called Insurance, a Contract scarce known formerly, but now as much practised as any whatever; or else I am to do so and so, in Consideration that you give me something of yours, or the Use of something of yours.

IV. But Acts communicatory, or such as introduce a common Title, make either Actions or Things common; or on the one Side Actions, 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, ἄδηλος, or ἀνάδηλος, a joint Fleet.

V. But mixed or compounded Acts are so either as to what is principal, or by Reason of an Accessory. Thus, if I shall knowingly give more for a Thing than it is worth, or than I can buy it for of another, it is (a mixed Act) partly a Gift, partly a Purchase. If I agree with a Goldsmith, for so much Money, to make me so many Rings of his own Gold, it is partly a Buying, partly a Hiring. 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 Perfon to Military Service for the Protection I give him, is Pacta, ut factas, I do this for you, that you may do that for me. But if something be to be paid yearly for it besides, by Way of Acknowledgment, it is then so far a Quit-Rent. So Money sent to Sea by Way of Venture, is something compounded of the Contract of a Loan, and of an Insurance.

VI. An Act becomes mixed, by Reason of some Accessory, in the Manner as we see it in the Cafe of a Bail or a Pawn. For a Bail, if you regard what passes between the Perfon putting in the Bail, and the principal Debtor, is generally a Sort of Composition 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 barthensome 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. Now all Acts, advantageous to others, except those which are of meer Generosity, are called Contrads 1.

VIII. In all Contracts Nature demands an Equality, inasmuch that the aggrieved Person has an Action against the other, for over-reaching him. This Equa-

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

V. (1) On this Doctrine see Pufendorf, B. V. Chap. II. § 10, where he corrects our Author's Notions, in Regard to some of the following Instances.

2. It is rather a single Contract of Sale, as was determined by the old Lawyers, against the Opinion of Cæsarius, T. Init. 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 Agent for his Labour.

3. Πλοήγησις the one or reciprocal Obligation, which the Greeks call Συνάλλαται, 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 is sufficient to express clearly the Idea we fix to Terms, the Signification of which is not well settled. The Commentators on the Roman Law are very much divided on the Definition of a Contract, and I do not know whether the ancient Lawyers were better agreed on the Matter or not. See Bachelius, in his Commentary on the first Part of the Digest, p. 587, 588.

VIII. (1) On this see Pufendorf, B. V. Chap. III. 4 G
Of the Rights of

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lity consists partly in the Acts, and partly in the Subject itself of the Contract; and this Equality, and Dealing upon the Square, must be observed as well in those Acts that are previous to the Bargain, as those that are principal and essential in it.

IX. 1. One of these previous Acts is, that he we deal with ought to discover to us all the Faults he knows of in the Thing we are dealing for; and this is not only what is enjoined by the Civil Law, but is also agreeable to the Nature of the Act, there, being a nearer Society, 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. Nor am I under any Necessity of telling what may be for your Advantage to hear, as in the Case of heavenly Things; for 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, 3 In all Contracts, whatsoever Faults are in the Things exposed to Sale, they ought to be discovered to the Buyer; which if the Seller does not do, 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 Laelius, 4 if a Buyer does not inform the Seller of his Mislike, that so be 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 ingenious Man, as Carneades would have him, but a Knave and a Rogue.

2. But it is not so with Circumstances that do not directly concern the Thing contracted for. As if a Man should know that there are several Ships coming laden with Corn, he is not obliged to tell you so; but, however, to discover such a Thing is kind and commendable, and in some Cases not to be omitted without Breach of Charity: yet I will not say it is unjust, that is, that it violates his Right with whom he is dealing; so that what the same Diogenes very pertinently said, as Tully relates it, is as applicable here, I have brought my Commodity, I have exposed it to Sale, I tell 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. 5 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 Infinces you may see there. 6

3. But it signifies nothing to speak of those Faults which are known to your Dealer, as the Servitude of the House, 7 which M. Marius Gratidianus sold to C. Sergius Orata, and which he had bought of him before. For 8 an equal Know-

IX. (1) See the Scholiast upon that Passage of Horace, Lib. II. Sat. III. 285.

Mention nis, &c.

Now he that sold him, might have safely known,
He's found both Wind and Limit at ever was born;
But cheated, if he feared him found in Soul.

Grotius.

CREECH.

See the Chapter of Pufendorf left referred to, § 2. Note 2. 2d Edit.

2 I have explained this in Note 1. on the same Chapter of Pufendorf, § 3.

3 Cicer. 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. As bount Seller must neither augment the Buyer's Hope of Advantage, nor divulge and conceal from him the Knowledge of the Faults and Inconveniences that accompany the Purchase. The Author is speaking there of an House which the Augurs had ordered to be pulled down, which Circumstance the Perfon 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. Noft, De formis emandandi doli mali, Cap. XIII.


7 De Offic. Lib. III. Cap. XII.

8 ibid. Cap. XIII.

9 Cap. XVI. See Note 4. on this Paragraph.


II. Theodoric's Edit. Cap. CXL. Grotius.
War and Peace.

Wak do to appear Rothom.

The Dealing is fair, and be may take your God.

You bought a faulty Regue, he told you so.

And this is a Remark of Plato's too, in his XI. De Legibus. 3

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 extrinsic to the Contract, but that no Man should be unjustly frightened into a Bargain; and if he be, that Fright should first be over. It: Respect to this the Lacedemonians made void the Purchase of some Land which the Eleians had by Fear exerted from the Owners, as Xenophon says, 9 as Xenophon, &c. Looking upon it to be as great an Injustice to take the Goods of weaker People, upon the Pretence of Purchase, as by mere Force. Which are the very Words of Xenophon 4. But what Exceptions the Laws of Nations allows in these Cases, shall be shewed in its proper Place.

XI. 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; 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. 5 I only mix the Contract, by making it partly permutatory, and partly gratuitous. 6 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. 7 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, 8 et nos ad eis, &c. Whenever in our Contracts, our Purchases, or our Payments, we stand baggling, and use all our Might and Means to beat down the Price, what is this but a Sort of Robbery? The Writer of Ixidor's Life in Photius tells us of one Hermias, 9 who having bought anything 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 2 Lev. xxv. 14 and 17. Ye shall not oppress one another.

12 The Philosopher says, If a Man sells a Slave who has been guilty of Murders, 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 laid, that If a Physician, or a Master of Exercise, buys a Slave, afficted with the Stone, &c. or any other oblique Distemper of Body or Mind, the Sale is good and valid, as if an express Declaration of his Dis- tempers had been made, because that it is presumed from the Purchaser's Prolixion, that he ought to know such Dis- tempers. X. (1) Hist. Græc. Lib. III. Cap. II. § 22. Edit. (2)

* B. III. Chap. XIX. § 2. XI. (1) See Pufendorff, B. V. Chap. III. § 7, 8.

* It is to be observed, in short, that the Execution of a Confinement, 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 Confinement, 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. Infruit Lib. III. Tit. XXVI. De Mandato, § 15. See also Diggil, Lib. XVI. Tit. III. Depeddi vel contra. Leg. 1. § 9.

3 Our Author doth not tell us from what Part of St. Chrysostom's Works he took this Passage.

3 The Historian says, that Hermias, practised the Marin, among other Occasions, in Regard to an ignorant Person, who offered to sell him a Book under its Value. Cod. CCXLI. p. 1044. Edit. Rotham. 1553.

XII. And, thirdly, in the

XIII. What E-

XIV. § 2, 3, 4. with the Notes in the second Edi-

tion.

XV. See the same Placie, § 7.

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

XVIII. (1) Cod. Lib. IV. Tit. XLIV. De reftin-
dendi &c. See what has been ob-

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

XVIII. (1) Concerning what relates to this Con-

XVIII. (2) D. Offic. Lib. III. Cap. XVII.

XVIII. (3) If there is a real Damage, the Civil Laws,

XVIII. (4) Pufendorf treats of this Contract also in ge-

XVIII. (5) See the same Author, Chap. XI. of the Book
already often quoted, § 2.
also, And among the Rabbis, in Rabbi Moyses Maimonides, Doctor Dubitant; Lib. 3. Cap. 43. 2. To this had Seneca Respected, when he said, "Some are responsible only for their Honesty; others for the Safety of the Thing with which they are entrusted." 3. And by this Rule we may easily form our Judgments of other Contracts. But now having (as far as was necessary to our Purposes) discoursed of Contracts in general, we shall briefly run through some particular Questions about them.

XIV. 1. The most natural Measure of the Value of any Thing, is the Want of it, as Aristotle rightly observes, and this is what the least civilized People are altogether guided by; yet this is not the only Measure; 4. For the Will of Men, which governs every Thing, covets many Things more than are necessary. 5. Luxury lays Play, gave the Price to Pearl. And Cicero, in his Oration against Verres, In Proportion to our Passion for such Sort of Things, is our Value for them. 6. And 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 Beneficio. Lib. 6. Cap. 15. where he also subjoins this, The Price of every Thing is according to the Markets; when you have commended them 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 on the common Estimation; that is, as he explains it elsewhere, on the Value that all the World puts on them 7. 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 fear be so settled as not to admit a Demand of more or less, except it be where the Law has fixed a certain Rate, & si potes, precisely, and to a Point, as Aristotle expresses it.

2. And now in that common and current Price of Things, 8 we usually have a Regard to the Pains and Expences the Merchants and Traders have been at, and it often rises and falls all on a Sudden, according as there are more or fewer Chapmen, and according to the Plenty or Scarcity of Money or Commodities. Besides,

a Communion, 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 preferred 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 have been in the other Passages, quoted from that Book.

7 This agrees with a Pass in Exodus, Chap. XXII. 10, 11, 12, 13; Moses de Kotze, LXXVIII. and LXXXIX. - Precip. Juden. Grothus.

8 De Beneficio. Lib. VII. Cap. XIX. The Words of Seneca are, Non tutelam, illi, sed fidem debet. The Philosopher is there speaking of the Obligation of returning what we owe a Man, even tho' he is at that Time disposed to waite it; for, says he, I am obliged to keep my Word, (Fidem debem) but not to preserve the Thing restored, (non Tutelam). So that tho' the 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 Creator's Guardian; I am obliged only to restore him his Goods, it is his Business to take Care of them.


2. On this whole Question consult Pufendorf, B. V. Chap. I. with the Notes.

3 And the same Author, in his thirty-seventh Book, treating of Jewels, It is People's Pride and Curiosity, and especially the Extraordinary Prices of Princes, that determines the Value of those Things. And in his thirty-second Book, The Indians set at such a Price on our Coral, as we do on their Pearls, for those Things depend altogether on People's Fancies. And St. Austin, De Civit. Dii. Lib. XI. Cap. XVI. And pray where is the Stranger of all this, when you find that is unaccountable are those Men's Nations, tho' they are in their own Natures of so much Excellence and Dignity, that they shall frequently give a Name for a Horse than a Man Slave, and for a Jew less than a Woman Slave? To Nations of Real foreigners are very different from those of Neccessity and Pleasure. Real foreigners are not what many appear to true in the Mind, but Pleasures for which many may gratify the Senec of the Body, Grothus.

4 For, adds he, it is hard to fix the Value of Things, till the Extent of our Passions is regulated. In Verbum. Lib. IV. Cap. VII.

5 Digest. Lib. XXXV. Tit. II. Al Legem Faciend. Pliny says, Lib. XVIII. Cap. XXXI. An honest prudent Man, who has a Family to maintain, makes Use of the Passions that every Year furnish him with, Grothus.

6 Digest. Lib. IX. Tit. II. Al Legem Aquil. Leg. XXXIII.

7 Nor does St. Austin dis approve of this, upon Pufen. xix. But, says the Perun, you are dealing with him, I bring my Goods a great Way, I only desire a living Price for my Trouble; and the Labourer is justly worthy of his Hire. Friend, we are not talking about your Trade and Business, but about your Lying and Perjury in it, Grothus.

4 H there
Of the Rights of

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there may possibly some such Circumstances intervene, as may very justly raise or lessen the ordinary Market Price; as, the Loss we suffer, the Profit we lose, a particular Fancy for certain Things, the Favour we do one in buying or selling what we should not otherwise have bought or sold; all which Circumstances the Person we deal with ought to be acquainted with. And we may also have regard to the Loss or Gain that arises from the Delay or the Promptness of Payment.

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

XV. 1. As to Buying and Selling, we must observe, that the Bargain and Sale is good, from the very Moment of the Contract; and tho' the Thing be not actually delivered, yet may the Property be transferred, and this is the most simple Way ofDealing: So 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 to be in an Exchange, but if it be agreed, that the Property shall not pass immediately, then the Seller shall be obliged to transfer his Property at such a Time, and in the mean While, both the Profits and Hazards shall be the Seller's. And therefore, that a Contract of Sale consists 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, and that the Profits shall belong to him before the Property be actually


5 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 etia fit in permutationes. 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 deliver what they deprives him of; or tho' only one of them immediately gives the other Poffeffion of the Thing exchanged, why may not the Transfer 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 laid, Cap. VI. § 1. in the Text and Notes.

But the Principle at bar here lies. According to the old Roman Law, when a Thing was sold purely and simply, the Seller only engaged fo to deliver it into the Hands of the Buyer, that it might be recognized among his Goods, according to the Law of Nations, (which was termed Dominium Bintari- num) 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 Quaeritum; the Property was not transferred on him nisi modo, not quoque modo, it was only a Sort of Possession. This therefore was barely called, to deliver (trade) whereas the Word to give (date) was used for expressing a Transferation of the full and entire Property, which was performed with certain Formalities (Municipati- onis, vel coffines 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 of the other Manner. Mr. Norden's Probabilia juris, Lib. II. Cap. XII.

5 See Puffendorf, B. V. Chap. V. § 3. where he makes a proper Reply to what is alleged for falsifying the Want of Connection in the Principles of the Public Law, or of leaving the Moderns, who are usually explained. The Seller, we are told, is considered as invested 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. Thomasius, however, (in his Notes on Huber, De jure Civitatii, Lib. II. Sect. VI. Cap. IV. p. 525) 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 tell 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, 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 Opinion, 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 Property; nunc for Property; and 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 the Proprietor of the Thing sold. The Seller is not obliged to deliver anything of his Goods till the Buyer has paid him the Money; as he always had the Right, he tacitly reserves to himself a Right of breaking the Contract, if the Buyer does not 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 holds only on Condition, that the Sale be null and void, on Defect
naturally transferred, are Maximis of the Civil Law, which are not in all Places obvi-
ated. Nay, on the contrary, most Law-Makers have thought fit to enact, that
till the Delivery of the Things, the Seller shall have the Advantage, and stand to the 
Hazard of the Goods, as Thoeporaphus has remarked, in a Paffage of Stobaeus, where 
you may also find many other Cautions touching the Formalities of Selling, or
giving Earnest, about retreating, very different from the Roman Laws; and Dion 
Phusis has observed, that among the Rhodians, a Sale was not compleated, nor 
the Contrats fulfilled, till they were publicly registred.

2. And we must know too, that if one and the same Thing be twice sold, of 
the two Sales, that shall stand good which had the Property immediately trans-
ferred, fault of Payment. Now either the Time of Payment, which ought to precede the Delivery of the Thing, is fixed or not. If 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 conveying the Advantage. This, I think, ought to hold good, ac-
cording 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 spec-
cified, it is not so much a Contract of Sale, proper, as one of Assenting 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, and con-
fsequently, if Accidents and Casualties fall on him. The Effect of such an Agreement is, that the fu-
ture Seller engages first, not to make a Contract of Sale with another, in Respect to the Thing 
bartered for, before the Term, either limited or not; and in the second Place, to give it at the Price a-
grained on, when the Contract of Sale shall be com-
pleted, 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 flown in my third Note on 
Puendorfius, as before quoted. Much more then may there be an Agreement to sell at a certain 
Price. And this seems to be our Author's Notion; at least it ought to have been so, in my Opiniori, when he was arguing on the Principles of the Law of Nature only.


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 distin-
guish which is prior or posterior in Date; nor does he speak of the Caf in which the two Sales were made on the same Foot; which Puendorfius sup-
poses, as above quoted, § 9, who on this Occasion accuses him pugniously, imagining that the whole Difference is, that one of the Sales was accom-
nipated by a Delivery; and following Ziegler in this Point, tho' he does not name him, who endeav-
ours to make Grotius contradicted 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 Seller being as bad as the Del giver, who in the Delivery, being a present Translation of the Property, there would be a Translation of Property on both Sides, which would make Things so far equal.

For tho' a present Translation of Property is in it-
self more conceptions than a bare Promise of trans-
fering 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 under a Condition to transfer it. So that the Moment a Man has promised to trans-
fer the Property of a Thing to another, he there-
by deprives himself of the Power of actually trans-
fering that Property elsewhere, till a Term, whether fixed or not, which is either expressly or tacit-
ly agreed on. In Reality, according to the Law of 
Nature alone, while there is no Delivery, the firft 
that in Date has the better Right, on what Foot ever the Sale was made. But when the Thing sold had been actually delivered, the Perfon 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 
frift in Date has the better Right, when there is no Delivery, appears from the Reason already 
alluded, and taken from the very Nature of Promises; even tho' there was a present Transla-
tion of Property in Favour of the lat in Date, if that 
Translation was not accompanied with an ac-
tual 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 affect that Right, 
and the other one to redeliver the Goods to the Damages and Interest of the Seller, who has a-
mused him with a fallacious Contract. This takes 
Place particularly when it depended solely on the 
latter Buyer to put himself in Possession of the Thing 
when the Contract was made and settled. But when the Thing sold has been actually delivered to one of the Buyers, even to the last in Date, it is 
no longer in Nature, but ought to be considered as 
lost. The Perfon 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 obli-
ged to forfere, that the Seller would promise it to 
another; so likewise, when the Seller has actually 
deprived himself of it, purfuant to a posterior En-
gagement, that the Perfon to whom it was delivered is 
not obliged to enquire, while he has no Reasons for 
Suspicion, whether the Seller has transferred his 
Right to another. The Necessity of Civil Com-
merce equally requires both; so that in both Cases 
it is a Misfortune to the Perfon who depended on 

having
ferred, either by Delivery or otherwise; for by this the moral Power of the Things goes from the Seller, which it does not by a bare Promise.

XVI. All Monopolies 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 Egypt: So also under the Romans, the Alexandrians had the Monopoly, 3 as Strabo tells us, of all Commodities brought from the Indies and Ethiopia. The like may be done by private Persons, provided they are contented with a reasonable Profit. But they, who, as the Oylmen in the Velabrum, 4 do purposely combine to advance the Value of their Wares above the highest Degree of the present 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. Now as for Money, we must observe, that it naturally derives its Currency, or Equivalence, 1 not from the Matter only, 2 nor from this or that particular Denomination 3 and Form, but from a more general Capacity of being compared 4 with, or answering the Value of all other Things, at least such as are 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; thus Michael Ephesius, Nicom. v. 'Ot òv òv tòv sòv òv tòv tòv, &c. Money itself having the Thing sold, if he be disappointed, either by the Discovery of a prior Right, or by a Discovery of the Delivery of the Thing, which puts the Seller out of a Condition to give the Possession of it.

XVI. (1) Concerning this Question, see Pufenдорf, B. V. Chap. V. § 7.

2 Every Body knows Thales's Story of the Olives. Pseudo-Chrys. Invention of buying up the Tyrian Lead for the Advantage of the Athenians, is in Aristotle, Oeconom. II. See Pliny, VIII. 37. of the Monopoly of the Skins of Hedge Hogs. And Procopius, of the Ingrossing all the Silks, in his Hist. Arcan. Chap. XXV. Grutius.

Theles, 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 Aristot., Polit. Lib. I. Cap. 11. and on that Place Hubert of Ghirlandius, in whose Version it is the seventh Charter; as also Diogenes Laertius, Lib. I. § 26. with his Commentators.


Neither this nor the foregoing Example is well applied, as Pufenдорf observes, in the Chapter above quoted, Not 2. It appears from the Palliage 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 Palliaje of Casiodore, referred to by our Author, are better applied.

4 It is a just and prudent Law, C. De Monopol. And there is a very notable Palliaje in Lydian 5 against the Corn-Factors, who advanced the Price of their Grain, by raising false Rumors. Add to these Cassiodore, IX. 5. and 7. Quistinicus. Cauf. XIV. Quell. IV. Grutius.

5 There is no Offence against the Rules of Charity in this Cafe, 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 contrab. eminent. We must not regard the Matter here, but the Worth of it, L. Si es cui, § 1. De plutoindia. Grutius.

2 Because we may give Silver Money, for Money of Gold.

3 Because we may give Crowns for Pitchers, 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 dear in Comparison with Money. See Pufenдорf, B. V. Chap. I. § 15, 16.

5 That is, if a Man borrows a Sum of Money, for Example, and, at the Time we are to pay it, Money, or other Things, are more plentiful, and consequently, Money is of more or less Value than it was when he borrowed it; the Creditor cannot demand more Pieces than he lent, nor the Debtor pretend to pay fewer than he borrowed. The Reason is, because the Cafe, 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 fame 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 intrinick or extrinick Value of the Species. But this is a different Question, of which it doth not appear that our Author thought, and concerning which Pufen дорф may be consulted, B. V. Chap. VI. § 6, 7.
Chap. XII

WAR and PEACE.

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 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. Letting and Hiring, as Catius 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, the owner bears the loss; so when a thing rented or hired proves barren, or by any other accident unprofitable, the loss is to the tenant, nor has the person who lets any thing the right of 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, upon the first tenant's not being able to make use of it, shall let it to another, whatever 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. 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 obligate himself entirely to every one of them, he may demand the same reward 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.'

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, that it is prohibited by the law of nature; yet the bishop of Caxia 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, as much may be said too of the loan

6 Its value is publick and perpetual, D. Lib. I. De contr. ent. Grotonus.

XVIII. (1) Concerning this contract, see Pufendorf, B. V. Chap. VI. with the notes.

3 Dig. Lib. XIX. Tit. II. Locati, lineat, Leg. II.

3 That is, a thing sold, but not delivered. See above, § 15. and my first note on Pufendorf, B. V. Chap. VI. § 2.

4 Provided such accidents do not entirely take away the use of the thing; as is the case, when a farm yields no profit, or so little, that it is hardly any thing in comparison of the labour and charge employed in the culture, and in proportion to the largeness of the farm hired. The only view in hiring a thing is to draw some advantage from it; so that here the case is the same as if the thing hired had perished, or the tenant was turned out.

5 It is here supposed, that the owner, or landlord, had no reason to think the first tenant would be unwilling he should let the thing to another, so long as he is not in a capacity of enjoying it himself. Such an impediment might also happen, as would dissolve the contract, by virtue of a tacit exception, founded on a reasonable presumption of the tenant's intention.

XIX. (1) This requires some retrenchment. See what is said on the question, § 4. of Pufendorf's chapter, quoted in the foregoing paragraph.

XX. (1) Concerning this see Pufendorf, B. V. Chap. VII. § 8, 95.

* In Cap. 25. Matt. xxv. 171. 172.

2 For these two loans (the commodatum and the mutuum) are very much alike, as locatius and favonas are, the one letting out of goods, the other of money; in L. Unica, C. Thoed, quin iust sif: There is, pecuniam commodat. Justinius has made it in his edition, mutuum dat. And Horace calls nummos favons, money taken up at interest, commodicus, money hired, Lib. I. Sat. II. where the Scholast has mutuum, et Ufuro. Grotonus.

See Mr. hoodie's excellent treatise, Dr. Favers, &c. Usarios, Lib. I. Cap. VI. In regard to the terius mutuum and commodatum, they are sometimes confounded together, and the other by ancient authors; of which have a considerable number of examples in farrow's notes on cujas, Paravis. C. Dr. Commodatus, p. 125. To which may be added James goderoy, on the title of the Code, quoted by our author, Tom. I. p. 228.

4 I of
of any other Thing that is not confumable; 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 the Industry of Man has made Monies, and other Things naturally barren, to become fruitful. The most plausible one is, that here one Thing is given for another; and that the Use of a Thing cannot be distinguished from the Thing itself, when that very Use confits 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 confumable, or of such whose Property paffes to the Perfons to whom they are lent, were introduced by a Decree of the Senate, but that, however, there were no such Use and Profits in Reality, the Controversy depends on the Idea of the Word Usuratus, Use and Profits, which Word certainly does no Way, according to its proper Signification, agree to any such Right; 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 last, who pays late. Therefore, &c.

3 Nor ought Money ever to be idle and unprofitable, &c. not susceptible, &c. W. in tanta, &c. De contract. &c. B. D. De usuris. Gro- tius.

4. Our Author propofes and answers this Objection more at Length, in the following Manner, in a Note on Luke vii. 35. It is objected by some, that if a Person lend a Thing confumable, 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 Reformation 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 referr’d in a short Time, receives more than he would get it returned after a longer Time, on Account of the Advantages attending the natural Poflefion. (H. 15. 2. 16.) And this holds good in a Loan of Things confumable, as well as in that of Things not confumable, if we consider the Nature of Things in themselves, and not the Subtlety of Terms. The Delay of Payment is undoubtedly susceptible of Estimation; and consequently, some Publication may be made in Con{ernation of such Delay. If, on, lending a Man a hundred Crouns, 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 Injufice in fuch an Agreement, than when I lend a Neighbour fome Oxen for Ploifmg 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 re{teated from it on Payment of a certain Sum in lieu of Place. Besides, Nature deduces to this as much as we are not oblige’d to serve another, when we cannot do it without Damage to ourfelves. Now, he who deprives himself of his Money for some Time, to pleasure another, might have laid it out on fome Piece of Land, and there have got a greater Profit, and received Profits arising from them during that Time. It may be said, that 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 Perfon to whom the Use and Profits of a Sum of Money are bestowed without the Property, is impofed to become richer by fuch a Legacy; it appears, that such Use is susceptible of Estimation; and consequently, the fame may be laid 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 fo much for the Interfcl of the Money lent. Now is not this admitti,ng the Substance of the Thing, and disputing merely about Words? For, according to this Opinion, we may bargain thus: If you give me my Money in three Days, you fhall give me fo 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 Founda{tion for the Nature of Things? I herefore 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 Usuratis remunerandi, &c. Leg. I. II.

6 For by Usuratus, we understand, a Right of enjoying a Thing belonging to another, and the Profits arising from it, without teaching the Subfance, or defifting of it. Digest. Lib. VII. Tit. I. De Usuratis. &c. Leg. 5. Whereas, when a Sum of Money is bestowed to any one for his Use, the said Use confits in the Consumption. See Mr. Noodt’s Treatife De Usuratis, Lib. I. Cap. II. and XX. XXI.


Concerning the Antichrift, see Pufendorf.

B. V. Chap. X. § 14.

8 Mr. Noodt has examined thefe Palfages of the Authors here quoted, and some others, in his Treatife De Foener & Oariis, Lib. I. Cap. IV. VII. VIII. IX.

Cicero,
Cicer, Plutarch, 9 and others allege against usury, does not so much respect the Nature of the Thing, as the Circumstances, and accidental Consequences that commonly attend it.

3. But whatever our Opinion may be of this Matter, we ought to be satisfied with the Law given by GOD to the Hebrews, 10 which forbids one Jew to take interest of another.

9 As Appian, in Givill. (p. 382. Edit. H. Steph.)

10 Our Author changed his Opinion since he wrote this, as appears both from his Introduction to the Law of Holland; his 1935 Letter written to Salmasius; and his long Note on St. Luke, of which I have already given a Part. He confesses 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 Virtually, Usury of any Thing that is lent upon Usury. Undo a Stranger thou mayst lend upon Usury; but thou 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 made because of the Danger of theFact, not of Right, that is, a bare Impropriety. But the Words do not admit of this Explanation; and the People for whom the Law was made, never understood it thus; as appears from the Testimonies of Josephus and Philo, and from all the Rabbins agree in this Point. The former of these Authors says, It is not lawful to lend upon Usury to any Hebrew, either Entails or Drinkable; for it is not just to raise a Revenue at the Expense of their Countrymen. But we may affit them in their Necesitie, and consider their Incommodities. De Tribut. but the Reward with which GOD will befriend 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 Perfons of the same Nation, (De Civili. p. 701. Edit. Pariss.) And a little later 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 Rich cannot be reduced in the amount Alleged, by being obliged to pay more than they received; and the Creditors will receive no Damages, since they will receive their Due, together with the Reputation of Goodness, Generosity, Gratefulness, &c. Common prudence, (p. 702.) Clement of Alexandria has imitated and explained this Passarge, Stromat. Lib. II. (Cap. XVIII. p. 473. Edit. Pallas.) Hence it appears sufficiently, that the Law in Deuteronomy, under Consideration, has been considered as containing only a Duty of love to the Citizen to another; which is clearly intimated in Levitical Law 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 we find the Royal Patriarchs, and the Prophets Examples, prate thus far 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, if that Father, if it was allowed to lend in this Manner to Perfons, who might be friends with them, (De Tribut. Lib. XV.) But this Exposition does 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 Perfons 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 from another Man's Field, and several others of the like Nature. Besides, the chief Income of the Hebrews came from Cattle and Fowls, and Josephus observes, Lib. I. Adv. Apis. Whereas most of the neighbouring Nations insisted themselves by Trade; as the Sidonians, the Tyrians, those who lived near the Red Sea, and the Egyptians. So that there was a very good Reason why the Law should allow the taking of some Intercit for Money lent to such Strangers, tho' it forbids 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 intimate 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 prefers in this Case, we may assign the old Law and the New. 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 admitted to receive the Sacraments, in the forty-third of the Canons attributed to the Apostles, in the fourth of the Council of Laodicea; the seventeenth of the Council of Nice; the fifth and fourteenth 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 every every Suspicion of Avarice. The Fathers of the African Council give us to understand as much, when they say, that What is libellous in the Laws, 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 the Bishop to meddle with human Affairs. See above, B. I. Chap. II. § 10. Num. 8. HAMENOPOLUS allegethe same Reason, after having quoted the Canons above-mentioned, (Praem. Lib. III. Tit. VII. § 8.) The Emperor Justinian, as the Same Lawyer observes, was the first that imagdng no Sort of Usury
exact Interest for Money lent to another. For the Subject of this Law, if not of indisputable Neceffity, is, without Doubt, morally honest, and therefore, 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 they do oblige us Christians too, as being called to give more noble Infiances of Virtue; and certain Duties which the Law then only enjoined, the Hebrew, or other circumcised Persons (for they were both equally obliged) the same ought now to be observed towards every Body, all Distinction of People being entirely taken away by the Gospel, and the Word Neighbour of a much larger Signification. As that excellent Parable of CHRIST [Luke x. 29, &c.] concerning the Samaritan, does fully demonstrate. And therefore Laclauarius, treating of the Duties of a Christian, says, he shall not give his Money upon Interest, for this is to gain by another's Loss; and St. Ambrose, To affi a Min in his Wants, is a Piece of great Humanity, but to extort more than is borrowed is savage and cruel. And Augustus Cæsar himself let a Mark of Infamy on some Roman Knights, who took up Money at an early Rate, and lent it upon extravagant Interest.

XXI. But yet we must observe, that there are some Contracts which look like Usury, and are generally thought to be so, which, however, are Agreements of another

"Usury was allowed to Christians, forbid it to all in general. Before that Time, even Churches borrowed Money at four per Cent. Thus for their Author. To which if we add the Reflections of Mr. Noodt, who has exhausted this Subject, in his Treatise De Penance & Usuris, Lib. I. Cap. X. XI. we shall receive full Satisfaction, in regard to the Objections which the Partisans of the contrary Opinion pretend to bring from Scripture.

11 The Hebrews are of Opinion, that by the Word שעה, is meant Usury for Money; but that ידmeaning signifies Usury for any Thing whatever.

St. Jerome, upon the eighteenth of Ezekiel, They think indeed that Usury confi's only in the Interest of Money: Which the Divine Scriptures providing against, do in every Thing prohibit an immovable Advantage, and oblige you to take no more on any Account than you have given. Grotius.

Concerning the Signification of thofe Hebrew Words, see SALMIUS, De Usuris, Cap. XX. p. 611, &c. and De medio Usurisam, Cap. VIII. p. 318, &c. also Mr. Le Clerc's Commentary on Leviticus xv. 36.

12 And in the eighth, A good Man is merciful and kind. Grotius.

13 ARNOLDI, in his fourth Book, says, that Christians generously impart what they have, and that to all Mankind, as much as Wisdom 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 inconveniencing ourselves, to Perfons in low Circumstances, who want Money for their Subsistence. But it by no Means requires we should make no Advantage of Money lent to such as improve and gain by it, and that often much more than the common Interest.


15 ST. CYPRIAN, De Iobis, reckons amongst several grievous Sins, the lending Money on Interest. St. Chrysostom, De Jejunio, V. 7. Lev. xxv. Deut. &c. If you sell, pray be sure that you do not put your Money out to Interest. Do you sell? 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 given from the Seme, the Price of Levitical and Propitiation. St. Austin, Epist. LI. What shall I say of Usury, which even the Laws, and our Judges allow of? Is it more horrid to who cheats and robs the Rich, than he who with his Execution murders the Poor? Maximus, Homil. III. De Summa. However, You will come to Church, Brother, as you ought to do; if that which Usury does not damage anything you in your lovely Sons. To these add St. Basil, upon our LORD's Sermon on the Mount, and what Gratian has collected from the Conscils and Fathers, Can. XIV. S. Chr. III. and IV. Grotius.

As the Practice of lending Money on Interest has been too much abused, how innocent formerly it may be in itself, and when reduced to just Bounds; we are not to be surprized, that the Seal of the Doctors of the Church, joined to their Wary of efficient Knowledge in each Spec 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 so much from the Monition, in his Treatise De Penance & Usuris, Lib. I. Cap. IV. VII. VIII. IX. He likewise flaws in Chap. XII. that the Interpreters of the Canon Law approve of certain Things, which imply real Usury. Father Cerrillier ought to have confuted this; and if ever I undertake to answer him in Favour, it will be easy for me to shew, that, as he understands nothing of the Law of Nature, he is not more happy than the ancient Fathers, in explaining the Holy Scripture by the Rules of judicious Criticism.

16 SUSTONIUS in Augusti, Cap. XXXIX.
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 deduced 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, this is not to be reputed Usury. And Demoglyphes, in his Oration against Pontanetius, positively demes, that he ought to be branded with the odious Name of an Ufurer, who lends 3 for a moderate Profit, what he has got in his Business, and by honest Labour, partly that he may preserve what he has got; and partly that he may oblige and accommodate some Body else.

XXII. And as for those human Laws, that allow Intereft for the Ufe of Money, or any other Thing, as in Holland they have long allowed '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 may indulge an Impunity, but they cannot grant a Right.

XXIII. A Contract for 4 saving harmlefs, called 5 an Insurance, is absolutely void, if either the Ufurer knows do not at this 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 Lofs considered, as uncertain and fulpicious. And the Price of such an Insurance must be regulated and ratified by the common Rate.

XXIV. 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 Perfon shall be rated according to his Quota, which Aristotle thus expresses, 6 εν χρηματοισ καινοιοι περικοι

bad Senec, and the Word Intereft is subfittuted in the Room of it, in a good Sense. Grotius.

What the oldet Latin Authors called Fenen, from an old Word which signifies to produce, meaning the Fruit or Profit fpring from Money lent, is in the main the fame Thing that has been fince termed Ufura, a Word which implies, that this Profit is made on the Account of the Ufe of Money lent. Mr. Norris proves this at large, and solidly, in his Treatife De Fennen & Ufuras, Lib. I. Cap. II. where he likewife fhews the different Sentences given by Cuthon to thefe two Words. The Roman Law, here quoted by our Author, doth not relate to all Kinds of Intereft allowed by the Laws, but only fuch as his Place in Cates like that there mentioned.

This is admittin the Thing as to the Sub- fame, tho' under another Name; as Pufendorf observes, B. V. Chap. VII. § 11. see likewife Mr. Norris, De Fennen & Ufuras, Lib. I. Cap. XII. § 3. Pufendorf, Gotth. III. (Cap. XL) speaking in the Praife of Germanus, Ihadiou's Relation, χρηματικον τοις δεινοις, &c. He lent great Sums to all who had Occafion for Money, and never took of them any Intereft that could be truly called f.

Grotius.

XXII. (1) So it is in the Empire. Grotius.

2 And therefore Justianin looked upon it to be his Duty to regulate the Intereft that was permitted before his Time, and to reduce it to a Juffer Rate. Newol. 32. 33. 34. Grotius.

XXIII. (2) See Pufendorf, B. V. Chap. IX. § 8. where he treats of other hazardous Con-
Of the Rights of
Book II.

In Partnership they are intitled to moft who put in moft. And the fame 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 ufuallly fay, One Man's Money is but an even Recompence for another Man's Work 1.

2. But this is not always done in one Manner, for either I may furnilh my Work, and you the Ufe only of your Money, in which Cafe the Principal, whether loft or made, is yours. Or you may put the Property of the Sum in common with my Labour, in which Cafe I am a Partner in the Capital. In the former In- stance, the Work or Service is not left against the Stock, but the Hazard of lofing it, and the Gain that might probably be expected from it. But in the other, the Value of my Work is luppofed 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 faid of Work or Service, the fame alfo may be underftood of the Fatigue and Danger of a Voyage, and in fuch other Cafes.

3. But that either of the Partners fhould share in the Profit, but yet be indemnified, in Cafe of Lofs, is againft the Nature of Partnership, but it may be fo agreed on without any Injury; and then there will be a mixed Contract of Part- nership and Insurance, in which Cafe an Equality will ftill be observed, if he who undertakes to make good the Lofs, fhall receive a greater Proportion of the Gain, than otherwife he fhould have had. But that any fhould bear the Lofs, and not partake of the Gain, is for this Reafon not to be allowed of, becaufe a common Share in the Advantages is a Thing fo effential to Partnership, that it cannot fubftitute without it. And as to what the Lawyers fay, that where the Shares are not ex- pressly named, they are to be underftood as equal, 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, muft be regard'd.

XXV. When a Number of Ships are fitted out against Pirates by a joint Stock, the common Advantage confifts in their common Defence; and fometimes in taking of Prizes. But the Ships, and all that are in the Ships, are ufually appraifed, and the Value brought into a Sum total, that fo the Proprietors of the Veflels and Effedts, may each of them bear his Share of the Damages and Ex- pences, in Proportion to what they respectively have in that Sum, among which Damages and Expenfes thofe for curing the wounded are to be reckoned. All we have hitfterto faid, is agreeable to the Law of Nature.

XXVI. 1. Nor does the voluntary Law of Nations feem to make any Altera- tion here, only in this one Particular, that where the Contributions are unequal, in the Clofe of Book XXIII. of three Companies of Partizans, who, in a prefling Nefcefity of the Commonwealth, undertook to go to Spain with Provisions, at their own Expenfes, for the Army of the Scipios. Thofe Partizans, among other Terms, required that the Publick fhould make good their Lofs, in Cafe any of their Ships were taken by the Enemy, or were left in a Storm. If our Author de- signed to refer this to a Mixture of the Contract of Partnership, and the Contract of Insurance, of which he fpeaks in the foregoing Paragraph, the Example would be nothing to the Purpofe. For the Agreement made by the Spanish People with the Partizans, was a Farm, with a Mixture of a Contract of Insurance, where there was no Partnership. The other marginal Reference is to Aristotel, who fpeaks of an Alliance between the ancient Phi- cans and the Carthaginians, by Virtue of which they were obliged to defend each other, particularly in their trading Voyages, Polit. Lib. III. Cap. I. p. 348. Tom. II. Edif. Paris. The Philofo- pher elsewhere calls fuch Alliances, Συμμετέχους φιλοσ. Ethic. Nicom. Lib. VIII. Cap. XIV.

2 See fomething like this in L. Wifemys, Lib. V. Cap. V. Grotius.
yet if they are confented to, and there be no Lie in the Cafe, 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 Civill Law, before Dinclefen's Conftitution, no Action was allowed in Court against such an Inequality; so neither now among thofe who have no other common Law than the Right of Nations, can there be any Redrefs or Contrainft on that Account. And this is what Pompônius means, when he says, that in Buying and Selling one Man may naturally over-reach another; where the Word may does not signify that it is jufi and lawful fo to do, but only that it is fo far permitted, that there is no Remedy provided for it againft him who is refolved to infift upon, and justify himself, by his Agreement.

2. But naturally, in that and some other Places, is put for what is conform to the received Custom. In which Senfe Nature is faid, by the Apostle St. Paul, to teach us, That if a Man have long Hair it is a Shame unto him. (1 Cor. xi. 14, 15.) when at the fame Time it was no-ways repugnant to Nature, and was what several People practifed. So the Author of the Book of Wisdom calls Idolaters, but not all Sorts of Men, φυλάς, Vain by Nature, (Chap. xiii. 1.) and the Apostle St. Paul, οὕτω φύσις ἀργες, By Nature the Children of Wrath, (Ephes. ii. 3.) speaking not fo much in his own Perfon as in that of the Romans, among whom he then lived. And Euenus, an antient Poet,

The Habit, Sir, that Care and Time produces,
Is what the World files Nature, and I think it's so.

In which Senfe too there is an old Expreffion of Galen, θαλήθη ψοφος τὰ ὦψ, Custom is an acquired or a fecond Nature, (Lib. 3.) So likewise Theocles, Τῶν ῥήματων πολλαγμον η ἀκρωτικον φύσιν, Human Nature is above Law, (Lib. 5. Cap. 84. Edit. Oxfam.) So the Greeks call Virtues and Vices which are become habitual, παρεμαζομένη, Naturalized: And we read in Diodorus Siculus, φύσις εξερχόμενη, When Nature, that is, the Strength of the Mind, is overcome by Nefcity. Thus Pompônius, the Lawyer, when he had faid, that according to the Roman Law, the fame Perfon, if of the Rank of thofe who do not bear Arms, could not make a Will, and yet die inteftate, subjoins, that there is a natural Contradiction.
Of the Rights of

Book II.

Contradiction in those Things, tho' that Rule depended on the Custom of the Romans only, nor was it practised by other Nations, nor even by the Romans themselves, 6 in the Cafe 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 heat 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 Purpoze, 10 ις γάρ ε'in ευνωμον, &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 Ilibore's Life, 11 whom I lately mentioned, calls the Buying too cheap, and the Selling too dear, Αδίκως ος μιαν τε νημαν αληθευω το δίκαιον

had assigned each of them his Share difinftly, 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 fame 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. Byst-kerhoek is of Opinion that the Reason of this Decision is, because, by the Laws of the XII. Ta-bles, 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. (Municipitate familie aut per & liberam.) See that great Law- yer's Observat. Juri Romani, Lib. II. Cap. III. However, when I consider well the Words of the Law in Question, I think it is plain enough that Posthumus was designed to say there is a real Contra- diction in supposing one and the same Perfon to die intestate, and yet have made a Will, ις νυν ανυβριμαν μαν παταρι επαινα in paganis & etiata & intestate δικαιος; earumque rerum naturaliter inter se pag- na εται. It is not at all probable, as James God- froy 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 fift Words of the Rule, and it is impossible to make Choice of Terms more strong, for expressing a Contradiction founded on the Na- ture of Things. I easily conceive that the Notions of a facile Philosophy might hinder that Lawyer from comprehending, that it is indeed a Contra- diction that a Man should make a Will, and not make a Will in Regard to the fame Goods, but he may dispose of certain Goods by Will, and let others fall to his lawful Heirs as if he did die 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 Remain- der was not mentioned. We can hardly form a Judgment of this but by Circumstances. How- ever 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 Godfroy thew us, that fuch 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 Apperance of Reason, he under- stands those Words, cunctum in paganis, that is, bini. There was also some Exception in regard to the Estates of Persons who did not bear Arms. See the following Note of the Author.

6 Nay, and often too in the Wills of those who are not military Men, where any Dispute arises about an inofficious Will, a Will which entirely leaves out, or very lightly provides for, those who ought chiefly to be considered, L. Mater. L. Num ef- f. L. circa. D. De inoff. Testament. As also L. cum duobus, C. de inoff. testis, as before. Gro- tius.


7 Dioclesian and Maximin, Cod. Lib. IV. Tit. XLIV. De residendia Venditum, Leg. VIII.

8 Festus: Hages Ready (Cociunen) seem to be called fe (2 Cautusions) from their Telingnthes and Hag- ing, 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. pre Civibus: Diu coecons- tus effi, He was a good While haggling about its. Grotius.

See the Note of Gronovius on that Verse of Plautus,

Visum est, nihil coci est; fes cujas? Non dico amplius.

Amint. Ad. L. Scen. III. ver. 51. and Mr. Bur- man's Note on the Passage of Quintilian, quoted by our Author.

9 De Benef. Lib. VI. Cap. XV.

10 Paraphrasing on Ethic. Nicon. Lib. V. Cap. V.

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.
CHAP. XIII.

Of an Oath.

1. In every Nation, and in every Age, an Oath has always been of the greatest Weight and Consideration in Promises, Agreements, and Contracts. For, as Sophocles says in his Hippodamia,

"An Oath with sacred Awe dothrouse the Soul,
And thus restrains her from the double Mischief,
Of angering Friends and of offending Heron."

Our Ancestors, says Cicero, 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.

Infomuch that 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 there, in his Story of Glauce, Epicydides, who had only deliberated with himself, whether he should falsify the Oath he had taken, of being true to a certain Truth repoizd in him; where that Author produces the Veris of the Priest-efis of Apollo,

\\n
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 preferred by Stobæus. The Original, of which our Author has only given us the Translation, stands thus,

"Οφνα χαλίον, Διώκες γαρ φολανον,
Φιλάντον προεπέστη, η μεκλεύον συμφέρον.
Flavileg. Tit. XXVII.

3. De Offic. Lib. III. Cap. XXXI.

4. "Όρυξ έτε δι εξώειν ὅπωρας αὑτήμενης
Περιέχει, ἵνα σε μου ἑλληνικόν διάλογον.
Thurgoa, v. 231, 232.

5. See Servius, in Excerpt. Fuldens. upon I. Αε-


nìd, Grotius.

I do not find any Remark to this Purpose in Servius's Commentary on the two first Books of the Ænìd, to which only Peter Daniel made Additions from the Manuscript in Quetioin. Vir-

gil himself says, in his Georgics, that the Romans were sufficiently punished for the Perjuries of the Trojan Nation, from which they claimed their De-

scent, and alludes to the fabulous Account of La-

mekon's Treachery in his Dealings with Apollo and


Neptune.

Satis iam pridem sanguine nostris
Laomedonice laetus perjuria Trojoe.


On which the ancient Commentator says not one Word. So that our Author may have confounded the Comment with the Text.

4. L 6 But
3. Cicero says very judiciously and well, that An Oath is a religious Affirmation, and whatever is promised after such a Manner, calling GOD, as it were, for a Witness to your Words, ought punctually to be performed. But as for what he adds, and this we are to do in Regard to Honour and Justice, and not out of any Fear of the Anger of the Gods; for there is no such Thing incident to their Natures. If by Anger he means a Passion or Disturbance, he is in the Right of it; but if he excludes Defile or Will to make the Guilty suffer, it is no Ways to be allowed, as Lucanian judiciously proves. Let us see now whence this sacred Power of an Oath ariès, and how far it extends.

\[ Quae jurat mens est; nil conjuravimus illa. \] Epist. 21. ver. 135.

* It is the Mind that sweares; with that we never sweare.

Taken out of Eurypides, who said in his Hippolytus,

\[ Jurata lingua est, monte juravi nihil. \]

* Jurata lingua est, monte juravi nihil.

My Tongue 'twas sweare, my Heart did nothing sweare.

But if any one willingly sweares, 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 pronounces the Words of an Oath, yet if it be not with an Intent to sweare, he shall not be obliged by that Oath, but he sins by sweareing 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
Chap. XIII. War and Peace.

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, is perjury. As also what Calphee, in Homer, swearing to Ulysses, says,

"Alloa ta min viz wj y phælegam.

But what I think I speak.

2. Yet it has this Exception, if he who sweareth 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: in that Sense wherein he thinks it is taken by those with whom he deals; and this is what the fame Cicero alleged; 4 You are obliged to swear to what you swear, if you swear in such a Manner that he who requires or administers the Oath, is perfuaded 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 Artificial to elude the Force of the Words of the Oath. And St. Auftin, 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 Eutropius, 7 Tho’ the Words of an Oath be never so crafily contrived, yet GOD, who is the Witness of the Conscience, takes it so, as to, when we swear, understands it. And this is what they call 8 Liquido jurare, To swear with a safe Conscience. And therefore Metellus did well in refusing to give

III. (1) De Off. Lib. III. Cap. XXIX.

2. Ohdif. Lib. V. v. 188.

3 St. Austin, Epift. CXXIX. speaking of a Prisoner of War, who going upon his Parole out of the Carthaginian Camp, returned thereto again immediately, and went to Rome. Tho’ who removed him from the Service, 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 Trent, Conv. Tit. III. Edit. Sirmonl. And in Hynocrates’s little Tretice De diversa Libatib & Tethorkè, upon Interrog. VI. where, agreeably to his Opinion, it is very justly said of GOD,

Qui non ut juras, fed ut is jurasfeta patovit
Guis juras, audit: Sic es utique reus.

Who does not mind what you do really swear,
But what the Person whom your Oaths concern
Did think you swear, 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 me to mean. Gratius.

4 Quod enim suum juratum fuit, ut mens (differens) consensui fuerit spectaret, id jurandum esse. De Offic. Lib. 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 differens, was in the common Editions in our Author’s Time, is not in the Manuscripts, nor in the first printed Copies. See my second Note on Pufendorf, B. IV. Chap. II. § 15.

5 Epift. Lib. IV. Cap. XLII. Num. 2.

6 Epift. CXXIX.

7 Lib. XI. De humana natura, Cap. XXXI. 1. It is quoted, Conuf. XXII. Lyoff. V. C. qonunmncv, Gratius.

8 Donatus upon that Passahe in the Fair A-
dition.

Quin et forte opus ad herum jure jurandum mini,
Non apponiffi ut liquidis pofium. (IV. 3, 12.)

Because if my Father puts me to swear whether I laid it there or no, I may do it with a safe Conscience. Liquids, that is, paré & manifesti, openly and plainly, Nicetas, in his Life of Alexander, blaming Andronicus Commenus’s Deceit, says, Xifwv µε διαστοβιναι, &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 catched at Words contrary to their Design and Meaning, τοις δημοσιοι τινες θυσιας, as άς μνμα τη μονατι, Sticking on what was said, as Files upon a Sort. The Court of Arcadius did very heinously offend against this Rule, which made a Person who had come to Confession, to be murdered at Chalcedon, tho’ they had upon their Oaths promised him Safety, Zovzimus, Cap. V. Add to this what is below, Chap. XVI. § 2. Gratius.

Concerning this Manner of Speaking, liquids jurare, see Duxarn’s Diffina, antwrpf. Lib. I. Cap. II. Our Author, deceased by his Memory, atributes to the Emperor Alexius, what Nicetas says of Andronicus Commenus, who afterwards succeedethed 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 one Passahe 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 Ηωονεμα, which has been since changed for Ηωονεμα; the Corrector thinking, no Doubt, he had thus mendef a manifest Fault in the Impression. But the Fault is relied by Zovzimus, Lib. V. Cap. XVIII. Edit. Cellar. The Historian is there speaking of the Favourite Eutropius, as remarkable for his tragi-cal End as for his surprizing Promotion.
his Vote with an Oath, for passing the Apulian Law; 9 tho’ there were other Senators, who, under Pretence that the Law was null, because unduly propounded, alleged, that the Oath was to be underfoot with this tacit Restriotion, that they approved the Law, on Supposition it had been duly propounded and enacted.

3. For tho’ in other Promises some tacit Condition may be supposed, which may abolve the Promiser, 10 yet in Oaths no such Thing is admitted; to which that remarkable Expression of the Apostle to the Hebrews is admirably pertinent, GOD willing more abundantly to shew unto the Heirs of the Promise, the Immutability of his Counsell, 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 ἔδειξεν is properly rendered, as plain speaking is called Truth, 11 Dan. vii. 16. viii. 26. x. 1.) we might have a strong Conformation. To understand which Words, we must know, that the Pennen of the Holy Scriptures do often speak of GOD, ἀνθρώπων ἄνθρωπος, 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 repent, as often as he does otherwise than his Words seem to imply, 12 by Reason of some Condition tacitly underfoot, which Condition then ceases, Ter. xviii. 8. You may find Instances of this Kind in Gen. xx. 3. Exod. xxxii. 14. 1 Kings xxii. 20. 2 Kings xx. 1. 1 Sam. 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 ἔδειξεν, 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. vii. 2. Josh. xxiv. 27. Josh. lviii. 11. Hoph. ii. 2. 12 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 Immutable- ility of what GOD had declared he would do, a Promise, because it gives a Right to the Person to whom it is made; and an Oath, because it admits of no Conditions that are tacit, or any Ways obscure and concealed; as we find Psal. lxxxix. 30. 31. 32. 33. 34. 35. 36. But it is another Case, if the Nature of the Affair plainly discovers and points out any Conditions; to which some refer that of Num. xiv. 30. Ye shall not come into the Land, concerning which I will 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 Potestie 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 Surprize. For if it be certain, that he who swore 15 supposing a certain


10 The Refpect 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 suspicing 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 to 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 Cave in Quetion 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 Promiser made without an Oath? Our Author in this Place, and all along, reasons on a fallae Sup- position, viz. that an Oath contains two distinct Obligations; and in some Measure changes the Nature of the Act to which it is added; a Suppo- dition destroyed in the Chapter of Pufendorf already quoted, which answers to this.

11 Our Author thus explains himself on this Pas- sage, in his Annotations, 14 "We say improperly a Person deceives (Thou?) when another mis- takes, for Want of understanding of what is said. Thus the Prophet Tzaddik deceived Tzaddik, 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 de- cided; but to repent, is to change what he has or- dered, whenever he pleases. Gratian has put this in Canz, XXII. Quod. IV. But pray explain it as in our Text. Grotius.


14 Add Job xii. 1. Hosea ii. 2. Grotius.

IV. (1) As Hippeutis, whom we spoke of just now;
certain Fact which really is not as he supposed, and that unless he had believed so, he would not have sworn, that Oath shall not bind him. \(^2\) But if it be doubtful, whether he would not have sworn, tho' he had not been thus mistaken, he shall then stand to his Words, because the most simple Interpretation is what is most agreeable to an Oath.

2. And hither I refer the Oath which *Joshua, \(^3\) and the Princes of the Congregation of *Israel, made to the Gibeonites; they were indeed deceived by the Gibeonites, who pretended to come from a far Country. Yet it does not thence necessarily follow, that if *Joshua and the Princes had known that they had been their Neighbours, they would not have spared them. For as to what they said to the Gibeonites, Peradventure you dwell among us, and how shall we make a League with you? It may be taken in this Sense, that the Gibeonites were asked what Manner of League they desired, whether to be admitted as Allies, or as Subjects; or it might be to shew, that it was not lawful for the Jews to enter into an equal Alliance with certain Nations, but not that it was prohibited them to save the Lives of those who surrendered themselves to them. For the divine Law which commanded them to destroy those Nations, \(^4\) being compared with another Order, may be underfooted with this Limitation, Unless they immediately, and upon the very first Simmons, 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 faved; and by the Example of Solomon, who received those who were left of the Canaanites into the Number of his Subjects, and made them tributary.

3. And to this Purposé 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 Purposé 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, infomuch 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, \(^7\) left whilst he was blaming the Perfidiousness

now, upon that of SOPHOCLES in OEdipus Coloneus.

\(^{2}\) *Ath. 6 *apóstos.

\(^{3}\) Ἠρώδης ἔστηκεν Ἦλλην ἀλλήλων προσ \\nεἰς ἁγίαρ γινωσκόμεθα ὑμεῖς.

\(^{4}\) (Ver. 216, &c.)

One Impostor upon another
Is not with Thanks but with Rain paid.

The Scholiast delivers himself thus, καὶ ὁ ἅγιος καὶ ὁ μέτρον. 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 demed Flyth. And to this Purposé is that Passagь:

\(^{5}\) οἱ γλαύκοι ἵμαρτον, ὁ καί διαὶ ἀνακαλεῖσθαι. My Tongue was fmere, my Heart did nothing favor.

For he himself was deceived when he favored. Grotius.

\(^{6}\) In the third Verse here quoted from SOPHOCLES, the best Editions, as that of Stephens, read αὐθεντώς ἵμαρτον. The Sense of the whole Passage I take to be this, "He who expostulates to the Danger of being fraudulently treated, by the Perjor 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 Learner."

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 Reafon subjoined to the Command of destroying them, Exod. xix. 33. Deut. vii. 4. For that Reafon sealed in those who undertook to observe the Precepts of Nabi's Son, and pay Tributc. So MAIMONIDES and SAmON Mi-cost, and MOSES DE KOTES, in Præcep. jubem. XV. and XVIII. are of Opinion.GroTIUS.

\(^{5}\) And by an Infallible in the Inhabitants of Gazer, in the History of JOSUA xvi. 10. And that the Garganes, or Gezzerites, remained till our Saviour's Days, appears from the Gospel, Matth. viii. 28. For these submitted at the very first, and therefore are not reckoned in the Catalogue of Enemies, Deut. xvi. 17. If. x. 1. GROTIUS.

No Reafon is assigned why the *Israelites did not drive out the Inhabitants of Gezer. Nor do we find any Account that the Garganes, or Gezzerites, submitted at the very first. No Inference can be drawn from the being omitted in the Catalogue of Enemies; for we find such Omisions elsewhere; the sacred Historians sometimes speaking only of the most considerable of those Nations, under which the Reft were comprehended. See the late Mr. RELANDS PedaflS, Lib. i. Cap. XXVII.

\(^{6}\) De Offic. Hic Cap. X. GROTIUS.

\(^{7}\) This Reafon doth not hold good, for the Moment a Man is deceived in an Agreement, he is not guilty of Perfidiousnes, if he doth not stand to what he had promised only on Supposition that he was not deceived.
of others, be himself should be worse than his Word, and forfeit his own Honour. But however, the Gibeanites did in some Measure suffer for their Fraud, being immediately, upon their Submission to the Hebrews, adjudged 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. And the Tribes therefore were not perplexed, 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 it is one Thing to give, and another not to demand again what is lost and gone. Of this Fact St. Ambrose speaks thus, 

1 Which Indulgence of theirs was not without a Punishment in some Measure fallible to the ungodly Punishment, whilst they were only permitted to feel themselves Wives, and not to enter upon that State with the sacred Solemnity of lawful Matrimony. Not unlike this was that Request which the Achbeans made to the Romans, who did not approve of some Things which they had done, and confirmed by Oath, that the Romans would be pleased to alter what they had a Mind to; but not to oblige the Achbeans by any religious Vow to make void what they had effectually by Oath.

VI. That an Oath may be binding, the Obligation must be lawful: For, if a Thing promised upon Oath be forbidden, either by the Law of Nature, or 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 Ptolemy the Jew said well in this Cafe, that the Oath is a sacred Thing, and deferves the greatest Circumpection and Care in the Management of it, as being the Seal and Suitability of just and honest Resolutions. For be 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 Refrained. And therefore let him refrain from such Actions, and implore the Mercy of GOD, which is essential to him, by asking Pardon for his rash Oath. And it would be down-right Folly, and unaccountable Madness, to close a double Evil when one might be excused for half. We have an Instance of this in David, who spared Nabai the son of him that had sworn to kill him. And Cicero gives such another Precedent in Agamemnon's Vow, and Demosthenes, in the Conspiracy of the Decemviri to seize upon the Government. Accordingly Seneca says, 3

8 As were the Brutians formerly by the Romans, Gellius, X. 3. Festus, in the Word Brutianu. 2 Grotius. V. (1) See what I have said on Pufendorf, E. IV. Chap. II. § 13. Notes 1, 2, &c. 2 Josephus loc. cit. (Antiq. Jud. Lib. V. Cap. II.) The decrees of the most holy. 3 Josephus says, Why should I admonish to fear a religious Mind with unjust and capricious Fears, because he afferts that you ought to make a Conference of granting what you cannot take away again without rendering yourselves odious. (Lib. X. Epist. LIV.) Grotius. 4 The Words of Symmachus are Part of a Petition to the Emperors Valentinian, Theodosius, and Arcadius, for obtaining Leave for the public 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. 31. 5 VI. (1) This Matter is handled very well by St. Ambrose, De Offici. I. and some other Authors, from whom Passages are inserted in Curs. XXII. Quoef. IV. And to the same Purpoze is the fenvent Canon of the Council of Nidra, in Conc. Gall. Tom. III. and many Things in Hinschmar's Works. 2 De specialibus Legibus. (p. 771. Edit. Parif.) Grotius. 3 He maintains, that Agamemnon ought not to have sacrific'd 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 Hilarion makes Cains 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, yet he, not to relin' 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 abject. Antiq. Rom. Lib. XI. Cap. XI. p. 682. Edit. Oxon. 5 Here, Oct. v. 430, 481. 6 Prefare
Chap. XIII.  
War and Peace.

Preparare sutor pacce me tacitam Fiden.
Si fellere careat: Interim fœsus est Fides.

(Where *Interim* signifies *Interdum*)

What I have promised, I own I can perform,
If there's no Crime in't; sometimes it's a Crime
To keep one's Promise.

And St. Ambrose, "Some Promises cannot be complied with, nor some Oaths observed, without acting against a Principle of Duty." And St. Augustine, "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. Boffi teach us, in his second Letter to Amphibalus."

VII. Nay, 'tis what is promised be not illegal and unjust, but only hinderers or 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 Paffage in that Philo "Judaicus I just mentioned, not impertinent to the Affair in Hand, and is very well worth our inferring here, ὅτι ἂν τινὰ φίλον ἀφαίρεσι, &c. There are some People of so morose and unfriendly 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 them themselves for any as long as they live. What he says, that some People swore, that they would never do this or that Man any the least Piece of Service, the Hebrews called, אָדָמָה יְרֵד, that is, צְרִיךְ אוֹבָחָה, the "Vow of Affiance, or Beneficence: An Oath to do Good," Lev. v. 4. The Form of this, as the Rabbins tell us, was רְשׁוּת נַחֲמֵה לוֹ שָׁמַע נַעֲמָה, or נַחֲמֵה נַחֲמֵה כְּלִי נָכְבָה כְּלִי, or רְשׁוּת נַחֲמֵה לוֹ שָׁמַע נַעֲמָה, All the Advantage that you might receive from me, be dedicated to GOD; agreeable to which is the Syriac, in the old Version of Matthew xv. 5, תָּפְרַע צְרִיךְ טַקִּיָּה לָשׁוֹנָה, in Greek διαφωτίζω τοῦ και ἔμβλημά οὗτος, that is, It is a Gift consecrated to GOD (for this is what is meant by בַּרְדָּה יְשֵׁב, by whatsoever thou mightst 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 τέμνω, to honour, signifies to affliit and be kind to, as appears by the parallel Place in St. Mark, and from St. Paul, I 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.

6 Oftr. Lib. I. Cap. I.  
7 De bono Conjugali, Cap. IV. This is cited in the aforesaid Quafion. See too GAILLIUS, De pace publica, Lib. I. Cap. IV. § 16. and the Story of Abibus, in PAUL WARMARE, Lib. XI. Cap. XXVI. GROTIUS.  
VIII. (1) See Note I. on PUFENDORF, B. IV. Chap. II. § 10.

2 Such an Oath was that of Honorius, who swore that he would never make Peace with Attila, as ZOZIMUS relates the Affair. See C. amongst several other Things in the above-mentioned Quafion, and the Council of Iberia in Conc. Gall. Tom. III. Canon VII. and HINCMAR too in the aforesaid Treatise, at Interrog. XIV. L. De dicturis, at Interrog. VI. and XIV. GROTIUS.  
3 De speciâli. Legib. p. 771.  
4 See BARA KAMA, Cap. IX. § 10. and the learned CONSTANTINE's Observations there. GROTIUS.  
5 The Peace of Lecetium speaks of Oaths by which a Man rashly engages to do something in Favour of another, which it is not in his Power to prome, not of Oaths by which a Man swore not to do good to a Person. See MR. LE CLERG's Comment on the Text.  
6 See this more at large in his Author's Notes on St. Matthew xv. 5, as also SEDDEN, De Jure Nat. & Gent. secundum Hebraeis, Lib. VII. Cap. II.
IX. As for what is impossible indeed for the present only, or because one supposes it to be so, the Obligation continues in Supreme; but so, that he who swore upon such a Supposition is obliged to take all the Care he can to render that, which he has promised upon Oath, to become possible.

X. The Form of Oaths may be different in Words, but the Substance is the same. For all are understood to appeal to God in this Manner; for Instance, Let God be my Witness, or Let God be my Avenger, which both amount to one and the same Thing. For 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 Perfidious-nets; 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, πιστεύεται γὰρ ἵνα ἔλθῃ τὸ κείμενον & Περίπλακα, Every Oath ends in a Curfe 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 Lexy, 2. Tit. Jupiter, ita illum foris, ut ego hunc Percurm. Do thou, O Jupiter, smite him (if the Violater) as I do this Hog. And in another Place, 3. Deos precatus, ita facimint, quemadmodum ipsum agnum mañfætavit. He prayed the Gods fo to kill him as be did that Lamb. And in + Polybusys and Fesus, Σέι σε ονοσίμες, ita me Diesipiter ojiciat, ut ego hunc lapidem. If I knowingly deceive you, let GOD conf me away as I do this Stone.

XI. And by the Name of other Things too, with a Regard to GOD.

X. (1) He is obliged 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 Abram sent his first Servant to Chorbin, 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 he free from his Oath, Gen. xxxvii. 8.

XI. (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 Chagamus Anaru. in Menander's Excerpt Legat. Grotius.

Some Doctors distinguish between taking GOD to witness and Swearing. See Mr. Bomber's Sur Ecclesiasticum Prostitutionum, Lib. II. Tit. XXIV. § 5. Et. But they have not observed that what our Author says here; which overthrows their whole System.

2. In their Treaty with the Abians, Lib. I. Cap. XXIV. Num. 6.

3. In the Promise made by Hannibal to his Soldiers, for encouraging them, Lib. XXI. Cap. XLV. Num. 8.


4. In his Treatise De abstinenti Animal, where he says Rhadamantus made a Law, ordering the Cre- tans to swear by Animals, Lib. III. p. 283, 286. Edit. Lodg. 1610. But the superfluous Philo- sopher 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 Socratici, (not Socrates) an ancient Writer of the History of Cret, he says, that Rhadamantus was the first who forbid forswear- ing by the Gods; and ordered that his Subjects should swear by a Gods, a Dog, or a Ram, and such like Animals. On ver. 512.


4 expressly
expressly made in the Name of GOD; but because the Jews did not so much regard these, being professed with such an Opinion as he was, who said Sceptrum non potuit esse Deus, 7 he does not believe the Scepter to be the Gods: he shews that even these are true Oaths. For, as Ulpian has very well observed, He who swears by his own Life, seems to swear by GOD; 8 for he swears with an Eye and Respect to some divine Power: So CHRIST tells us, that he who swears by the Temple, swears by GOD who prefides there, and that he who swears by Heaven, swears by GOD, whose Throne it is.

2. But the Jews Rabins 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 Kepa, or εν το ταύτη. 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 APPIAN. 9 And for the same Reason, I suppose, it was that the Greeks called the Eastern People, καθαροι, 10 which Word we find in ESCHYLUS 11 and EURIPIDES 12; and καθαρός of the same ESCHYLUS. CHRIST, in the above-mentioned Parable, opposes this Error. And TERTULLIAN 13 informs us, that the ancient Christians used to swear by the Life of their Prince, a Thing more auguft 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 even by all Mankind.

XII. Nay more, '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. 4 And tho' we see indeed, that the holy Men of Antiquity have never proposed an Oath in that Form, much less have taken it themselves, which I admire that Duarenus should have allowed; yet, if they could...
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 Isaac and Jacob, Gen. xxxi. 53. This is what St. Athine says. Even he who swears but by a Stone, if he swears falsely, is punished: And then, The Stone does not bear you feak, but GOD punishes you for your Deceit.

XIII. 1. The principal Effect of an Oath is to end all Disputes, πάντα αἰτιόγειως ἀφίκεται ἐν βεβαιώσει ἐν θεῷ, says the divine Author to the Hebrews, An Oath for Confirmation is the End of all Strifes. Not unlike to this is that of Phile, ἐγὼ μάλα ἐμοὶ τοῦ πλήσθαι οὐδεμίαν, An Oath is the Testimony of GOD in doubtful Cases. And that of Dionyfius Haliartanfsis, τελέιος ἦν ἡ τίτι θεασος τοῦ πολέμου, The utmost Assurance that either Greeks or Barbarians can give, and which no Time can efface, is taken by their Oaths and Vows they make the Gods the Sureties of their Contrafs and Agreements. So was an Oath among the Egyptians, τό ὑπὲρ τοῦ αὐθανάσιος τοῦ, The greatest Pledge of human Fidelity.

2. He then who swears is obliged to two Things, First, That his Heart agree with his Words, which Chrysippus terms αὐθανάσιος, To swear truly. Secondly, That his Actions answer his Words, which he calls Δεικνύς, To swear well; he who offends in the former Cofe is said, τοῦδε ἄλλως, To swear falsely; he who in the latter, Δεικνύς, To be perjured, as the fame Chrysippus nicely distinguishes them, tho' sometimes they are confounded.

XIV. And indeed, if the Matter be such, and the Words so conceived, that they regard not only GOD, but also some certain Perfon, that Perfon, 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 Perfon, by conferring any Right on him; or if they do respect him, yet so as that somehow may be opposed to his Claim, then the Force of the Oath will be such, that that Perfon shall acquire no Right, but that the Swaref shall nevertheless be obliged before GOD to make good his Oath. 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 4 restored by the Prophets, and punished by GOD, 3 for breaking-


4. Sermon XXVIII. De verbis Apostolis; it is quoted, C. Ecce dixit, Cauf. XXII. Quæst. V. Grofius.


2. Procopius Persec. "Οὕτως ἐπὶ τῶν ἐν αἰτιόγειωσιν. &c. An Oath, which is looked upon by all Mankind to be the laft and strongest Pledge of mutual Faith and Vercacy. Grofius.


5. The Pangage of Chrysippus is preferred by Stobæus, Sermon. XXVIII. p. 156. Edit. Genev. 1699. Our Author has quoted and explained it, in his Notes on St. Matthew v. 17. But this is at the Bottom no more than a Dispute about Words, of which Sort we have a great Deal in Stoick Philofophy.

6. This false Swearing is forbidden. Exod. xx. 17. And in the Note on Levit. vi. 2, as the Hebrews affirm, praep. jubilat. CCXL. Grofius.

XIV. (1) St. Austin, in his 224th and 225th Epiftles, tells us, that an Oath, tho' we were drawn into it by Force, ought in Reverence to GOD to be kept. Grofius.

See Puffendorf, B. IV. Chap. II. § 8. I might here add, that, if our Author's Hypothefis, in Regard to the double Obligation he conceives in Promises made with an Oath was well grounded, I do not see how he could fay, as he does below, § 20. that a Superior has a Power to annul fuch Sort of Oaths. For, since the preuent Quifition 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 uncontrahed, unless GOD had declared his Will to renounce his Right, if I mayufe the Expression.


3. This Example is of no Service toward eftablifhing our Author's Hypothefis. 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 forever the Fear was by which the Perfon was obliged to make it. See B. III. Chap. XIX. § 11. So that the Oath which bound the Treaty between King Zeidilab and Nébaodaélæn, would only have rendered the Violation of that Treaty more criminal. Secondly, Zeidilab probably designed to forge truly, and considered the Treaty as good and valid; as he would
ing their Faith, which they had sworn to the Kings of Babylon to maintain invi-
able. Cicero commends Pompeius, the Tribune, for keeping his Word and Pro-
mise, 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, but also those six ten that Cicero mentions, were obliged too to
return to Hannibal, for this was what their Oath had laid upon them.

XV. 1. Nor does this take Place only in Relation to publick Enemies, but in
Regard to every other Enemy; for it is not much the Perions 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 Appius, 4 as τεραν
poznius χορος τιτανος ης νομος, The Romans think it no Point of Honour or Duty
to observe either Faith or Oath to Tyrants.

2. But tho', by the Law of Nations, there is a great Difference between an
Enemy in Form, and a Pirate, as we shall there onter, yet will not that Differe-
ence be of any Weight in this Cafe, where we have to do with GOD; for tho' the
Condition of the Peron be such as he cannot claim a Right, yet that signifies
nothing, for it was GOD we are engaged to, and therefore an Oath is sometimes
called a Vow 5; 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, 6 is to be restored to him, 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 Peron 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 underflood in the plainest Sense, and so as they
may have a real Effect. And therefore he who came back to his Enemy privately,

would have done that which he might have extor-
ced, 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 Domi-
nions. So that no Consequence can be drawn from thence, against such as have no Delign of
Swearing truly, and do not think themselves ob-
ligated to stand to an Agreement where Force is
employed. Thirdly, GOD had declared to Zedekiah,
by his Prophets, that he required that Prince shoul
diligently stand to what he had promised the King
of Babylon; against whom he could not rebel with-
out the highest Impudence.

4. That Tribune having accused Lucius Manlius
of holding the Dictatorship beyond the Time pre-
ferred by the Laws, the Dictator's Son, afterward
named Tolumnius, went to Pompeius, and find-
ing him alone, swore he would kill him if he would
not promise on Oath, not to molest his Father.
Whereupon Pompeius delisted; to which the
People consented, as soon as they knew his Rea-
on. Dr. Offic. Lib. III. Cap. XXXI. See Livy,
Lit. 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. IIII. Chap.XXXIX.
§ 6.

6. Tho' ten Prisoners who returned to Hanni-
lai's Camp for one Moment, under Pretence of
having forgot something, thereby committted a
Fraud, which would have rendered them guilty of
a Violation of Fidelity, even though they had not

sworn. See B. IIII. Chap. XXIII. § 13.

XV. 1. (1) Gregor., ii. *διεκολο. τον
(2) περατονιον αισθητον ενομον. Perjury
charges GOD with Neglect. Grotius.
2. De Offic. Lib. III. Cap. XXIX.
3. De Offic. Lib. III. Cap. VI.
(1515. H. Steph.)
5. Plutarch., in his Lyfander, επι τον παγ-
νικαλα. He, who decides his Enemy by an
Oath, confesses that he fears him, but defies GOD.
Grotius.
6. It is called to only improperly. For there is
in Reality a wide Difference between a Vow and
an Oath. See Pufendorf, B. IV. Chap. II. § 8.
7. Faciam. Deo, juramentum per Deam, says
our Author himself, in his Notes on Numbers
XXX. 3.
Leg. XXX. § 1. To an Ulfperer too, as the
Periogist did to OrBermus. Polybius and
9. Lessius is quoted for this Opinion, Lib. II.
De jfigliitiis & Jure, Cap. CLII. Num. 27.

and
and then went off again, did not, in the Judgment of the Roman Senate, satisfy his Oath of Returning.

XVI. Whether an Oath given to one who does not regard his Word be to be kept, explained by a Distinction.

XVI. 1. As to that of Accius, T. Pregifii fideum. A. Dyamnaque dedi, uque do indefeli cupidiam. 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, was grounded upon another's Promise, as upon a Condition to which our 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, admires himself to him in the following Terms,

Who to long Ages in the Records of Fame,
Shall stand a bright Influence of nicest Honour,
To false Carthaginians kept;

2. A plain Inequality in Contracts, naturally gives sufficient Caufe 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. And therefore the Psalmist reckoning up the Qualities of a good Man, adds this as one of them, He that seacareth to his Neighbour, and disjoints him not, the it were to his own Detriment.

XVII. But it is to be observed, that there is no Right transferred to the Person with whom we deal, on the Account of some Defect, as arorefaid, 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. For as the Goods of the Decreed pass to the Heir, so do also the Charges and Incumbrances, but not any other Obligations, which were only the Refult of meer Piety, Gratidude, or Sincerity. For there have nothing to do with what is strictly termed Right, as it is now establishing, as we did not forget to observe elsewhere.

XVIII. But also where there arises no Right to the Peron who receives it, yet if the Oath feemns to respect the Advantage of a third Person, and that Person will not accept thereof, the Oath shall not oblige him who gave it; nor if the Quality

XVII. He who is bound to GOD alone does not oblige his Heir after him.

XVIII. It is no Pa satisfactory to keep an Oath, or Oath, to him whom we do not desire that it should be kept; as if that Quality be carried on as a Resid of Condition, under which, and in Consideration of which the Oath was made, conf.

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 fined, put under a Guard, and carried back to Hannibal. Lib. XXII. Cap. LXI. Num. 4. See Aulus Gellius, Noct. Att. Lib. VII. Cap. XVIII.

XVI. (1) In Cicero, De Offic. Lib. III. Cap. XVIII.


De Bell. Punic. Lib. VI. v. 63, 64.

3. This is grounded only on the false Supposition of two different 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 answering to this, § 17. with the Notes in the second Edition.

XVIII. (1) Plautus, in his Ruid, I beg that you would discharge him from his Oath. (Act. V. Scen. III. v. 58, 59.) Grotrius.

2. See to the same Place in L. Si atua, § Grotrius. D. de exequiis, &c.

3. See to the same Place in L. Si atua, § Grotrius. D. de exequiis, &c.

of the Person ceases, in Regard to which a Man swore; as if a Magistrate shall cease to be a Magistrate, the Obligation ceases. In Cæsar, \textit{Curio} thus speaks to \textit{Domitius}' Soldiers, \textit{How is it possible that you should be bound by an Oath to him, who having thrown away the Ebugia of Power, and renounced his Command, is become a private Man, and a Prisoner under another's Power?} And pretendly adds, \textit{the Oath has lost its obliging Force, by the Loss of the Impofer's Liberty.}

XIX. \textit{It is an Inquiry too, whether an Act done contrary to an Oath, be only unlawful or void?} Where we must distinguifh, if our Faith only be engaged, \textit{the Act done contrary to our Oath shall stand good, as in a Testament or Sale. But the Oath shall not be of Force, if it be so framed, that it comprehends an absolute renunciation of any Power that do to Act \textit{and.} And these Things do naturally attend any Oath; whence we may eafily judge of the Oaths of Kings and ol Foreigners to one another, when the Act is not subjed to the Law of the Place.

XX. \textit{Let us now fix what Power and Authority Superiors, that is, Kings, Fathers, Masters, and Hufbands (as to what regards a conjugal State) are intitled to. And here the Superiors of our Actions 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 Perfon swearing, the other over the Perfon to whom he swears.

2. \textit{The Act of the Superior may refrain the Perfon swearing, either before he swears, by making such an Oath void, as far as the Right of an Inferior is subjed 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 \textit{Hebrew Law,} the Husband had Power to make void the Vow of his Wife, the Father that of his Children, fo long as they were under the Power of his Government. \textit{Seneca} proposes this Question, \textit{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, \textit{The fame Laws differ 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, supper, through Fear or Want of Judgment, shall be binding only so far as he, the Superi, approves of it. And upon this Foundation are built the Dispenfations and Abolutions, \textit{which Princes in former Times did exercife by themselves, which}}

\begin{footnotes}
3 \textit{De Bell. Civili. Lib. II. Cap. XXXII.}
4 \textit{Ibid.}
XIX. (1) That is, if a Person has only sworn not to do a certain Thing, as not to marry; or to do some fhew, without actually transferring his Right to it. See \textit{Puffendorf, B. IV. Chap. II. § 11.}

As when we give or mortgage a Thing to a Perfon, which was before given, or mortgaged, to another, by an Act, accompanied with an Oath, \textit{Mr. Vitriarius, in his \textit{Initiat. Juris Nat. \& Gen. Lib. II. Cap. XIII. § 28. brings the Example of a Prince, who, making a Treaty of Alliance with another, has sworn to conclude no fuch Treaty with any Perfon whatever, and afterwards should enter into an Alliance with a third.}

XX. (1) \textit{St. Augustin, Epift. CCXI. and CCXII. Grotius.}


3 \textit{Suetontius, in his \textit{Tiberius. XXV. And fo it was in Spain for a great While, as is observed by Ferdinand Vasque, de Sut. eri. creat. Lib. II. Sect. 18. Grotius.}

\textit{Suetontius} there speaks of a certain \textit{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 discharg'd him from his Oath. In the same Manner the Emperors \textit{Antoninus} and \textit{Felix} dispenc'd with the Oath of a Man who had sworn never to accept of any publick Post, and was afterwards created \textit{Dux} \textit{Carthaginiensis.} \textit{Diogenes Lib. I. Tit. I. Ad Municipalem, &c. Leg. ult. The Fact which relates to \textit{Spain, is not in the Section of \textit{Vasquez, quoted by our Author, the it treat of} several Thing but Cases where an Oath intervenes. I have in vain fought for it in several other Parts of that large Work, where he might have had Occasion to speak of abolving from Oaths. What farther inclines me to doubt whether there is any Thing like it, is, that the late Mr. \textit{Heritius, in a Note on \textit{Puffendorf, B. IV. Chap. II. § ult. tells us, that the Kings of Spain, as well as those of France, do at this Day abolv 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 O Power,
Of the Rights of

Book II.

Power, by their Consent, is now executed by the Heads of the Church, the more officially to prevent any Thing contrary to Piety 4.

3. So the Act of a Superior may be directed against the Person to whom it is sworn, either by taking from him that Right which he has gained, or if he has no Right, by forbidding him to claim any Right by that Oath. 5 And this may be done two Ways, either by Way of Punishment, 6 or for the publick Good 7 by Virtue 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 recompenced with the Right of that which was before dispuited 11 if the Agreement were made, after that Dispute began.

4. Yet may a human Law take away that Clog and Impediment, which itself had laid upon some particular Kind of Acts, if an Oath intervene, either in general Terms, or under some certain and precise Form; which the Roman Laws have done in such Impediments 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

4 See Note 3. on Puffendorf, B. IV. Chap. II. § 24. It is upon A priori Principles that some Protestant Doctrors, even at this Day, pretend, that if Princes have a Power to dispence 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 Præstabilitum," Lib. II. Tit. II. § 50. See also what he says, Tit. XXIV. § 23, &c. concerning other Things, in which the Protestant in this Case imprudently follow the Principles of the Canon Law.

5 If he had acquired no Right, the Oath is void of itself, so that there is no Need of a Dispensation.

6 A Criminal, for Example, is affauled 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' before given, with an Oath.

7 A Man, for Injustice, 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 whole Favour the Oath was taken, and who does not depend on him, of the Right he has thereby acquired, may, for good Reasons, discharge his own Subject from his Oath. And the other has no Reason to complain, when the Discharge is granted for just Reasons; because he knew, or ought to have known, that the Person who has sworn, could oblige himself only as far as his Sovereign should think proper, in such Things as are subject to his Direction. On the contrary, the Sovereign of him to whom the Oath was taken, cannot discharge him who took it, and whom we suppose not to depend on him. But he may deprive his own Subject of the Right which he had acquired by such an Oath; which, in the Main, comes to the same as if he who swore was discharged from his Oath.

9 He has no Need of it; since the Oath is null of itself.

10 This Reason is good, when there is nothing that can hinder a Man from contracting a real Obligation by Swearing. But when the Engagement is null, the Words of the Oath ought to have no Effect.

11 See Puffendorf, B. V. Chap. XI. § 76. Our Author here seems to follow the common Opinion, grounded on a Law of the Code, Lib. II. Tit. XVIII. § 5. When 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 Redress in Relation to a particular Case; nor doth it speak of all Sorts of Oaths, but of an Oath taken in Perjury (Juramentation corporali perditiuim), See Puffendorf, B. IV. Chap. II. § 65, 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 Relation to the Person pretending to be injured, or in Relation to the Injury itself which determined the Emperor to make the Oath void.

12 good, without design ing 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 Schuldist Lawer, mislating the Scene of this Refcript, perverted the Emperor Frederick II. to join it to 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, "Juramentation corporali perditiuim, in Tit. De Minors, &c. § 3. See also Cujus, on the Title of the Code, under which this Refcript appears, and Puffendorf, as above quoted, § 11. All this is derived from the Authority of the Canon Law, which, without having any Regard to the Civil Laws, by which an Act is declared null, teaches that the Oath joined to it, renders it valid, of what Nature forever it be. See Note 3. on Puffendorf, B. IV. Chap. II. § 19, second Edition, and Mr. Bohmer's "Jus Ecclesiasticum," Lib. II. Tit. XXIV. § 23, &c.
of Force in the same Manner, as it naturally would be if there was no such human Law, either by obliging his Faith only, or by giving also a true Right to another, according to the different Nature of the Acts, which we have explained in another Place.

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, of which we have some Instances in St. Paul, but to obligatory Oaths, which promise something future and uncertain. This is plain from the Opposition, in the very Words of CHRIST, Ye have heard it hath been said by them of old Time, thou shalt not swear by 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, that ye fall not into Hypocrisy, that is, that ye be not found Deceivers, for so the Word significat in the Greek, as appears 

\[\text{Ex illo Corydon, Corydon est tempore nobis.} \]

From that Time Corydon was Corydon indeed.

And in another like it, Ad illam diem Memmius erat Memmius. To that Day Memmius was Memmius. For the former Yeas and Nays signify a Promise, the latter the fulfilling of that Promise. For 

\[\text{Nai,} \text{ or Yeas, 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 fame Signification in the Syriack, \[\text{יו} \text{,} \text{ answering to the Rabbinical \[\text{י} \text{,} \text{ as does the \text{Arabic \[\text{ي} \text{,} \text{ as among the Roman Lawyers \[\text{ي} \text{,} \text{ and Quodini, why not? are Particles of Speech} \text{ that denote the Content of the Person to the Agreement that is propounded 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 Nai \[\text{,} \text{ of Yeas and Amen, that is, are certain and undoubted. And from hence arises that old Way of Expresseion amongst the Jews, Yeas, Jaffi Hominis, \text{ Nai of vaal, & non, eft non. An aenf Man's Yeas is yeat, and his No is no.} \]}

3. On the contrary, they whose Words and Actions disagree, are said to be Nai \[\text{,} \text{ Yeas and Nay, 2 Cor. i. 18, 19. That is, their Yeas is Nay, and their Nay is Yeas. So St. Paul himself expounds it; for when he said he did not \[\text{,} \text{ Lightness, he adds, his Word was not Nai \[\text{,} \text{ Yeas and Nay. For the Relations between the several Significations of the Word Nai,} \text{ writes thus, Some} \text{ derive it from the Greek, \[\text{Nai \[\text{,} \text{ Nay,} \text{ Nai cai ochi, and say that it imports a fickle inconsistent Creature. Now if Nai \[\text{,} \text{ Yeas and Nay, signifies Fickleness and Inconstancy, it will follow that Nai, vaal; \[\text{,} \text{ Yeas, and Nay, signify Con-}

4. So that our Saviour's Words imply, what \[\text{Phil the Jews express, Kalltqs} \[\text{,} \text{ baiocat, \[\text{,} \text{ agaien, &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.} \text{ And in another Place, O ye patefivai \[\text{,} \text{ yeas, so as to be considered,} \text{ The Word of a good Man ought to pass for a firm, unchangeable, and fin-

XXI. (1.) Rom. i. 9. &c. 2 Cor. i. 23. xi. 31. Phil. i. 8. Thess. ii. 5. 1 Tim. ii. 7. Grotius. 3 Virgil, Eclog. vii. v. 70. 3 Our Author has quoted this Example, either from Aquila Romanus, an ancient Rhetorician, who gives it in the very Words here set down, p. 19. Anh. Rhet. Lat. Edit. Pillovi, or from Martianus Capella, p. 174. 4 Words used in replying to a Stipulation. See Digby, Lib. XII. 7 De Legatis & Fideicommiss. III. Leg. XXXIX. § 1. and Lib. XLV. Tit. I. De verborum obligat. Leg. i. § 2. See Buxtorf's Hieroglyphic Horatianum, p. 329. 6 You had better in this Passage of Festus write \[\text{,} \text{ as it is often in Homer, for this comes nearer the Word Nai,} \text{ Grotius. 7 De Doctr. Grotius. 8 De specialibus legibus. Grotius,}
core Oath. And, as Josephus says of the Essenes, "παν ὑπὲρ τοὺς ζώους [ἐκείνοις ἐπαύουσας εἰς ἐπεξερήτω ἰεραίαν] οὕτως καὶ ἐν ὑπεραίαν αὐτὰρ, ἐπεξερήτω ἰεραίαν. Every Word spoken by them was fiercer than an Oath, and therefore they looked upon an Oath as superfluous.

5. Pythagoras ⁴ seems to have borrowed this Maxim from the Essenes, or some of the Jews whom they followed, καὶ ἐν γενετικοῖς Σάλον. Do not to swear by the Gods, for every one should take Care ⁵ to be believed without his Oath. Curtius tells us, the Scythians thus addressed Alexander, Do not expect that the Scythians should oblige themselves to you by swearing, they take an Oath of Fidelity in being always as good as their Word. And Cicero, for Rufius the Comedian, Whatever Punishment the immortal Gods have appointed for a perjured Perjur, the same is inflicted by them for the Liar and the Fraudulent; for they are not so much offended with Men for breaking their Words upon Oaths, as for their Treachery and Perfidiousness, whereby they intend to cheat and circumvent others. Remarkable is the Saying of Soren, καὶ εἰς ἐν τούτῳ βασιλεύειν ὑπὲρ καὶ δεινον. Be of that Probability, 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 γὰρ ἐν θράσοις καὶ ἀμφιβασμένοις καὶ ἑαυτοῦ δικαίου βιῶν χρηστόν, καὶ λέγω, ¹⁵ To show the Sincerity of his Promises by the Firmness and Uniformity of his Life and Conversation. And Alexis the Comedian,

"Οὐκ ἄλλως τίνος ἀνάμνησις μὲν."

If I do but not 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, Ο οἷος ἐν θράσοις. It is remarkable, that 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 tripping and hazardous, and therefore it is neither decent nor safe

10. For Hermippus, the Pythagorean, as Orig. against Celsum (lib. i.) affirms, that Pythagor's Philosophy was derived from the Jews. And both Josephus and Jamilchius 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 idaiom, where we now read idiaion. See his Bibliotheca sacrae, vol. ii. p. 162, &c. Our Author quotes Jamilchius, but his Memory deceives him. He has confounded that Author, who says nothing like what he ascribes to him, with another Philosopher of the same Sect, whose Life of Pythagoras is printed in the same Volume; I mean Porphyrus, who makes Pythagoras travel among the Jews, as well as the Egyptians, Arabians, and Chaldseans, Num. II. Ed. Kii. Whereas Jamilchius speaks only of his going into Egypt and Syria, Lib. i. cap. iii. iv.

12. Philo, "οἷος ἀναμνήσθημεν, &c. For he ought to put to his Oath, is subject to being false to his Word, (De Decalog.) In Sophocles' Oedipus, Oedipus, O'Edipus has expressed himself thus,

"Οὐκ ὁμοθύμων ὁμοθύμων ἐν κακῷ προσβολήματος."

I won't require your Oath, as I would a Ratcatcher."

(Ver. 6:42.)

Thofus replies,

"Οὐκ ὁμοθύμων ὁμοθύμων ἐν κακῷ προσβολήματος."

Nor if you did, would you've more than my bare Word.

(Ver. 6:43.)

M. Antonin, in his Description of a good Man; Μαρτυρίος ἐν θράσοις. One who has no Occasion to swear, (lib. iii. § 5.) St. Chrysostom, De Status. XV. Ei qui ait, &c. If you believe he is a honest Fellow, do not let him under the Necessity of an Oath; and if you know he is a Raggus, do not force him to be perjured. Grotius.

13. Lib. VII. cap. viii. num. 28.
14. Diogenes Laertius, lib. i. § 60.
16. St. Chrysostom very well animadverts upon this, in his twelfth De Status, 'οι καὶ μὲ κακῷ προσβολήματος μὴ ἐπεξερήτω ἰεραίαν, &c. Tho' they did it without Compunction, Passion, or Inconsiderateness, yet sometimes from the very Nature of the Thing will you be forced, with your Consent and Knowledge, to favour yourself. And presently after, ἐφαρμόζεται καὶ ἴναι, &c. It is dangerous for a Man even to favor 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.
highly commends a Christian Emperor, becau
because 
that
not, &c. he was so far from perjuring himself, that he dared even to feare the Truth. And Eustathius, upon that of the fourteenth Odysse (v. 171.) 'Allòs ἤτοι ἐκεῖνον καὶ τῷ σώμα, But we will allow an Oath, says thus, that is, ἄρα ἤτοι ἐκεῖνον τῷ σώμα, &c. in doubtful Matters there is no Occasion for an Oath, by Way of Confirmation, but of Prayers for Success.

And therefore in many Places, instead of an Oath, it is customary to ratify a Promise by joining of the right Hands of the two Parties together, which is ἀπὸ βιοῦ ἀρρητῆς, the strongest Tie of Faith among the Persians; or by some other Sign and Circumstance, and is so powerful an Engagement, that if the Persians do not faithfully perform what he has promised, he is no less deterred than if he had been really perjured. And it is used to be particularly said of Kings and great Persians, 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 jam, 4 I am a Man of my Word; and with Eumenes, 5 that they would sooner lose their Lives than be worse than their Word. And very pertinent to this, is that of Gunther the Gene
de, No;u; jut, & reverentia verbo Regis infcffe jdis, quouis juramine major. 6

No solemn Oath affords more sacred Ties Than does a Prince's Word.

And Cicero, in his Oration for Dei was, in Commendation of Julius Ces
car, that his Hand was not more to be depended on in War and Battle, than in what he had promisèd by it. And it is observed by Aristodole, 7 that in the Heroes Days, if a King did but lift up his Scepter, it was as good as his Oath.

XXII. (1) This is mentioned by Eustathius, upon the 24th Odysse, upon the 24th Odysseus. Aristophanes's Scholiast, ed Naber, (v. 81.) Crantetus, Sennet XI. 27. In E. Ad horus de his qui metie tie causi aquan
tur juramentum & fides interponit. Grotius.

2 Diooudus Siculus, Biblioth. Hiftor. Lib. XVI. Cap. XLIII. p. 537. Edit. H. Steph. As to the Perjurers, see the President Brisson, De Regni Præsule, p. 107, 27., and Lib. II. p. 270. Edit. Syburg. Another still more remarkable Pas sage might have been quoted from the Scholiast on Aristophanes. The Poet, in his Acharnæns, v. 307. makes the Court fay, that the Lacedemo
nians keep neither Alters, Faith, nor Oath sacred. Whereupon the Scholiast says, that Treaties and Alliances were made in these different Manners; by Words, by Actions, and by the Hands. By Words, As when the Parties were sworn. By Actions, When Sacrifices were offered. As when the Hands, when the Contractors joined their right Hands, which was called Giving their Faith. After which he quotes a Pas sage from Homer, (Iliad. Lib. II. v. 341.) No
thing is more common among the Antiens than the Custom under Consideration; and several modern Writers have quoted great Numbers of Passages on the Subject. Among others, see Everhard Fres
tius, Antiq. Homer. Lib. IV. Cap. XVII. Martin Kempis, De Osiulla, Differt. XVII. 5
with our Author's Notes on Zachary xiv. 13.

3 Thus in Holland, where there are Recimmers, who, midunderstanding 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 Prelect. Jur. Civil. Tom. II. in Tit. De Jurejurando, p. 335. Edit. Thomas.

4 Iocrates speaking of Evagoras, King of Salamis, 'Opiun. 703. He kept his Word and Promises so 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. Βασιλεὺς τὸν μὲν, &c. Kings ought above all other Considerations 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 Alter to confirm it upon his Oath, all the Judges unanimously cried out, that he should not swear. Grotius.

5 This is related by Plutarch, Evamnetes, being solicited to abandon Perdiccas, replied he would sooner lose his Life than violate his Promise to that General. Vit. Examen. Tom. I. p. 585. Edit. Web.

6 Lib. III. ver. 510, &c. where the Poet puts these Words in the Mouth of Frederick Barka
rauf.

I. The Opinion of those Reflalted, who hold that Reflitution to the full which arises from the Civil Law, extend to the Acts of Kings as fuch, as alfo that Kings are not obliged by their own Oaths.

I. Bodin thinks that a King is over-reached by Fraud, by Miftake, or by Fear, he may for the fame Reafons be reforted to his own Rights, and this both in Things that affect and leffen his Royal Prerogatives, and in thofe 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 Contrafts agreed on be fuch, as may be revoked by the Civil Law, tho' the Contrafts be agreeable to Honesty; and that he is not therefore bound, becaufe he has sworn, but as any Man may be bound by juft Covenants fo far as another is interefled in the Execution of them.

2. But we as we have elsewhere defcribed do here alfo diftinguish between the Acts of Kings which they do as Kings, and the private Acts of thofe 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, could have no Power over fuch Acts, becaufe the Community is not superior to it felf; fo neither can the Laws of a King. Wherefore Reflitution, which receives its Power only from the Civil

I. (1) Bodin's Words, which our Author has not quoted very exactly, are thefe " But is not the Prince Subject to the Laws of the Land, which he has sworn to obferve? We must diftinguish. If the Prince takes an Oath to himfelf, to obferve his own Laws, he is not obliged by thofe Laws, nor by the Oath taken to himfelf; for even the Subject is not bound by the Oath he takes in their Contrafts, from which the Law allows him to depart, tho' they are honofl and reasonable. If a Sovereign Prince promises another to obferve the Laws made by him or his Predeceffors, he is obliged to obferve them, if the Intereft of the Prince, to whom the Promife is made, be concerned, even though he took no Oath. But if the Prince, to whom the Promife is made, has no Intereft in the Affair, neither the Promife nor the Oath can bind the Prince promifing. The fame may be faid, when a Promife is made to a Subject by a Sovereign Prince, even before his Election; for in that Cafe there is no Difference, as ferveral imagine. Not that the Prince is obliged by his own Laws, or thofe of his Predeceffors, but only by the just Agreements and Promifes, by him made either with or without an Oath, in the fame manner as a private Person would be. And for the fame Reafons that a private Perfon may be releafed from an unjuft and unreasonable Promife, or one that proves to barbarifome to him; or in Cafe he has been circumvented by Fraud, Miftake, Force, or a juft Fear, fo as to fufain a very considerable Dam- age; for the fame Reafons, a Prince may infift on Reflitution 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 thofe of his Predeceffors, but only obliged by his juft and reasonable Agreement, in which the Subjects in general or in particular are interefled. Several Perfons miftake in this Cafe, by confufing the Laws with the Contrafts of Princes, which they call Laws, &c." Hence it is evident that this learned Politician doth not fuppofe that the Reflitution in Integrum, which he grants to a Prince, acting either as a Sovereign, or as a private Perfon, is founded on the Civil Laws. He certainly draws it from natural Equiety; and herein he is Right, whatever our Author may fay, who has been juftly cenfured on that Score by his Commentators. See Zieglcr, on this Place; and Pufendorf, B. VIII. Chap. X. § 2. &c. Bodin had alfo good Reason for confidering 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 confufed, as I have obferved on the preceeding Chapter.

2. That is, if the Community or Body of the State, as fuch, doth fomething contrary to the Laws, it has made, if, for Example, they treat in a Man- ner not conforme to thofe Laws, the Engagement would not be let valid; because by establishing fuch Laws as the Rule of Contrafts between private Per- sons, they did not tie up their own Hands. See Chap. IV. of this Book. § 12. Num. 1.

3. It doth in fome Places only, as in Regard to the Time, Manner, and Extent of fuch Reflitution; and thus it may take Place, without upholding a Superior who grants it.
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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. I. 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 upon this Condition. Thus we see some Kings have taken their Advantage of the Laws against Extortion 5. Yet a King may, if he pleases, exempt from those Laws his own Acts, as well as those of his Subjects; but whether he intended to do so, must be gathered from Circumstances. If he do so, then the Case shall be determined by the mere Law of Nature: Provided, where the Laws make void any private Act, not in Favour of the Actor, but as his Punishment, those are of no Force against the Acts of Kings, nor any other penal Laws, nor any Thing whatever that carries a Constraint along with it. For to punish and to force must proceed from distinct Persons. 6 Neither can the Compeller and the compelled be one Person, nor is it sufficient here to consider one and the same Person under different Constraints.

III. But a King may, by a preceding Act, make void his Oath as well as a private Man, 7 if by a former Oath he has deprived himself of the Power to take

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 Paffage of Puffendorf, quoted in Nat. 1, and the late Mr. Heritius’s Diflleration, De Tutelis Regis, Sec. II. § 12. p. 478, Tom. I. Commun. II. & Opif. 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.

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 feized on all the Affignments, 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. 8 By the new Agreement made with them he declared and openly confessed that the aforesaid Merchants and Traders had dealt fairly and honestly with him, and laid the whole Fault on himself and his own extreme Neediness. Thefe are the very Words of Emmanuel de Mestheren, in his History of the Laws Countries, II. XVIII. at the End. See the following Book, Fol. 417, of the old French Translation, published at the Hague in 1618.

3. In Cafe of a Doubt, it ought to be premised that the Kings, who treat 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 himself, whenever he doth not very clearly satisfy 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 confines 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 the 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 Contradactor, commonly approve some Privity, or some other culpable Disposition in that Contradactor, 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 Contradactor, be allowed to violate those made for punishing the Contradactor, that is to say 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 Cafe, to disclaim those who have acted as by his Order, and retract what he has done in the latter? Thus the Law will take Place in regard to him, without prejudicing his Independence, and without any other Inconvenience. The Act, by which he submits to it, will not be a Punishment, properly so called, much less a Constraint. It will be only a Declaration by which he voluntarily retracts what he had done without considering well on it. He will thereby only discharge his Duty, in the same Manner as when he stands to an Engagement, into which he entered as a Private Person, conformably to the Laws in Being; tho’ no Man can force him to it.

III. When a King is obliged by his Oath, and when not.

such
fuch an Oath; but by any after Act he cannot; because here also is required a 
Distinction of Perfons. For tho'fch which are made void by an after Act, had be-
fore 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 felf, 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
fome Fault in that Perfon, yet he who swears, is bound before God, as I faid be-
fore; and thus are Kings also obliged by their Oaths, no lesS than private Men,
the Bodine be of another Opinion.

IV. We have also fhewed already, that full and absolute Promifes 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 lay that Kings are
not bound by the Promifes which they have made without any Cause or Reason for
f0 doing; which yet may be true in fome Senfe, as we fhall fee hereafter.

V. As to what we have faid before, that the Civil Laws of a Kingdom have no
Power over the Agreements and Contrats of the King, it is no more than what
Vafquez has obferved. But his Inferences from thence, that his buying and felling at
no certain Price, his letting or hiring without any Rent agreed on, or giving any
Thing away in Fie, without a Writing under his hand, shall be valid, I cannot
allow. For these Acts are done by him not as a King, but as any other Perfon
would do. And over fuch Acts as are not only the general Laws of the Nation,
but even the particular Laws of the Place, where the King refides, have Power.
Because the King, for fome special Reason, is confidered there as a Member of that
Corporation. And this is the Cafe, unlefs (as I faid before) it fhall appear by good
Circumftances, that it was his Intention, that his Actions should be exempted from
the Power of thofe Laws. But the other Example brought by Vafquez, concerning
a Promife any way made, is very well grounded, and may be explained by what
has been faid 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 obfcurc. 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 ftrictly due: As for an Executor to pay entire Legacies, without de-
ducting, as it was by the Falcidian Law allowed, a fourth Part, or to pay a fuft
Part, when the Creditor is incapacitated by the Law to receive, or to return a
Kindred,

2 Consequenter: that is, fo as to annul, by an
Efect of his Wifli, an Oath, which would other-
wife have been good and valid. See the foregoing
Chap. § 30. Mr. Vitriarius, in his Infiftit.
Jur. Nat. & Gent. Lib. II. Cap. XIV. Num. 3.
ffays, that a King may likewise make void his Oath
by a posterior Act, when there is juft Cause for fo
doing. But this juft Cause is fuch only because it
was tacitly included in the Oath, as a Condition for
rendering it invalid. See § 12. Num. 3. of this
Chapter.

This is a falfe Supposition, which we have re-
jefted several Times.

V. (1) EMPYTHEUSIS. The Interpreters of the
Roman Law are not agreed that it is efential to this
Contrat, that the Grant fhould be made in Writing;
and it is very probable that tho'fch who deny it are in the Right. At leaff this is not praetifed at pre-
ient in several Nations, as our Author himself tells us in Regard to his own Country, in his Intra-
duction to the Laws of Holland, written in Flemifh, B. II.
Chap. XI. See CVJVAS, on the Title of the
Cod. De Juris Empytheusis, with FABROR's Nota,
Tom. II. Opp. p. 165, and Rexit, in Cod. Tit.
De Pactis, Tom. IX. p. 101. As also VIN-
NIUS on the Infiftitutes, Lib. III. Tit. XXV. De
Locutione & Conftitutione, § 3. and Mr. CoccEUS's
"ius controversium Civile," Tom. I. p. 443. 444.
2 That is, without a Setipulation in Form.

VI. (1) Concerning this Distinction, see what
PUENFORD lays, B. III. Chap. IV. § 5.
2 Code, Lib. VI. Tit. L. Ad Legem Falcidianam,
Leg. I. That Law, to which our Author refers,
speaks of an Heir, who being well aflurred that three
Fours 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
lapp'd to renounce his Right, and make the Le-
gates a Preferent of what might lawfully be detained.
See COJAS, Tom. X. Opp. p. 536, 537. and AN-
So that it contains nothing relating to what the Ro-
man Lawyers call Conditio inedita, or a Demand
of what is not due; for that Action takes Place
only when a Man has by Mitake paid what he
thinks he owed. But the Cafe, which our Author
means, is commonly found in Law IX. of the fame
Title of the Code; though the Lawyer left quoted
pretends that Law speaks of the Trichrallian fourth
Part; not to mention the celebrated Qefition
concerning Error of the Fact; which will ever be
a Problem in the Civil Law.

3 Dig. Lib. XII. Tit. VI. De Conditiione
inedita. Leg. XIX. That Law has chiefly in View
the Cafe of a Son, who, becoming his own Maffer,
had paid what he borrowed, while under another's
Power, which he might have refused by Verfue of

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Kindness, 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 Contrasts; or transfers none, as in an imperfect Promiss accompanied with a full and firm Resolution. **Maimonides the** *Jewish, Dnc. Dubiti.* Lib. III. Cap. LIV. makes an apt Diffinition between these three, he says, that whatsoever comes more than is due, falls under the Notion of *Whore Bounty,* which other Interpreters upon *Prop. xxi. 28,* call *vultus* or *plus of Goodness,* that is, if due in Strictness and Rigour, is called in Hebrew *shuv* or *Judgment,* and that they file what proceeds from a Principle of Honesty, *mrp* Justice, that is Equity. The Translator of *Mat. xxiii.* 23. distinguishes between *is* *w* *w* where by the Word *w* *w* he means what the Hebrews generally call *sasunos, righteoujhefs* : For *w* *w* signifies what is strictly due, as you will find in 1 Mac. 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 arises 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 Contrasts, even between God and Man, as we have showed already. If the King engages himself, not as King, but as any Perfom 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 *Vafquez.* 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 Perfoms we are dealing with. For that Subjects should force him, to whom they are subject, is not lawful, which Equals may do against Equals by the Right of Nature, and Superiors against Inferiors by the Civil Law.

VII. But we must also observe this, that a King may two Ways deprive his Subjects of their Right, either by Way of Punishment, or by Virtue of his eminent Power. But if he do it the just 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 Promiss or Contract.

the *Mac thermometer* Senatus *consulatum.* This appears from the Title 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. Not 5. But if, with *Graconius,* we here apply the Cae of an Out-Law, or Criminal, whole Goods have been confiscated, the same Diffinition must be employed, which I have made in regard to a *Deposition,* placed in the Hands of such a Person, in my Comment on *Pufendorf,* B. IV. Chap. XIII. § 4. Nov. 5. the Second Edition.

*Diatri. Lib. V. Tit. III. De hereditatis petit.* Leg. XXV. § 11. It cannot be certainly inferred from this Law, which our Author quotes after others, that, according to the Roman Laws, the Duty of Gratitude is one of those natural Obligations which hinder a Man from remanding a Thing given by Mifsake, as if really due. As to the Question in general, on which the Doctors are divided, the contrary Opinion to that here enquired of by our Author seems best supported. See *Hugh Donell, Comment. Jur. Civil. Leg. XIII. Cap. II. Concerning the Signification of the word srt. See Mr. Le Clerc's Commentary on *Gen. xxii.*

25. To this belongs what is done upon no other View or Account, but only the mere Exercise of our Liberty and Municience, as the Law explains. *II. de donationibus, srt. in pignor in significatione srt. Gratia* from the rich Fountain of God's Nature. *Plutarch in his Cato Major. Crotius.*

7 For the Sense of those three Great Words, consult our Author and Dr. Hammond on the Passages of the Evangelist. Our Author lets us know in this Place that he takes the Gofpel of St. Matthew as we now have it, to be a Translaton. He was of Opinion, as appears from the Notes on the New Testament, that the Evangelist wrote in Hebrews, 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. R. Ed. Holland.* Dr. Milliken likewise undertakes to shew the fame in his *Prefugia to the New Testament.* But it is highly probable that the pretended Original Hebrews, to often mentioned by the antient Fathers, who were but indifferent Critics, is a mere Chimera. See Mr. Le Clerc's *Dissertation De Authentico Evangeliorum, and his Evangelical Harmony,* § 1. with his Preface to the Gofpel of St. Matthew, in his Translation of the New Testament, printed at Berlin.

VII. (1) See *Pufendorf,* B. VIII. Chap. V. § 7.

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VIII. The Rights of Kings.

Of the Rights of Kings.

VIII. Nor must we by any Means allow that Distinction, which some make, of the Right acquired by the Law of Nature, 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, of such as are in no Respect Subjects) which Right of Foreigners can by no Means be under that Sovereign Dominion; 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. From what has been said we may perceive, how false the Opinion of some is, who hold all the Contracts of Kings to be Laws. For from the Laws there arises no Right to any Man in regard to the King; And therefore if he should repeal those Laws, he wrongs no Man. However, if he does it without any just Cause, it 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.

X. Let us now come to the Successors; and here we must distinguish 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 Precedent, and that either in Imitation of other common Inheritances, or otherwise; or whether succeeding by a mixt Right. For they who inherit all the Goods with the Kingdom, are without doubt obliged to perform all the Contracts and Promises of the late King. And that the Goods of the Deceased shall be obliged even for his personal Debts, is as antient as Property itself.

XI. But how far they 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. 3 'Tis plain enough that such Sort of Successors, as such, are not directly, that is, 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 immediately, that is, on the account of the State, such Successors are obliged; which must be thus understood. Every Society, as well as every particular

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 Virtue of the general Right, which Necessity gives to all Men; not by Virtue of the Sovereign Dominion, which supposes the Person thus dispossessed a Subject. I find Mr. Vander Mulfen confines the learned Gronovius on this Head.

IX. (1) As, if by Virtue of a Treaty of Commerce, the Subjects are obliged to deliver certain Goods or Commodities at a certain Price to the Subjects of another Nation, with which the King makes this Treaty.

X. (1) See the Authors quoted by Reinkingius, Lib. I. Chap. III. Chap. X. Gronovius.

2 See Puffendorf, B. VIII. Chap. X. § 8.
3 See Puffendorf, B. VIII. Chap. X. § 8. and what our Author has said, Chap. VII. § 19. of this Book.

XII. (1) See Avignonus published by Frewer, p. 373. Gronovius.
2 Thus Solomon was not obliged by the Promise which David had made to Shimei. Gronovius.
3 See several Things to this Purpose, C. I. De factionibus. It comes nearer to the Matter in Hand, what is mentioned, C. Abr. de Sentent. &c. where there are these remarkable Words. When both the Donation of the above-mentioned Places were made in the Name of the Kingdom, See too Treutl. Part I. Disp. VI. Thos. VII. Syn. de pace religiosis, Concl. XIX. Gronovius.
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ticular Person, has a Power to oblige itself either by itself, or by its major Part. This Right they may transfer, either expressly, or by neccessary Consequence, by transferring, for Instance, the Sovereignty: For in Morals, he who gives the End, gives all Things that conduce to the End.

XII. i. 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. A Guardian, says Julian, is considered as Master of his Papil'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, every Society shall be obliged by the Acts of the Governour, whether the Agreement be advantageous, or prejudicial to the Society. We are not however to judge of the Engagements of a King, by the Rules of a Contract for managing Affairs (as some maintain) so that his Act shall then only be esteemed ratified, when the State receives a Benefit by it, for it would be very dangerous to the State it self, to reduce the Prince to such Necessities. And therefore it is not to be supposed, when the People conferred the Government upon him, that they designed to restrain him thus. But what the Roman Emperors declared in a Rescript with Respect to the Corporation of a Town, that what was tranfacted by the Magistrates, should be of Force in doubtful Cases, but not so when that which is plainly due is rafhly given away; the fame Anfwer may be returned to our Inquiry, concerning the whole Body of the People, obferving a Proportion accordingly.

2. As then every Law does not oblige Subjects; for besides those which enjoin Things unlawful, some Laws are manifestly absurd and unreasonable, fo also the Contracts of Princes do not oblige their Subjects, unless they carry any warrantable Reason, which in doubtful Matters sought to be premeditated, in Respect to the Authority of Governors: Which Difinition is much better founded than that which is usally alledged by many, about the greater or les Damage that may enuie. For in this Case we are not so much to regard the Success of the Contracts, as the Reasons wereon they were grounded, which if warrantable, the People themselves shall be obliged by them, if they should become free, and so full their Successors too as the Heads of the People; for if the People whilst independent have made any Contract, he also who comes afterwards to possess the Sovereignty in a full and absolute Manner, shall be obliged to stand to it.

6. The Emperor Titus is much commended for this, that he would not suffer himself to be petitioned, to confirm any Thing that his Predecessors had granted;

whereas

XII. (1) Agreeable to this is what Camden has, Part IV. of his Queen Elizabeth, in the Year 1595. and what Cromerius has about the Debts of George King of Bohemia, immoderately undertaken by Weidius Lib. XXVII. Grotius, 2 Diglj. Lib. II. Tit. XIV. De Pactis, Leg. XIV.

3 Cod. Lib. II. Tit. IV. De Tranfmutationibus, Leg. XII. See Mr. Norwood's Tractie De Pactis & Tranfactions. Cap. XXVII. and Mr. Sculting, on the Title De Pactis, XXV. 4 As the Law of Cabedal King of Persia in Procopius and Agathias. The Subject of this Law is applied to Alleations by Petrus the Embassador of Justus the Second to Choseres, speaking of some Things which Justinian seemed to have promised the Saracen, and he is the authour, &c. For no State, I think ought ever to be condemned to the Practise of one Man; no, nor on the Account of some insignificant Law, tho' it were the King himself who abettted that Practise, and wanted that Law. Grotius.

I have given again Number of Instances of unjust and unreasonable Laws in my two Discourses, one on the Permission of the Laws, the other on the Benefit of the Laws, which are added to the Fourth Edition of the Duties of a Man and a Citizen. The Words of the Imperial Embassador here quoted may be seen in the Embassies of Menander the Protecter, Cap. XII. of those of Juffin, Juffinian, and Tiberius. But it is Jufius, and not Peter who speaks there. Our Author has confounded the Names; the Greek Writer, had a little before Juffin's Discourse, mentioned Peter, who had been for Embassador to the fame Choferes some Time before.

5 Sidonius, Lib. V. Epift. XVII. Whatever a Prince has engaged for, his State is always to discharge. See St. Ambrose in his Praifes of Theodosius; Symmachus, Lib. IV. Epift. VII. and XIX. Lib. V. XXXVII. Conc. Teucer. V. Cap. VI. C. Caerenum de donationibus. Corippus, Lib. II. says, that Juffinian's Debts, who had left a great deal of Money unsatisfied behind him, were paid by Jufinus, who succeeded him in the Empire. Grotius.

6 The Story is in Suetonius, Chap. VIII. in Xiphilinus out of Dion, and in Victor. You have something like it, C. Jufitiana. Cauf. XXV. Quæst. I. Gaii. Lib. II. 66. 15. See ao Radvigerris History. Gundius Liguris, Lib. V.

Now scintilia factum subvertere Reges
An reversionem, &c.

Ner can the following Kings subvert the Deed, Or fer reverts its, he has left the Duke all just Signed with the Royal Seal.

And
whereas Tiberius, and his immediate Successors, no otherwise esteemed the Grants of their Predecessors to be good, than as they themselves also had granted them to the same Persons. That excellent Emperor Nerva, following the Example of Titus, in his Edict recorded by Pliny, speaks thus, Let no Man imagine that what he has obtained from another Prince, either privately or publickly, shall be by me revoked; that is, if I confirm those Grants, he may be the more obliged to me; no Man’s Congratulation hands 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 Poteity; and that all the World flock’d about him to obtain his extravagant Gifts, some with Money purchasing his Favour, he adds, All wise Men looked upon those Grants as null and void; which could neither be given, nor receiv’d, 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 Cafe) it had been judged unlawful and unjust; then may that Contract be not so much revoked as declared no longer obliging, as if it were made conditionally of being void in that Cafe, without which Condition it could not have been justly made.

5. And what is here said of Contracts is true also 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 observ’d, whether there is any plausible Reason for giving, or otherwise alienating such Sort of Things.

6. But if the King shall by any Contract endeavour to alienate the Crown or any Part of his Kingdom, or of the Royal Patrimony, beyond what is permitted him, such a Contract shall be of no Force, as being made of what was not his own to dispose of. As much may be said of such Kingdoms as are limited or restrained; if the People have exempted certain Affairs, or certain Sorts of Engagements from the Power of the King. For to make such Acts valid, the Consent of the People by themselves, or their Representatives, is required, as we have shew’d already, when we treated of Alienations. Which Distinctions being observ’d, 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 fee many Examples in Bodin.

XIII. Neither is that, which many affirm, to be allowed without Distinction, that the Favours of Princes generally 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. 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

And Lib. VIII.

Tanta tamen clari fuit indulgentia Regis, Ut sibi non belli, &c.

So Great the Indulgence of this famous Prince, That who’er prof’d the Grants of former Kings, Did still enjoy them, could they fairly prove By authentic Writing the Goodness of their Claims.

Grotius.

7. Lib. X. Epist. LXVIII. Grotius.

8. Mariana XXIV. 16, quotes this and applies it to the extravagant Magnificence of Frederic King of Naples. Galba return’d Nero’s Grants, even those that were purchased, leaving them only a Tenth, Tacitus, Hist. I. and Plutarch. And Ptolemy deprived the freed Men, of what under the Pretence of Sale, they had been enrich’d with in Comodus’s Reign. Thus BoiF the Macedonian Emperor revoked what the Emperor Michael had given away. Zonaras speaking of him, εν αυτοις κατειλευσε, It was universally agreed on, that they who had receiv’d Money without just Reasons should re-

fund, same all, same half. See the same Author in his Ignorant Commentaries of Grants made by Lewis XI. See Serratus in Charles VIII. of some of his Grants made even to Churches, and yet return’d; see Philip Cominarius, Lib. IX. Mariana, Lib. X. Cap. XVI. of some Grants repealed, which Ramillius of Arragon had made. Of Grants of Jutella revered even by her self, XCVII. 11. Gronarius of the Will of Coflim King of Per-

land, partly allowed, and partly disapprov’d, 12: Grotius.

9. C. Sugerum sibi de decimis. You have an Instance of it in the Acts of Aëonius and Sestinius in Mariana, Lib. XII. Cap. ultimos: In Cam-

den in the aforesaid Year 1591, and 1597. In Con-


10. You have several Things relating to this Affair in Conc. Gall. Tom. III. Grotius.

XIII. (1) See those cited by Reinckinibus, Lib.


See likewise Pufendorf, B. VIII. Chap. X. Saltz.


alio
Chap. XV. War and Peace.

also other Benefits, which only take away the obliging Power of the Law, without any Contract, and these are revocable. For as a Law absolutely taken away, may always be absolutely restored; so also being in regard to a particular Person taken away, it may be in regard to a particular Person restored. For no Right is here acquired to the Prejudice of the Legislator’s Authority.

XIV. But by such Contracts as are made by Utterers, or those who without any just Title invade a Kingdom, neither the People nor their lawful Princes shall be obliged; because such Invaders had no Right at all to bind them: However they shall be obliged for so much as turns to their Advantage, that is, in Proportion to what they are become the richer by that Means.

XIV. (1) Conufent Polyndorf, B. VIII. Chap. XII. § 3.

C H A P. XV.

Of publick Treaties, as well those that are made by the Sovereign himself, as those that are concluded without his Order.

I. 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 to whom 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 their private Contracts a War is sometimes occasioned, but ofter 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.

II. Now these publick Conventions, which the Greeks call συνθέας, Conventions or Accommodations, we may divide into Leagues, Sponfions or publick Engagements, and other Agreements 2.

III. 1. The Difference between Leagues and Sponfions may be learnt out of the ninth Book of Livy, 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; * but a Sponfion 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 Syracus, according to Livy, 4 having contracted an Alliance with Hannibal, sent afterwards to Carthage, to turn that Alliance into a League. And therefore 5 that of Seneca the Father, (since the Chief has made a League, the Roman People may

I. (2) Digby, Lib. II. Tit. XIV. De Pattiis, Leg. V. See Mr. Noort’s Traité De Pattiis & Transfactiuisus, Cap. VII. where he explains this Division; as also Mr. Schulting on the Title De Pattiis, § 2.

II. (2) See the Clofe of this Chapter, where you have a short Explication of what is meant by tho’ Sort of publick Conventions, or Agreements. III. (1) Tit where he is speaking of the shamefull Accommodation, made by the two Conuls with the Samnites, after the Action at Canus 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 Signorius, De antiqua jure Italie, Lib. I. Cap. I.

2 Peter patratus. He was one of the Peculie 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.


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 Prosector at Leyden.

4 R
be said to have been done it, and to be included in it) relates to those antient Generals, who had received a special Commission for that Purpofe. Indeed 6 in Monarchies the fole Power of making Leagues is in the King, according to Euripides in his Sup-

plies.

For we muft read it there, as we said, ἐρωμενοὶ and not ἐρωμενὸι.

2. Now as inferior Magiftrates cannot oblige the People; fo neither can the leffer Part of the People oblige the Whole; which makes for the Romans 7 againft the Galli Senones, for the greater Part of the People was with the Dictator Camillus; but as it is in Gallies 8 there is no treating with one and the fame People in different Places at the fame 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 Sponfors, or Perfons engaging, ufe their utmost Endeavour to perform what they have undertaken, they are sufficiently defengag'd from their Word, according to what 9 we have faid before, concerning Promifes made by a third Perfon. But the Nature of the Affair under Confideration, which includes a Sort of Contraft, requires a ftricter Obligation. For no Man in Contrafts will give or promife 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 Promife for another Man's Fact, 10 a Promife that engages that fuch

6 See what is below, B. III. Chap. II. § 11, &c. SER Vius upon that Pfalige of the Second AEneid.

But you, 0' Try, preferre the Faith you gave, If I to few my felf, your Empire favre. "DRYD.

Because what the King promifes, the State dare not to promife. And where Amus going to fight a Duke, flirt enters into a League with Latinus, he does not, fays he, living in Turnus Sweating, because when the King is present, he has no Power to do it.

GroTES.

7 This was not the Refton, on which the Romans went. The Fact was as follows. The Gauls after a complete Victory gained over the Romans near the River Alia, marched to Rome, and eaftily made themselves Master of the whole City, except the Capital; whither the Senate and fuch young Men as were able to bear Arms, had retir'd. The Gauls could not carry that Fortrefs by Storm; but at left the Want of Provisions obliged the Begified 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 Romaut, who had rallied at Veii, after their Defeat in the Battle of the Alia, had created Camillus Dictator, with the Approbation of the Senate, then flut up in the City, into which Place a young Man, named Pontius Cominius, found Means to enter privately, and get off without being discovering. As they were on the Point of weighing the Gold, promised to the Gauls, the Dictator came up, with his Army, and fefled it, telling them he was ready to give them Battle. It was to no Purpofe that the Gauls replied, they demanded only what was their Due by Virtue of the Treaty. Camillus answered that, as he was invoffed with Sovereign Authority, in Quality of Dictator, no Perfons had a Power to make such a Treaty without his Orders. Livy, Lib. V. Cap. XLIX. Num. 2. See alfo Plutarch, in Camillus, Tom. I. p. 143.

8 See what is below, B. III. Chap. II. § 11, &c. SER Vius upon that Pfalige of the Second AEneid.

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or such a Thing shall be confirmed and ratified " by a third Person, does oblige the Promiser to pay Damages and Interest.

IV. Menippus, King Antiochus's Ambassador to the Romans, as Livy relates it, being guided by his own Interest more than by the Rules of Art, divided the Leagues of Princes and States into three Sorts, the first whereof is, when the Conqueror gives Laws to the Conquered; where it is in the Conqueror's Power, and left to his Discretion to determine what the Conquered shall have, and what he shall be deprived of. The second is, when two Enemies having had equal Advantage in War, make Peace on equal Conditions, &c. that by Virtue of their Agreements they may redeem and caufe to be restored what is reciprocally due, and if either the one or the other has been disturb'd in his Possession, during the War, the Difference is to be accommodated, either according to ancient 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. But for our Part we shall make a more accurate Division, by saying that there are two Kinds of Leagues, either thoe that require such Things only, as are agreeable to the Law of Nature, or thoe 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 thoe who before had not contracted any Engagement towards one another. And the Reason of it was, because that Principle of Natural Right, which maintains that there is a Kind of Natural Relation between all Mankind, 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, that it was accounted lawful to rob and plunder Strangers, tho' no War was proclaimed, which Epiphanias calls ξισκομε, the Scythian Fashion.

2. Hence that Question in Homer, " Are you free Bootes? " Is a complaiant and unprofitive Inquiry, which also Timcydides takes notice of; and in the old Law of Solon you have the Companies Παν Λαον Ἰκαριαν of free Bootes; for as Jujthin says, Pryacy was to the Days of Tarquin an honourable Employment, it is the very fame in that Maxim of the Roman Law, wherein is declared, that if there be

11 This holds good in regard to the Proxy of a Plaintiff, when the Communion do not appear clearly, for such a Proxy is obliged to give Security for the Ratification of what he has done. Infruit. Lib. IV. Tit. XI. De falsis proactionibus. Digeb. Lib. XLVI. Tit. VIII. Quia non habebat, & de ratificationibus. Leg. XIII. See Mr. Noodt on the Title of the Digest, De Procurationibus, &c. p. 130. and Mr. Scuellt on the same, § 7.


2 See the Law quoted in the Prediminary Difcourse, § 14.

3 Caesar, speaking of the Germans; Robberies that are committed without the Bounds of a State, are to Manner of Diftribution in them. (De Bello, Gall. Lib. VI. Cap. XXIII.) This is confirmed by Tacitus in his Account of the Custom of Germans, and by Saxo, Lib. XIV, and in several other Places. The fame is reported of the Tyrrenians by Servius, upon the eighth and tenth Additon, and of other Nations upon that Text; and of the Portugues by DiDorus Scylius, (Lib. VI. Cap. XXXIV) with whom agrees Plutarch in his Maruis; " Το ανεστον ηφασατο εφ Των Κληρον Αυτοσ δια τον Πρωτας, the Spaniards came to that Day loked upon Robbery as a very honourable Employment. Just in the same story that there is any Satisfaction to be made to an injured Person, if he is neither a Jew nor a Confederate of the Jews. Grotius.

Our Author probably, takes the Fact last mentioned from Baba Kama, with the Comment of the Emperor Constantiues, Cap. I. § 2. p. 13. We meet with a great Number of Instances of these barbarous Notions and Practices, in a Difcourse of James Thomasius, intituled Historia Latrecia gentium, in genem. Tom. VII. Observation. Holland. § 14. Offid. III. Where the Scholasts say, Τον Ερατον Παταλοι την Ιππον τηλικοτατος. Robbery was formerly so far from being Inhuman, that it was counted Reputable and for a Man's Honour, (see our. 71.) Grotius.

3 Lib. I. (Cap. V. Edit. Oxon.) Where be subjoined Ερατον του Παταλοι την Ιππον τηλικοτατος. This was an Affair that instead of being scandalous, rather carried a Reputation with it. Grotius.

5 Digest. Lib. XLVII. Tit. XXXII. De Colle- gibus & Corporibus. Leg. IV. The learned Salaman- cerus finding here Ιππον to have corrected it, as it stands in the Text of our Author. But his Conjecture is too bold, and by no Means necessity; as it is made appear by Mr. De Bynkeshower, in his Offene. Tur. Lib. I. Cap. XVI. Where he likewise explains and corrects some other Words in this Law, in a Manner different from the best Interpreters.
any Nation with whom the Romans have no Tye of Friendship or Hospitality, or Alliance, they are not to be reputed proffered 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 fame is to be observed, if any one of them falls into the Hands of the Romans; in which Case too the Right of Postliminy shall be allowed. Thus the Carthaginians formerly, before the Peloponnesian War, were no Enemies to the Athenians, yet had they neither Peace nor Truce with them, as appears from the Speech of the Corinthians in Thucydides. So Sal- luß speaks of Bocchus, "Nobis neque bello, neque pace cognitus, known to us neither by Peace or War. From hence to pillage Barbarians, or Strangers, was thought by Aristotle a very laudable Practice, and the Word Helfis, an Enemy, in the old Latin signifies no more than a Foreigner.

3. Under this Kind I comprehend alo 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, in an Harangue of his to the Acheans, where he does not insist upon any Confederacy, but only to 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 sag, Peace, and oppose them to arwioa, to Treaties properly so called, as you may see in several Places, particularly in the Oration of Andocides upon the Peace with the Macedonians.

VI. 1. The Conventions which add something to the Law of Nature, are concluded either on equal or unequall Terms. The equal are those, we épés de báboi, and aúçapti sviqoi, which are alike on both Sides, as Socrates speaks in his Panegyric. To which that of Virgil alludes.

Both equal, both unconquér'd shall remain
Joint'd in their Laws, their Lands, and their Abodes. Dryden.

And those the Greeks sometimes call συνήθεια, Alliance, sometimes συνήθεια εἰς τὸν ἄνα, Alliances upon the square, as you may find in Appian and Xenophon; and those upon unequal Conditions more properly, σφάλαξ, Leagues, and in respect to Inferiors, πραγαμμα, Injunctions, or σφάλαξ ἐν τον ἀνθρώπως, Treaties of Injunction; which Demosthenes says are to be carefully avoided by all those who love Liberty, because they come very near a State of Slavery.

VI. (1) So Pliny says, that the Parthians lived with the Sythians upon one and the same Foot. And Plutarch in Lycurgus speaking of the fame Nation of the Parthians says:

Solus
Ex aequo me Parthus edit.

With me

The Parthian only comes upon the Square.

Grotius.

2 This Paffage certainly belongs to Isocrates; tho' Pufendorf, who quotes it, has not observed the Mistake. The Words are those: Thos, 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 Rhodesians, 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 Myrthas, King of Caria, Vaffal to the King of Perseus; which Myrthas instilled the Chiefs of the Rhodesians in fealing the Government, and thus in some Manner received at Ephesus, as did his Widow Artemisia, after his Demise, supported by those Oppressors of the Publick Liberty, who were her Creatures, p. 79. Edit. Bogl. 1572.

2. Both
2. Both these Leagues are made either for the sake of Peace, or for the sake of some Alliance. Treaties of Peace, upon equal Terms, are generally made for the restoring of Prisoners, or Goods taken in War, and for mutual Security, of which I shall treat hereafter, when I come to speak of the Effects and Consequences of War. Treaties of Alliance upon equal Conditions, respect either Commerce, or the Joining of Forces, and Sharing the Expence of the War, or some other Matters. Treaties of Commerce may be various; as that no Custom shall be paid on either Side, which was in the old League between the Romans and Carthaginians, 3 except only what was given to the Notary and the Crier; or that no more shall ever be demanded than what is at present paid, or that a certain Rate shall be fixed.

3. So also, in a Confederacy of War, that each Party shall contribute an equal Number of Foot, Horse, or Ships, and that either in all Wars, without Exception, which the Greeks call Ἀ συμμαχία, A Conjunction of Arms, which Thucydides thus explains, Τάς αὐτὰς ἐκθέσεις, καὶ ἐξεσσεῖτον, Το λαύκιον ὅποια εἰς Ενεμοὶς καὶ Φρονίς οἱ τον, to be fo to the other. And this Expression we often meet with in Livy, or for the security of their Countries, which the Greeks call Ἀ συμμαχία, 4 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 Romans entered into Articles with Antigonus and Demetrius, to affit them against all Enemies whatsoever, except Ptolomy. 7 The like equal Leagues may be made in Respect of other Things; as, that 4 neither Party shall erect any Forts on the other’s Borders, that neither shall protect the other’s Subjects, 9 nor grant an Enemy leave to march through their Country.

VII. 1. From what has been said of equal Leagues, we may callly understand what is meant by unequal ones; which Inequality may respect either the stronger or the weaker. That of the stronger is, when Affiliation 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 Iocrates speaks in his Panegyric, Τάς εἰρήνες ἐκτάλλαξα Εἰρήνης ἐν διναισ, Where one Side is defegred more than is just and reasonable, are those which we said are called προσεκληρυνμένα, Injunctions, or ἐπιτάξιμα, Commands. And these are such as do either leffen, or not leffen, the sovereign Jurisdiction of the inferior Power.

2. An Alliance that leffens 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, κατατάξαντα τεμπέως Σαράνθιαν, 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

3 Polybius. Lib. III. Cap. XXII. Edit. Amstel. 4 The Antients termed it Ἀ συμμαχία. An Union of Sparta. Zosimus, Lib. V. (Cap. XXII. and Lib. IV. Cap. XVI. Edit. Cellar.) Grotius. 5 Thus Thucydides tells us, the Athenians made such a defensive Alliance (ἀσυμμαχία) with those of Corcyra, (Corfu) Lib. I. Cap. XLIV. It appears from what goes before, that the Term Ἀ συμμαχία is opposed to Ἀ συμμαχία, in the Sense given by our Author. See the Schoioli on this Place.

6 Lib. VII. Cap. II. p. 703. Edit. Augst. 7 Plutarch, in Vit. Demetri. Tom. I. p. 299. 8 See an Inflance of this in Procopius, Peri. I. (Cap. II.) Grotius. This is allowed, unless the contrary is expressly fixed. See below, Chap. XXII. of this Book, § 5. Num. 2. 9 We have, in Tresmar’s Notes on this Place, some Inflances from Thucydides, M. De Thou, Camden, Buchanan, and others.

VII. (1) This was one of the Conditions imposed on them by Scipio, as Livy informs us, Lib. XXX. Cap. XXXVII. Num. 4. See also Dion Cassius, Excerpt. Legat. XVI. Polybius, Hist. Excerpt. Lib. XV. Cap. XVII. Our Author, however, doth not express himself exactly in this Place, when he gives us this Clause, as being of the second League between the Romans and Carthaginians. He means the Treaty made after the second Punick War, as he himself speaks in the following Chapter, § 14, where he likewise mentions this burdensome 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 Extracts Lecitatorum, collected by Polybius Erinas, for I find it not other in The History of the Punick Wars, nor in the Extracts, collected by Mr. De Piresec, and published by Henry de Valois. 4 S.
Of the Rights of the

3 Thus the Samaritans, being seduced by Lucius Papius the Dictator, sued for a Peace, which was granted, on Condition of Clashing the Roman Army once; and paying them for the Service of one Year. Livy, Lib. VIII. Cap. XXXVI. Num. ii. The learned Gronovius, 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. VIII. (1) P. Antoninus, Cæcilius, Toletus, Molina, Valderius, Malderius, Grotius.

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Book II.

Of the Rights of

fening 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 Theatre 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 permanent, are such as oblige the Payment of the Forces employed in the present Service, the demolishing Fortifications, the quitting some Places, the giving Hostages, the delivering up Elephants and Ships. The Conditions that are permanent are such as oblige all Reversion 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 the least 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 trade, 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 making 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, not only among Divines, but among some Lawyers too, of which Number are Oldradus and Decianus.

IX. 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 Jacob's Treaty with Laban, not to say any Thing of Abimelech, because it does not fully appear that he was an Idolater. Nor did the Mosaic Law make any Alteration here: Let the Egyptians be a Precedent, who doubtless were Idolaters, yet the Hebrews 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 appointed to execute that Sentence; for they persisting in their Idolatry, and refusing Submission, the Jews were commanded not to spare them: To whom also the Amalekites were added by the Divine Decree.
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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  

1 David and  

2 Solomon, who made a League with Hiram, King of Tyre, where it is remarkable, that it is said in Holy Writ, that this League was made by Solomon according to the Wisdom that GOD had given him.  

3. The Law of Moses indeed does especially command them to do Good to their own  

3. Nation, 'Δόνατε τον ποιόν, 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 nostrare Vias cadem nisi sacra coeli. (Sat. 14. v. 103.)  

Afs 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 fame 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 συζητάντες, ζητώντες, υπάρχοντές, πορεύοντες,  

1 to have any Dealings, not to eat, not to converse with, or  

come into one of another Nation. And Apollonius Molo objected to them, οὐ ἔχον φαρμάκον τῷ ἄλλῳ, &c. That they receive none, who entertain Nations of GOD different from them, nor will they have any Thing to do with those whose Method of Living is not entirely correspondent to theirs. And the Courtiers of Antiochus, in Diosorus, accuse the Jews, μόνος αὐτῶν ἐστιν, &c. That they are of all People the most unfriendly to Strangers, and take them all for Foes. And then there follows, μόνον ἄλλοις, &c. They will admit no other Nation to their Table, nor even give them a good Wish. And presently they are charged with μηταρίπτες, A detesting of all Mankind. And in Philostratus, Tyaneus speaks thus of the Jews, οἱ ἰδίοι ἄμοιν τοιχίδος, &c. They have found out an unconquerable Way of Living, that they will not so much as eat with other People. And accordingly in ῾Ιεροβωλίας, very frequently, τὸ ἀμόινος, τῷ ἀμώλοις, τῷ ἀμώλεις, οἱ ἀμώλεις ἀμώλεις, the Jews Unlocableness, and Inhabitability, 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  

to receive Water at the Hands of the Woman of Samaria. Nor did David ever make any Difficulty in retreating to People of another Religion, nor was he ever blamed for it. And Josaphus 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 οὖτις ἄμοινες ἐστιν οἱ ἀμώλεις πρὸς τὸ ΄ντίφωνος ἅγιον. 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.  

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 Paffage, you had better render ᾿οὐσαίων, than their Peace) nor their God, 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,
this Place may be rather understood, according to the Opinion of some of the He-
brew 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 a-
gainst the Ammonites, Deut. ii. 19. nor did Jephtha * fight against them, till he
had tried all the Ways of an equitable Accommodation; nor a David, till provoked
by intolerable Affronts. The remaining Question then is, whether it be lawful to
enter into a confederate War with Infidels.

6. That this also was not unlawful before the Law, appears from the Example
of Abraam, who with his Army aififted the wicked * Sodomites: Nor do we
read, that the Law of Moses did in general alter any Thing in this Affair. Of
the same Opinion were 2 the Asimoneans, who were both very illfud in the Law, and
great Re fleers of it, witness their religious keeping of the Sabbath, wherein,
however, they allowed the Ufe of Arms in their own Defence, but no otherwise:
And yet these very People * made an Alliance with the Lacedemonians, and the Re-
mans, with the Confedear both of Priests and People; nay, they offered up solemn
Sacrifices for their Prosperity. But as to the Authorities alleged against this Op-
nion, they may have their particular Reafons.

7. For if there were any Kings or Nations (besides tho' 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 Con-
federy with them, was without Doubt unlawful. To this Purpose is that of the
Prophet * to Jofeph, for making a League with Abah; 3 Should they help the
Wicked, and love them 3 that hate the LORD? Therefore is Wrath upon them from
before the LORD. For Michæah the Prophet had be fore tolerat the ill Sce-
cess of that War. And that of another Prophet to Amaziah. 4 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 Ac-
count of the peculiar Quality of the Perfons, as may be evinced from hence, that
GOD did thrice rebuke and threaten 1 Jofeph, for entering into a Treaty of
Commerce with Abazia King of Israel, tho' that Treaty was no otherwife than
what David and Solomon had made with Hiram, on which Account we told you,
they were not only not reproved, but even commended. For as to that Claude,
that Abazia did very wickedly, it is to be understood of the whole Course of his
Life, which had rendered GOD an Enemy to him, and all his Undertakings:
As this Story is explained in the Book called The Conftitutions of Clement VI.
Chap. 18.

8. And this also must be obferved, that the Cade of thofe, who being defhended
d of Jacob, had forfaken the LORD whom they knew, was far worse than that of
mere Strangers; for against fhuch Apoftates, all the rest of the People were, 6 by
the Law of Deut. xiii. 13. commanded to take up Arms.

6 Judges xii. 16.
2 Gen. xiv. 13.
3 He also made a League with Ephraim and Anor,
(Chap. xiv. 13.) As David did with Achis and
Naftphan; Solomon with the Egyptians; Afa with
Benhadad: Grotius.
4 Gen. xiv.
5 You have Commendations of them in the Chaldean
Targum, in the Books of the Maccabees,
and in the Epifele to the Hebrew. Several Chri-
tian Emperors and Kings, following them as their
Precedent, entered into Treaties and Alliances, ei-
ther with tho' were no Christians at all, or at
leat not very few found ones; as Conftantine with the
Goths and Vandals; Jofiphon with the Lombards;
Theodorus, Florianus, Leo, Heraclius, Boif, Isiaci-
us Angilus, Paleologus, with the Saracens, Alani,
Gepides, Franks, Suevi, and Vandals; Alfonius
Hispalensis, Ramires, Alfonius Califus, Sanfius
Cajtilia, Ferdinand the holy, Kings of Spain with
the Moors; fo Peter King of Lens; the wise Albe-
nus, King of Cafils; Rodolphus Halphergius with
the Tartars. Confult JOHANNES DE CARTHAGA-
GENA, Lib. III. Cap. i. De jure beli Romani Pen-
siftici, Cap. i. and Pope Julius the second made
Ufe of Turkish Troops. Grotius.
1 Mac. viii. and xii.
4 Jofiphon, ί' ίέλος, πις ξειανα εννια-
μας αναθνως αχον 2, περηκε. He blamed
him for entering into a League with abah, an irre-
ligious and wicked Man: Grotius.
5 Gratian returned this Anfwer to his Uncle
Pallins, who defir'd his Advice againft the Sy-
thians, ους α λ α τον ενθλα της σαμαξης,
One ought not to engage in any Treaty with a Man
who is an Enemy to GOD. Grotius.
4 2 Chron. xix. 2.
5 = = = = = = = = =
6 Add Jofeph's Example, Chap. xxii. Gro-
tius.
9. Sometimes
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9. Sometimes the Leagues themselves are blamed, for the wicked Disposition of those who made them; so the Prophet reproves Aha, 1 for applying himself to the Syrian, in distrust to God; which he shewed by sending the Things confederated to God, unto this Syrian; so he was also blamed " in his Sicknes, for putting his Confidence more in the Physicians than in God. And therefore it no more follows from this History, that it is in itself, and in general, an ill Thing to enter into an Alliance with such People as the Syrians, than that it is so to consult a Physician. For the bad Disposition of the Mind, sometimes makes that unlawful which is not so in itself. As David's numbering the People; 2 and Solomon's shewing his Treasures. So in one Place the Confidence the Jews 3 had in the Egyptians is reproved; when yet Solomon 4 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 " 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 5 to difuade us from associating with the Wicked; but there are the Advices of Prudence, and not Precepts of a Law; and these 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 6, Nor by the greater Encouragement to such Leagues, by Virtue 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, 7 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. Excellent does Tertullian say, "As long as GOD confined his Covenant to Irael, it was with Reason that he had them flow 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 whatsoever Holes had spoken began to be fulfilled; 8 the Nation which were not my People, is now my People, and he 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, ον ου ἡμείς ἐδωκανεν ις πληθυντων ἡμων προς τινα ἄνθρωπον. We must give of our Labours to all, but prefer the Saints. 7 A perfect Liberty (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. 9 So Aristotle, ου γὰρ ὡς ἐπικοινωνίας τον άνθρωπον, ἠμείς ἐπικοινωνίαν. For there is no Reason that we should take the same Care of Strangers, as of Friends.

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 Apologists from, and Contemners of, the Rule of Christian Discipline, but only an unnecessary Familiarity, and not what may give one Hopes of their Conversion. For as to that of St. Paul, 0 Be not unequally yoked with Unbelievers; for what Fellowship hath Righteousness with

1 2 Chron. xvi, 2, 7.
2 Sam. xxiv.
3 2 Kings xx. 13.
4 7, xxxi. 1.
5 1 Kings iii. 1.
6 20, xxxvii. 7.
7 Prov. i. 15. xiii. 20. xiii. 24. xiv. 1.
8 Matt. v. 45.
9 X. (1) Adversus Marcianum, Lib. IV. Cap. XVI.
10 Lib. VII. Cap. III.
11 Offic. Lib. I. Cap. XXX.
13 Thess. iii. 15.
14 Cor. vi. 14, 15, 16.
15 Unrighteousness.

4 T
Of the Rights of

Unrighteousness, and what Communion has Light with Darkness, and what Concord hath CHRIST with Belial, or what Part hath be who believes 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, "What Agreement hath the Temple of GOD with Idols? And to this Effect is what you have in the first Epistle to the Corinthians, Ye cannot be Partakers of the Table of the LORD, and of the Table of Devils."

4. Nor must we conclude, that it is unlawful to make Treaties and Alliances with Pagans and Infidels, because we are not to put ourselves voluntarily under their Government, or to intermarry with them; for in both these Cases there is evidently more Danger of being exposed to the Temptation of renouncing the true Religion, or at least more Difficulty in maintaining the Profession of it, than in the other Affair. Besides these Engagements are more falting, 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 defining their Affiliation, as Saint Paul did that of Cephas, and of the Tribune.

XI. 1. And therefore this is not a Thing in itself evil, or always unlawful, but only 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 Egyptians; for that of Anaxandridas is not without its just Grounds,

\[\text{οὐς αὐτοῖς ἀποψάλλεν ὑπομανάν, ἢς.}\]

Under your Colours I cannot, must not march;
For neither your Manners, nor your Laws, agree
With ours; but are vastly different. 9

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 would be better to abstain from it, unless upon absolute Necessity; and what Thucydidus said in a like Case, is very much to the present Purpose, "οὐκ εἰναι Λαόν καὶ μακρών καὶ φραστος τος, τος. They are not to be blamed who are treacherously invaded, as we are by the Athenians, if they endeavour to get the Affiliation, 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, who at this Day have the Government in their Hands, would be mindful of that generous and pious Advice which Fulke, Archbishop of Rheims, once gave to Charles the Simple, Who would not tremble to consider, that you should seek the Friendship of GOD'S Enemies, and make Use of the odious Arms and Alliances of Pagans, to the Ruin and

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9 2 Cor. x. 24.
10 Acts xiv. 11. xiii. and xiii.
XI. (1) See Phædrus's Speech to the Læni in Agathias, Lib. III. and Saxo, Lib. IX. in the Words of Louis 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 Affiliation, should be sure, in the first Place, to take Care that he is of the same Religion, or for whom different Forms of Worship, and different Notions of GOD, have met at a Distance from each other, can never perform great Exploits together. Grotius.

2 Athænæus has preferred this Fragment, which evidently regards a Difference in Religion, as appears from the following Verfers. Dipsisphob. Lib. VII. Cap. XIII. p. 299, 300. Ed. Cajander, 1637.
3 Foro Gard, or Flodoard, Hist. Edict. Remonstr. Lib. IV. Cap. VI.
4 We have an Instance in Mancafa, in Niceta's Account of the Affairs of Ionia angelus, Lib. XI. where the Piety of Emmanuel Duke of Savoy is highly applauded, who, when he could have recovered Cephas, by the Affiliation of the Turks, scorned the Profit. Grotius.
Chap. XV.

W A R and P E A C E.

Delegation of Christianity? For there is very little Difference between confederating
with Infidels, and the remonstrating of GOD to worship Idol. And Alexander in Ari-
rian, says, "Athanais mata kai ephesiaous, &c. That they were guilty of the most
enormous Bafenefs, who would wear Arms for the Barbarians against Greece, contrary
and in Prejudice to the Rights and Laws of the Greeks. 5

XII. I shall here add this, that since all Christians are Members of one Body,
which are commanded to have a Fellow-feeling of each other's Sufferings, as that
Command affects every single Perfon, fo should it every Nation as they are a Na-
tion, and all Kings as they are Kings. Nor ought any one to serve CHRIST
in his Perfon 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 affift and stand by one
another; which cannot be done conveniently, without a general League and Con-
fedency to that very Purpofe; and fuch a League has formerly been made, and the
Roman Emperor 3 was unanimously chofen Head of it; all Christians then are ob-
liged to contribute either Men or Money, according to their Ability, to this com-
mon Caufe; and how can they be excufed who refufe it, I cannot fee, unless they
are hindered by an unavoidable War, or some fuch great Calamity.

XIII. Another Question which arises, is, Whether of them, supposing
feveral Nations engaged in War with another, we are obliged to affift them, being
all of them equally our Allies 4? In the first Place, we must remember what I
foaid before, that nothing can bind us to an unjust War. And therefore 5 he
of the Confederates is to be preferred who has the juifer Caufe, if it be againft one
who is not our Confederate; nay, tho' it be againft another Confederate. Thus
Democritos, in his Oration about Megalopolis, 6 fhews, that the Athenians were
obliged

5 That Hiftorian fays, that after the Battle of the Granitos, Alexander lent the Grecians he took in
Darmer's Service, in Claims to Macedon, with Orders to make them work like Slaves, * Because,
"adds he, being Grecians, they had born Arms
"for the Barbarians, againft Greece." De Esped.
Alexandri, Lib. I. Cap. XVII. Edit. Graecov. Our Author, tho' he quotes the Original, doth not
give the Words exactly. See what the fame Hifto-
rian fays in the Clofe of his firft Book.

XII. (1) Our Author fuppoifes, without Doubt, that this Enemy of Christianity has taken Arms un-
juftly againft some Christian Power. He could not be of Opinion, that the Intereft of Religion
ought to be made an Exception to the general
Rule, which he lays down for all Sorts of War. He likewise fuppoifes this Enemy not only to be a
 Turk, a Pagan, or of fome other Religion different from Christianity, but alfo, that he has plainly
fhewn his Design on all Christians, as fuch, and
only wants an Opportunity of oppofing them all
Manner of Ways. Otherwife it would not be the common Caufe of all Christians; as he confiders it
a little lower. See Silioh's Reflections, in his
Minifter of State, Part II. Book I. Discoure IV.
Befides, it has been juftly obferved, that, according to the present Difpolitions of Christian Princes,
such an Alliance would not be of great Service. See a Difparation by Mr. Budius, De ratione fia-
tis, in Acta Fideris, printed at Halif, 1666.
2 Upon this Subjeft fee Mariana, Lib. XXX.
Paruta, Lib. IV. Bizar, VII. and XII. Gro-
tius.

3 Our Author, as G r a n c h i u s observes, means
Frederick III. The learned Commentator refers to
a Difparation, written by B o c k e r, De Paschagi,
which is, to be found in Tom. I. of a Collection
published feven Years ago. But, tho' that Emperor
had the Thing very much at Heart, and was very
anxious to have the Pope's Power
in it; nothing was concluded, much less executed.

XII. All Chris-
ians obliged to
enter into
League against
the Enemies of
Christifhiiy.

XIII. (1) See Purfendorf, B. VIII. Chap.
IX. § 5.
2 See below, B. II. Chap. XXXV. § 4. And in the Form of the Oath of Fealty it is faid, If I fhall
underfand that you have a Mind to make an offen-
sive War upon fome Grounds, and I fhall be either
generally, or particularly, required thereunto, I will,
to your wifhes, give you my Prefence. Grotius.
3 In the Oration quoted by our Author, De-
Mefifhenes undertakes to perfuade the Athenians
to affift the Megalopolitans, a People of Arcadia,
against the Lacondemnians. As it no one doubted
that, if once the Lacondemnians made themselves
Masters of Megalopolis, they would fall on Megara,
the Oracel renounces to the Athenians, that it
was their Bufinefs to fend Speedy Relief to the Me-
galoplitans, their Allies, against thofe other Allies, both
by Virtue of their feftant Treaties, and for their
own Intereft. Mr. Thomafius, in a Difparation,
De fentoone Romanorum Quodem, (which is the
faith of thofe printed at Lipfich) § 22. &c.
maintains, that all Treaties of Alliance, by which a real
Confedency is contracted, but particularly thofe
made for War, of themselves imply this tacit Con-
dition, that no Succours are to be lent to any one,
not even to another Ally, againft the Power with
which the Contract is made. The Reafon is, that
the War breaking, or at leaft very much disturbing
the Union of the Allies for a certain End, it im-
pies a Contradiction, according to our able Law-
yer, that one should engage to take Arms againft an
Ally, even tho' done with a Design of succouring
another Ally in a juift Caufe. And as it may be
objected, that every one is bound, by the Law of
Nature, to defend thofe who are infulted, or un-
juftly attacked, if it is in his Power, Mr. Tho-
masius answers, that this is no more than an im-
perfect Obligation, or a Duty of Humanity. We
ought to give Place to more fublime Words.

2 Upon this Subject see Mariana, Lib. XXX.
Paruta, Lib. IV. Bizar, VII. and XII. Gro-
tius.
obliged to help their Confederates the Meßenians, against their other Confederates the Lacedæmoniæans, if the Lacedæmoniæans were unjust Aggressors; which holds true, unless it be expressed in our Articles not to lend 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.

2. But if our Confederates engaged in War, have each of them an unjust Cause, (which may sometimes happen) we are then to fland Neuters. So Aristides in his fith Letfedric, α μιν ιπ τοικειοι, &c. If either of our Allies had defired our Alliance against Strangers, we would preferly 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.

3. If our Confederates be engaged in a just War against one who is not our Ally, and require our Alliance; if we are able, we ought to lend each of them either Men or Money, as is practifed in the Cafe of personal Creditors. But if a Prince be demanded personally to affift both, having to promise; because his Perfons cannot be divided, it is reafonable that he should prefer him with whom he has the longest in Alliance, as the Aēaronians told the Lacedæmoniæans, in Polybius. The like Answer was returned to the campamians, by the Roman Conful, When we enter into new Treaties and Friendship, we ought to take special Care that we do not violate and infringe the old.

ments. But it only follows from the Reason alledged, that there are some Cafes in which an Alliance is broken, or in great Danger of being fo; and that the Cafe in Question is one of that Sort. Whoever treats for an Alliance, and has, or may have other Allies, is, and ought to be suppos’d, tacitly to agree, that the Power to 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 Intereft requires this, as well as his Duty, and the Sentiments he is suppos’d to entertain. So that affifting 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 reafonable only as far as the Intereft of him who makes it, requires he should Take care of himfelf, preferably to others. Mr. Budeus, who declares for the Opinion here oppofed, in his Diflertation intitled Jurisprudentia Historica Specimen, § 92. feems not entirely confident with this, nor with what he fays in the foregoing Paragraph.


5. The Orator doth not go on the Subpoimation 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 Difcourfe is to fhew, that there was not more Reafon for fuccouring the Lacedæmoniæans than the Pelopon; because the Athenians had not received more Good or Harm from one than from the other; and that, moreover, it was their Intereft to let them fight. So that the Question here turns on what Prudence demanded, not on the Justice or Injustice of the War.

Each by Personal Creditors are meant those whose Right extends to the Perfons of the Debtor; and is not confined to fuch and fuch mortgaged Goods, in Opposition to fuch Creditors as have a Pledge or a Mortgage. Perfonal Creditors are in the Roman Law called Chirographiæi, because they commonly have their Bond, or Note of Hand, for Security of the Debt. And when there are several fuch Creditors, if the Debtor's Estate is not fufficient to satisfy them all, each has his Share assigned, in Proportion to the Largefis of the Debt, without any regard to the Time when it was contracted; whereas Creditors on Mortgage are not only preffed to all personal Creditors: and if they latter have some particular Privilege; but he whose Mortgage is of the earliest Date, takes Place of the Reft; so that if nothing remains, the posterior Creditor lofs all. Even in the Cafe of privileged personal Creditors, if the Privilege is of the fame Nature, no regard is paid to Priority or Posterity of Time. Digest, Lie. XXIII. Tit. V. De robis antiquariorum judiciis poftfolidis. Leg. XXXII. Cod. Lib. VIII. Tit. XVIII. Qui paritres in Pignora babentur, Leg. VIII.

7. See Lib. IV. Cap. XXXI. De Feudis. Groschenwerth.

Our Author here quotes the Feudal Law, according to Cujas's Edition. In the common Edition the Paffage occurs in B. II. Tit. XXVIII. where it is faid, that A Paflus ought to affift his Lord against all others, and even against his own Brother, and Son; but not against one who has been his Lord longest; for he is to be preferred to all others. This Difcition is founded on the fame Principle which our Author lays down for a Preference between two Allies; a Principle manifestly reafonable. See Pependorf, B. III. Chap. VII. § 11.

8. Not the Aēaronians, but the Ethelians, make this Reflection by the Mouth of Obelaios, their Ambaffador, who speaking againft the Aēaronians, remonftrates to the Lacedæmoniæans, that by joining the Ethelians, they would do nothing to the Prejudice of a more ancient Alliance. Lib. IX. Cap. XXV. p. 784. 785. Edit. Angl.


The Paffage quoted in this Note, has no Relation to the Cafe under Consideration; but to that spoken of in Note 3, and may help to confirm the Opinion there examined.

4. But
Chap. XV. War and Peace.

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 Cafe of a Sale, we lay the first Purchase is preferred, unless the latter has actually transferred the Property. So Livy reports of the Nepotines, 12 that the Faith given upon their Surrender, was more obliging than that of former Leagues. Some differing from 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 premeditated to be tacitly renewed, 1 unless such Acts intervene as can bear no other Construction; 2 for a new Obligation must not easily be premeditated.

XV. If either Party break the League, the other is free, 3 because each Article of the League has the Force of a Condition. Thus we find in the Academic 4 that the Romans, 5 or any other People, are bound to others for Assistance, but by those who do not perform in Deeds, what they promised upon their Oaths. 6 And in another Place, 'who is a friend to the other, is his friend.' 7 If either Party offend against the Articles they have sworn to, never so little, the League is broke. 8 But this is only true, in Cafe it be not agreed on to the contrary, which sometimes is done, that a League solemnly sworn to should not be easily broke upon every slight Offence.

XVI. There may be as many Sorts and Subjects of Sponfions, as there are of Leagues. 9 For these differ only in the Capacities and Power of the Persons who make them. But there are two Questions generally talked about Sponfions. The first is, how far the Persons engaging are obliged, in Cafe 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 Power 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; the second to Equity and Reason; which the Tribunes of the People, L. Licinius and Q. Mecius, urged in the Caedune Controversy. The third is approved by Ute and Cælinum; as appears by the Examples of the two remarkable Sponfions 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 Poburanus to the Romans, 10 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 you made no Agreement. And again, I absolutely deny, that any Contract can oblige the People, which is made without their Order. 11 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 Power they were in before. 12 But if the Expiration of the Term of the Alliance, the Alliance is renewed for that Year. On the same Principle the Romans 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. Digiti. Lib. II. Tit. XIV. De Poetis, Leg. LVII.

XV. (1) See Pufendorf, B. III. Chap. VIII. § 8, and what our Author says, B. III. Chap. XXX. § 35, as also a Differentia by Mr. Budeus, De contraventionibus Federarum, Cap. III. § 14.

2 Lib. I. Cap. LXXI. Edit. Oxen. See likewise Cap. CXXXII.

3 Lib. IV. Cap. XXXIII.

XVI. (1) See Pufendorf, B. IV. Chap. IX. § 12, 13.

2 See above, § 3. Num. 6. Nat. 11.

3 Litiv. Lib. IX. Cap. IX. Num. 16, 17.

4 Ibid. Num. 9, 7.


11 By an Edit of Theodoric, Cap. CXXXVIII.

12 Lib. VI. Cap. X. Num. 4. This Cafe is not entirely to the Purpose. The Narrators having asked Affiliation of the Romans, their Allies, and receiving none, were obliged to surrender to the Etrurians; after which they would not revolt from the Obedience promised to the Conqueror, who had made himself Master of the Town. In Order to propose a Question agreeable to the Subject before us, the Question should have been, whether the Etrurians would have thought themselves obliged to assist the Nepotines, 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. § 11.

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
Summits would have any Dealings with the People of Rome, 5 they should have kept their Army at the Fucra Caudina, 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 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 alleged, that the Violation of the publick Faith was not to be expiated by the Blood of a single Perfon.

3: It may more plausibly be said, 7 that the whole Army was obliged by that Agreement; and certainly, this would be entirely just, if the Sponsors had made the Contract by their Order, 8 and in their Name; as we read that was which 9 Hannibal made with the Macedonians. But if the Summits were contented with the Word and Honour of 10 the Sponsors, and 11 the fix hundred which they defired.

5 THOMASius, in his Differtation De Sponsio Romanae Caudiniae, § 84, &c. confutes our Author's Opinion. I own, says he, that the Summits acted imprudently; as appears from the Reflections made by Hieronymum Pontius, their General's Father, 1 in Lib. IX. Cap. III. Num. 6, &c. and those of Opificius Calvinius, ibid. Cap. VII. Num. 3, &c. and from what Livy himself says, ibid. Cap. XII. But it doth not chence follow, that the Romans were blamable. He, who knowing a Man to be a bad Debor, lends him Money, without requiring a Piece or Security, certainly acts imprudently. But the Debtor who refuse Payment, is not less guilty of Difhonesty. The Roman Army, which was put up in the Defiles of Caudina, made the greatest Part of the People, as Lucius Lentulus, the first Lieutenant General said, Cap. IV. Num. 13, 14. Even though no Prejudgement could be framed, that the Reft of the Romans who were at Rome, would not consent to the Treaty, made by the Confuls, 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 Majoriy, for the Preservation of that Majoriy? (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 Romanis, in a like Cafe, engage themselves not to take Arms 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 Refpects, without a Violation of the Treaty? But, even tho' the Roman People were not directly obliged by the Treaty made with the Summits, they were engaged indirectly, which our Author cannot deny, without destroying a Principle which he himself lays down, B. III. Chap. XXIII. § 3. The Romans having reaped a considerable Advantage from the Treaty in Quifition, by the Prevarication of their Army, ought to have renounced that Advantage, if they were not obliged to stand to it, and have sent back their Troops to the Defiles of Caudina, and left them to the Discretion of the Summits, as the General of that People very justly observed, Cap. XI. Num. 4. Livy, who makes Pontius inter alia in this Manner, expresses a Doubt concerning the Conduct of the Romans on that Occasion. He says, that when the Summits 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. 15.

6 Lib. II. Cap. I. The Numantines thought it equitable, that if the Engagement was not approved of, the Army which was fet at Liberty upon that Engagement, should be delivered up to them. GROTIUS. Our Author, probably, had this Eye upon that Passage of ORGIVUS, Is the "Julius of the Numantines to be commended? The Senate ijlself did tacitly approve of it, when the Numantines sent Embassadors to them, requiring either that the Peace should be preserved inviolate, or that all what had been alienated to them, should be made back. Hist. Lib. V. Cap. V. Besides, Mr. THOMASius has written a Differtation, De Sponsio Romanae Numantiae, which is the fourteenth of the same Collection, where he reasones on the same Principles. See also Mr. BUDIUS's jurisprud. Hist. Specim. § 77.

8 The Speech of Lentulus, in Chap. IV. of Book IX. of Livy, thus 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. 689. Edit. Angl.

10 There were two Conuls, two Queftors, four Prefets, and twelve Tribunes, as APPIAN relates it. They were all by the Treaty of Caudina bound, but by the Treaty of Numantia one Conul ; the Reft were spared on the Account of Thibrias Gracchus, as PLUTARCH says in the Lives of the Gracchi. GROTIUS.

11 Pontius the Son, in APPIAN, &c. I will pick out some of the Principal of the Conflants for Hiftories of thofe Affairs, till the whole Body of the People ratified and confirm them. The Romanis, in a like Affair, judged it fufficient that the Hiftories were left to the difcretion of him who had them in his Cufody. MARTIANA XXI. 12. If they accept of what are delivered up to them, they are probably, had his Eye to the Penalties, POLYBIUS, Excerpt. CXXXII. GROTIUS. The Passage of POLYBIUS here referred to, speaks of the Roman Senate, who would not receive the Murderer, and the other Accomplishes in the Affiliation of one of their Embassadors; because, says the Historian, they were resolved to referre 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. 1524. Ed. Repair. See below, B. HI. Chap. XXIV. § 7.
fired for Hostages, they might even thank themselves. On the other Hand, if the Sponsors had pretended to have had a publick Commission for contracting with them, 12 they had then been obliged to have made Restitution and Satisfaction for the Damage occasioned by their Fraud. But if that did not appear, they were still obliged to make good what the other Party might reasonably be suppos'd 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 expres'd, 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 stipulat'd after such a Manner, the Reul of it is this, that if the Fact engaged for cannot be performed, nothing else can be demanded from that Obligation; because in this Café, 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 otherwife, it is my Sentiment, 14 that by Vertue of an Agreement made without the Order of the Sovereign Power, the Estate of the Sponsors stands fir'd engaged for Damages and Intereft, and if that be not sufficient, his personal Liberty. 15 Fabius Maximus, when the Senate refus'd to ratify an Agreement made by him with the Enemies, fold his own Land for two hundred thoufand Siferces, and so discharge'd his Promife. But the Samnites very juftly order'd, that 16 Brutus Popius, who had broke a Truce, should, Body and Goods, be deliver'd up to the Enemy.

XVII. 1. Another Question is, Whether if the Sovereign Power be acquainted with the Agreement, and yet is silent, it shall not be obliged to stand to it? Here we must fir'd distinguish, whether the Agreement were purely and simply made, or whether upon Condition of its being ratify'd by the Sovereign Power; for if it were conditional, that Condition not being performed, (for Conditions ought to be expressly performed) the Sponsion is of no Force. Like that of Lutatius with the Carthaginians, 2 which the People of Rome declar'd was not made by their Order; and therefore a new Treaty was made by publick Deliberation.

2. In the next Place we fhould 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 Conform, without some Thing or Deed, which probably would not have been, if that Agreement had not been approved of, as we have declar'd already, when we treated of relinquishing a Property. But if any fuch Acts happen, which cannot probably be referred to another Cause, then it may juftly be suppos'd to be ratified, as Cicero, for Balbus, well observes in the Café of those of Cadiz.

Note 1. And as to what regards Hostages, Chap. XX. of the fame Book, § 58.

12 It appears evidently, that, on the contrary, the Consuls declined treating, because they had "no Commination from the People." Livy, Lib. IX. Cap. V. Num. 1.

13 Livy, Lib. IX. Cap. V. Num. 5.

14 See Chap. XXI. of this Book, § 11.

15 Dion. Scol. in Excerpt. Porph. Valerius Maximus, IV. Cap. VIII. Groitus. It is not Diodorus of Sicily that speaks of this Adition of Fabius, in the Excerpt of Mr. De Petriw e's, but Dion Cassius, to be seen p. 597 of that Collection.

16 Dion, Excerpt. legit. V. Groitus. XVII. (1) Différé. 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 Café like this, we certainly mean an express Ratification; and that the rather, because a short Time is usually fix'd 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 Treaties. Whereas, when a Treaty has been made purely and simply, the Party seems to have suppos'd, either that he had a Power to treat, or could easily obtain a Ratification; and the Treaty is confirm'd to no Term.

2 For Lutatius had inferr'd this Clause, that the Agreement should be good and valid, only in Café it was approv'd of by the Roman People. Livy, Lib. XXI. Cap. XIX. Num. 3. See also Polybius, Lib. III. Cap. XXI.

3 See likewise Polybius, Lib. I. Cap. LXII. LXIII.
3. The Romans pleaded Silence against the Carthaginians, upon the Agreement made by Africinus; but because it was express'd in negative Terms, That the Carthaginians should not pass the River Ibusus, it could scarcely be allowed, that a bare Silence should be enough here to ratify another's Fact, since no Act properly theirs Silence should 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 consist'd of many Parts, and it had always appeared, that the Romans had observ'd 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.

4 Livy, Lib. XXI. Cap. XIX. Num. 3.
5 That is, should not pass over it, in Order to make War. Polybius, Lib. III. Cap. XXIX.
6 Those are treated of in Chap. XXII. and XXIII. of the third Book. Mr. Thomasius, in his Dissertation De Sponte Romorum Causid, § 47. criticizes this Division of our Author as unexact; for, says he, these Agreements made by Generals, or Soldiers, concerning their private Affairs, are therefore private, not publick Agreements. But our Author places them among publick ones, because, tho' they most commonly relate only to the private Concerns of the Generals, Officers, or Soldiers, they make them as publick Persons, and on Account of the War, which is a publick Affair. Add to this, that several Questions arise here, which have some Relation to publick Agreements; as will appear from the Chapters already referred to.

CHAP. XVI.

Of Interpretation, or the Way of explaining the Sense of a Promise or Convention.

I. 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, 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 pleas'd 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 Prefcription against Callimachus, said, ἂν οὐκ ἔχεις ἡμᾶς ἀδικεῖν τις ἀποίκος ἡμᾶς ἱνωθείς, (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, not only the Greeks, but the Barbarians too, as the same Author had a little before express'd it.

1. How Promises do not universally oblige.

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 Handing to them, as acknowledged by all Nations.

2. And
And therefore it was a foolish pitiful Shift that the Locrions made Uf of, when, having put fome Mould into their Shoes, and carrying fome Heads of Garlick privately on their Shoulders, they swore they would keep the Articles of the Treaty, as long as they carried thofe 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 abfolved from their Oaths; which Story is in Polybius. We have also feveral Examples of the like Treachery in Polybius 3, which there is no Occa{Sion to mention, because no Body doubts them. But Cicero 4 well observed, that this is not the Way to prevent Perjury, but to render it more Criminal.

III. But Terms of Art, which the common People are very little acquainted with, fhou'd be underftood as explained by them who are moft experienced in that Art, as what Majesty is, what Parricide; which the Profef{Sors of Rhetorick refer to the common Place of Definition. For, as Cicero fays 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 underftood of a Multitude of Soldiers, that publicly invade another's Dominions. For Historians generally diftinguifh between thofe who plunder a Country privately, like Robbers, and thofe who do it openly with regular Troops. Wherefore the beft Way to judge what Numbers make an Army, is by the Strength of the Enemifies. Cicero reckons six Legions, with fome Auxiliaries, an Army 5. Polybius faid a compleat Roman Army was 16000 Romans, and 2000 Allies, 6 but a lefs Number may fometimes do it. Uplian calls him a General who commanded, tho' but one Legion, with its Auxiliaries 7; that is, as Vegetius expounds it, 10000 Foot, and 2000 Horfe 8. And Livy makes a juft Army 8000 9.
The like may be said of a *Fleet*. So a *Fort* is a Place so strong as to be able to keep off an Enemy's Army for some Time.

IV. I. Conjectures are necessary, when Words and Sentences are, *πολλακις*, *Of several Significations*, which the Logicians are in their Disquisitions; for if a Word can have several Significations, they call it, *εμφάνισις, An Equivocation*; if a Sentence *αμφιβολία, An Ambiguity*. And we must also use Conjectures, when in any Contracts there is, *καταφυγία, 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 fet 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 Ads 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 Confect of several is required, as in Contracts and Agreements. This the Rhetoricians call, *εδιπολία, A Contrariety of Laws*. In which Cases, the manifest Obfuscity of the Words justifies our Recourse to Conjectures.

2. And sometimes the Conjectures themselves are so plain, that they carry us to a Sense contrary to the more common Acceptation of the Words. This the Greek Orators call *ερημία* \\*έρημος*, 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. *First*, From the Matter, as the Word *Day*, (if a Truce be made for thirty Days) ought not to be understood of natural Days but of artificial ones, as agreeable to the Subject-Matter. So the Word *Giving* is taken for a Forbearance, according to the Evidence 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 confents 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 *Gives* ought this to be understood, agreeably to the Nature of the Thing, and the Intention of the Person speaking. See *Cujus, Observe Ex. XX. Cap. IV. and Anthony Faure, Rauam. Tom. V. p. 566. 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 intimating that this is done only conditionally, he is not supposed to have referred to himself any Right of demanding what he has abated, how great Plenty for ever the following Years may produce. It is an Act of Generality, and ought naturally to be understood thus; because the Referre in Question makes a great Diminution in the Value of it. The Farmer therefore has no Reason to suppofe 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 Disquisition which I have made, Chap. XII. § 18. Nut 4.

8 Servius, upon the first *Aenid, Arcas* (Fortes) are so called from arcas, to repel, because an Enemy is repulsed from thence, that is, hindered and kept back. *Grotius.*


3 See Hermogenes, Parit. Orat. Sec. XI. Cicero, De Inventione, Lib. II. Cap. XIIII. and the Author of the Rhetorics, addressed to Hermogenes, Lib. I. Cap. XI. as also Quintillian, Inflit. Orat. Lib. VII. Cap. VI.

V. (1) Tertullian, De pudicitia. An *Ex preffion* (Sermo) must be understood according to the Nature of the Subject spoken of. He has the same in his Book De Reformatio Carmit. *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 Cafe, in the Chapter of PUFFENDORF, which answers to this, § 7.

3 Our Author had here quoted in his Margin, a Law which says, that *If, by Reason of a bad Year, a Proprietor of a Farm abate some Part of his Rent, making Ufe of the Word De nation, it is a Sort of Forbearance, and not proper ly a Donation.* Digest. Lib. XIV. Tit. II. Locut. Consult. Leg. XIV. § 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 confents 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 *Gives* ought this to be understood, agreeably to the Nature of the Thing, and the Intention of the Person speaking. See *Cujus, Observe Ex. XX. Cap. IV. and Anthony Faure, Rauam. Tom. V. p. 566. 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 intimating that this is done only conditionally, he is not supposed to have referred to himself any Right of demanding what he has abated, how great Plenty for ever the following Years may produce. It is an Act of Generality, and ought naturally to be understood thus; because the Referre in Question makes a great Diminution in the Value of it. The Farmer therefore has no Reason to suppofe 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 Disquisition which I have made, Chap. XII. § 18. Nut 4.
according to the Nature of the Affair it is employed in. So the word Arm sometimes signifies Infruments 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 Plautius did. So when People are required to lay down their Iron, (Ferrum) they satisify the Order, if they lay down their Weapons without their Buckles, as Pericles with his Shifts and Quirks pretended. And by a free going out of a City, is meant a safe Conduét, contrary to what Alexander did. And by leaving half the Ships, is meant half of the number of the Ships, whole, not cut in two, as the Romans safely dealt with Antiocclus. 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 we must rather take it in that Sense which is liable to no Aburdity. It was then an idle Cavil of Brafibidas, who having promised to depart out of the Land of the Bastians, said afterwards, that the Place where his Army was encamped, did not belong to the Bastians, as if his Promisie had referred to the Possession which the present Fortune of War had given him, and not to the ancient Limits of the Bastians; in which Sense the Agreement itself had been vain and of no Effect.

VII. Lastly, from the Circumstances and Connexion of the Words with others, 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; in a dubious Cafe, the Will is presumed to be consonant to itself. Thus in Homer, 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. And Plutarch gives the Reafon i(2) τώ μάθη, &c. Judges are guided by that which is plain, letting what is obscure and left evident quite alone.

VIII. Among the Circumstances of the Place, the principal and most weighty is the Reafon of the Law, which some confound with the Intent of it; 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

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. Strategem. Lib. IV. Cap. VII. num. 17.
6 See Dio DORUS of Sicily, Lib. XVII. Cap. LXXXIV. Polyæus, Strateg. Lib. IV. Cap. III. num. 20. and PLUTARCH, Vit. Alex. all which Authors have the learned Gronovius quotes in this Place.
7 VALERIUS MAXIMUS ascribes this to Q. Fabius Labe, Lib. VII. Cap. III. § 4. But at it has been already observed, Livy, Lib. XXXVII. Cap. XXXIX. relates the Thing in a different Manner.
8 VI. (1) There 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. Noody's Commentary on the first Part of the Digest, p. 23. col. 1.
9 2. Our Author here mistakes the Persians. Brafibidas was General of the Lacedemonians; nor does he say this to the Bastians. They are the Words of a Herald at Arm, sent to them by the Athenians, who had promised to quiet their Territories. See Thucyd. Lib. IV. Cap. XCIV. Edit. Oxon.
10 VII. (1) Our Author's Explication is, Contraestārunt aut excusam loca tuas.
11 2. St. Austin against Alhiman,nus, Chap. XIV. excellently well observes, that they pick and cut out little scraps of Scripture to impose upon the Ignorant, without taking together what goes before, and what follows, which would hit them into the Meaning and Design of the Writer. Grotius.
12 3. See Lib. III. ver. 92. 93.
13 4. Agrammemnon explains this of killing his Man, ver. 281. thus Priam understands it, ver. 309.
15 VIII. (1) CICERO in the behalf of A. Cæcina: There is no great Difference in the Reafon of the Thing, but only in the Manner of it, whether I am dissatisfied by your Agent, who is the flated and universal Agent of every Body, who is out of Italy and abroad on the Government's Account, a Sort of Lord and Master, that is, one who manages and acts uncontrollably in Right of some other, or by your Tenant, or Neighbour, or Client, or Freeman, or any other Person whatsoever, who has done me this Injury and Difference by your Orders, and in your Name. Grotius.
16 See the Notes of Francis Hotoman.
17 2. Our Author seems to have had in View a scholiastic Lawyer of Middelburg, whom he frequently quotes in this Chapter. It is Nicholas Everhard, who expressly says, The Reafon 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 Reafon of the Law.
moved to such a Thing by some one Reason as its only Caufe; 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 Pream, or Deed of Gift, made in Propeçt, and on the Account of Marriage, 5 is revocable and void, if no such Marriage does ensue.

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 'Cognition 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 Ufe indulges. As Death in the Civil Law extends to Transport or Banishment, whereas in the common Acceptation it signifies quite another Thing.

X. We must also observe, that of Things promised some are favourable, others odious, and others of a mixt or middle Nature 6. The favourable are thofe that carry

3 And consequently what agrees with one, may
not agree with another; and, on the contrary, what seems to clash with one may be confonable to another.

4 See what I have said above, on Chap. XI. of this Book, & 21. Note I.

5 Digest, Lib. XXXIX. Tit. L. De Donationibus, Leg. I. § 1. The Words are these: But when we say that, if the Bridemake make a Preament to the Bride, with this Intention, that, a Marriage ensuing, it may be taken away, it may be denounced; we say nothing contrary to what is before advanced: But we grant such a Donation was made between thofe Persons, as may become void immediately. This Inheritance is misplaced; for it relates to tacit Exceptions implied in a Preamble, in Consequence of the manifest Intention of the Promitter; not to the Explanation of the Words of the Promitter. Here the Sense is pefectly clear, and no Ambiguity in the Word Donation. But the Donation is void, because it was made only on Supposition of a Marriage, which doth not ensue.

IX. (1) See the Chapter of Puffendorf, which answers to this, § 21. Note 3, and for the following Examples, Note 3.

2 Deportati. Such as were banished for Life into an Island, fo that they forfeit all the Rights of a Citizen, and their Eftates were confiscated. In other Reflexes, they enjoyed their Freedom, and all the Advantages enjoyed by the Righs of Nature and Nations. This was termed minor or media capita disminuiti. Much more were thofe who left their Liberty and were condemned to work in the Mines or Quarries (which was called Maximus capitii diminutti) considered as dead. See Digest, Lib. XVII. Tit. II. Proyectis, Leg. LXXXI. § 10. as also Lib. XXXVII. Tit. IV. De honorum privatione contra tabulas, Leg. I. § 8.

3 See Guicciardini, Lib. XVI. where there is a Discourse about some Agreements of Charles V. relating to the Duchy of Milam. Grothi.

The Paffage runs thus. "For the Agreement and Promife of protecting and defending Francis Sforza in the Duchy of Milan, he did not deprive the Emperor of a Power of proceeding against him, as against his Vail, and declaring the Fief conquered for the Crime with which this Fief charged, viz. having conjurifed against his Majesty. And Mr. de Bourbon, named to this Dutchy, in Caft of his Death, succeeded him on his being deposed, because the Laws speak of natural and civil Death; and because the latter, who is considered as such a Crime." P. 341. Edit. Geneva, 1645.

X. (1) I do not reftaft what I have advanced, either after others, or of my own Head, in the Notes on § 12. & 7. of the Chapter in Puffendorf's work, on the Consequences of this, concerning the Right of Sedility 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 feem to have applied his Distinction of the Civil 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 feeldom; and unfortunately, as before observed, his Design is only to fliw the Manner of interpreting Agreements and Promifes; in short, all voluntary Engagements. As to the Substance of the Question, I think at present only add some Reflections, occasioned by what I have lately observed in a new Edition of the Abridgment of Puffendorf, De officiis huminis & civibus, printed at Glaugow in 1718. under the Direction of Mr. CARMICHAEL, Professor of Philosophy in that University. That able Man, who has added a Volume of Notes and Supplements, larger than that of the Text, says, in his Remarks on B. I. Chap. XVII. That the Distinction of Favorable and Odious, which I have rejected after others, is founded in the very Nature of Things; some of them being more defirable than others. Things having different Faces, fo that according as they are viewed, some of them ought to be considered as Objects of our Difpofs, and others as Objects of our Aversion. This, fays he, is dictated by common Senfe; fo that it is in vain to seek for fixed Definitions of the Favorable and the Odious. It is not yet certain, that this Distinction ought to be allowed some Weight in the Explication of a doubtful Speech; fo that, as far as the Use of Terms and other Circumstances permit, it is conjectured that the Intention of the Perfon speaking was fuch or fuch, according as the Queftion hangs on fomewhore favourable or odious. To this I anfwer, Fiyth. That not one of thofe, who have rejected the Distinction under Conderation, ever thought of denying that fome Things are more defirable than others; but the Queftion only whether they are favourable or odious. And for Example of a Donation, which, according to the Principles of the Partifics of the Distinction before us, belongs to the
carry in them an Equality, and respect the common Advantage, which the farther it extends, the greater is the Favour of the Promiss, as in those that make for Peace, the Favour is greater than in them that make for War; and a defensive War has more Favour allowed than one undertaken upon any other Motive. Others are odious, such as those that lay the Charge and Burden on one Party only, or on one more than another; and those which carry a Penalty along with them, 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 false of Peace, it shall according to the greatness of the Good, or the manner of the Alteration be reputed sometimes favourable, sometimes odious, yet so that if other Circumstances are equal, the favourable shall have the Preference.

XI. The Difference of Acts due in Equity, and those due in strictness of Law, XI. The Diff-
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 Injustice, if in any Countries there be some Acts which have one certain common Form; that Form, 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 Promiss, we should flock rather to the Words.

XII. 1. These Things premised, we must observe these following Rules; in Caffes not odious 1 we must understand the Words in their full Extent, as they are generally taken; and if they are ambiguous, then they must be taken in the largest Sense, as the Mafculine is to be taken for the common Gender; and an indefinite Expression shall be understood universally 2. Thus the Words, unde quis dejectus sit, from whence a Man has been ejected, shall be extended to the restoring of him who is by Force and Violence kept out and hindered from coming to his own; for the Expression in its largest Sense will admit of this Construction, as Cicero pleads in his Oration for Cæcina.

2. In a Matter altogether favourable, if he who speaks be versed in the Law, or speaks by the Advice of those who are, the Words shall then be taken in their larger Sense, so as to include that Signification also which is used among the Lawyers, or which the Law has imposed upon them 3. But we are not to run to Significations evidently improper, unless otherwise some gross Absurdity would follow, the Clas of odious Things. I say, if we consider it as an Act baronethone to one of the Parties only, it will be a Thing but little definable, 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 definable Thing: Here will be Room for premising 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 Difference still more impracticable. Fourthly, No Notice is taken of the Reasons I have employed for thinketh that in all the Examples produced, the Interpretation may be made without the Affi-
tance of this Difference; which therefore is entire-
ly useless, even though it had a clear and firm Foundation. I hope then that it will not be taken amiss, if I leave it here, till it is so established that we may know how to make Use of it.

2 Quæ communes judicium utilest. The Terms are ambiguous, and may signify the common Advantage of the Parties. But it appears from the two Inferences, alleged by our Author immediately after, and from some which occur elsewhere. (B. III. Chap. XX. § 4.) that he designed to speak of the Advantages of human Society in general.

3 That is, something burthenethome to which a Man has subjected himself, in Cafes 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 forsan 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 Proprieter, 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.

3 Consult Note 5, on the same Place.

4 See an Inference of this in L. cum virum. C. de Fidei communi. Grat. C. 4 Y
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 Injury, or an Aburdity; 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. 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 promis'd by one Party only, is presumed to be rafed at the Charge of that Party which defines it.

XIII. Whether under the Name of Allies future ones are comprehended and look for they are fo; where also of the Romans Treaty with Alcudahul, and sic Controversies as thefe.

The Reader may also consult HUBERT GIPHA
NIUS, concerning the Case mentioned in this Law, and others of the like Nature, in Cad.Tit. Famili. scienendas, p. 194, &c. as likewise Mr. HERN
TUS's Difputation, De Proeljatis, § 18. p. 325, 326. Tom. III. Comment. & Opif. &c. 5 See Note 7. on § 13. of the Chapter in PU
FENDORF, which answers to this.

XIII (1) See PuFENDORF, B. VIII. Chap. IX. § 10.

2 POLYBIUS, Lib. III. Cap. XXVII.

3 Lib. XXI. Cap. XIX. num. 4, 5.

4 Which Claude was added in the Peloponnefian Treaty of Peace made between the Lacedemonians and the Athenians, THUC. Lib. V. GROOTUS.

The Claude 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 Confederation of a Tribute to be paid as before. It was flipulated that these 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. Edt. Oxon.

5 But, fays Mr. BUDEUS, in his Jurifprud. Hispr Specimen, § 100. It was on the other Hand, a foreivable Matter to the Romans and to the Saguntines, that the Town should be preferved, 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 Diftraction of the Favourable and the Odious, I fay, no Prefumption is hafily to be formed of a Senfe, tending to justify any Thing, from which the Violation of a Treaty may enufe; but then, as there is no Room for thinking that the Parties defired the Treaty should hold good, whatever might happen, it fhould be considered whe-
ther, by following a certain Senfe, fome Reason may not be found why they probably would not rather chufe that the League should be broken, or be in danger of being fo, than be secured from a Ru-

ture by the Favour of another Sefide. But whoever enters into an Alliance, knows, without Doubt, that it may easily become as a dvantage, or more advantageous, and fometimes even necelfary, to ally himself with others, without any Preclude to the Engagement, by which he has deprived himself of a Power to do or not do certain Things. So that
nians of their Liberty of bringing those by Force of Arms to Reaſon, 6 who were believed to have injured them; 7 a Liberty which by the Law of Nature was their Due, and therefore not rashly to be Putpoſed 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 Carthagiſians had done nothing contrary to the Štipulation, if they employed the Arms, which they looked upon to be lofty jufť, against the Saguntines, nor the Romans if they defended them. As in Pyrrhus's Time, when it was agreed between the Romans and the Carthagiſians, 8 that if either of the two People should enter into an Alliance with Pyrrhus, it should be with the Šerue, of having the Power and Freedom to fend Affiſtance to that State which Pyrrhus should attack.

I do not ſay that the War on both Šides in this Case could be juſt; 9 but I deny that this was any Violation of the League 10 in so doing. As Pyſius rightly diſtinguidhes concerning the Succours ſent to the Manerituous, whether it were juſt, and whether the League would allow it 11.

3. And this is what the Corcyreans tell the Athenians in Thucydides, 12 that not withſtanding their League made with the Locadeſtainians they might fend them Succours, because they were allowed by that League to form any new Alliances when they pleaded. And the Athenians afterwards acted on that Principle, ordering the Commanders of their Ships not to fight against the Corbydians, unlefs 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 inſoma[5]patible with a Treaty, for one of the Allies to defend those who are injured by the other, 13 fo long as the Peace is in other Reſpects maintained. ʃuffin 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 left Perjury by helping their Allies, than by engaging in open War themſelves 14. We meet with the very Šame Thing in one of Doroſiene's Orations concerning the Ιſle of Holoneis, where it appears, that by a certain Treaty of Peace between the Athenians and Philip it was diſputed, that the Cities of Greece were not included in that Treaty, should remain free, and that those who that he is Putpoſed to reſerve to himself a Liberty of making ſuch Alliances, provided he has not ex‐preſſly renounced that Liberty; and consequently, there is good Reaſon to believe that when it is re‐ gularly diſputed that neither of the two Nations ſhall molest the Allies of the other, each of the con‐tracting Parties ſhould beſt the Clause of its future Allies, as well as of the preſent. See what I have laid on the preceding Chapter, § 13. Note 3.

6 No ſuch Thing. But as the Carthagiſians 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 in 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 Quæſtion will be whether the War was juſt or no. The Carthagiſians, by attack‐ ing 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 Infraſection of the Treaty lay on the Šide of the Romans, who pro‐ teced it.

7 The Romans to the Samnians who had a mind to invade the Sidicines, and asked the Romans leave to do it, made this Anſwer, There was nothing fuppoſed that could hinder the Samnians 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 he does not by the Right of War forfeit upon any of their Cities, nor contravent any Alliances with them. Livy XXXVIII. Polybius in ex. legis. XXXV. Grotius.

The Sidicines were in no Manner allied to the Roman People, as is obſerved by the Samnians in the Clide of the preceding Chapter. As to the Clause of the Treaty with Antiochus, it relates only to the Right of Šelf-Defence, which ought to be fup‐poſed tacitly excepted in all Agreements.

8 Polybius, Lib. III. Cap. XXV.

9 Procopius, Pericr. II. § 14. &c. § 15. &c. He ſaid that he had no Ways in‐fringed any Articles that were between the Persians and the Romans, because neither of them had in‐ fered him in them. Grotius.

10 It seems to me to have been an Infraction of the Treaty. See what I have laid in Notes 5 and 6, on this Paragraph.

11 Lib. III. Cap. XXVI.


13 Thus after the Times mentioned there, the Corcyreans declare, A htons. That they would indeed, according to their Agreement, affiſt the Athenians with their Troops, and yet ſtil be Friends to the Peloponnesians. Grotius.

14 Lib. III. Cap. VII. num. 44. 15.
Of the Rights of
Book II.

XIV. How it is to be understood, that one Party shall not make War without the other’s leave.

XIV. We shall here give an Instance in unequal Leagues, as suppose it be stipulated that one of the Confederates shall not make War without the other’s Consent; as we took Notice before, that it was agreed on between the Romans and Carthaginians after the second Punic War, and also in the League between the Romans and the Macedonians, before the Reign of King Periplus: Now since under the Terms of making War, all Wars may be comprehended, or only offensive Wars, and not defensive; in this dubious Case we must take the Expression in its stricter Sense, left our Liberty be too much restrained; 5

XV. What the Romans promised, that Carthage should be free, is of the same Kind, tho’ it could not reasonably be understood from Independence from the Nature of the Act, (for they had long before left 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.) For in the Words, To be left free, avisaus, to be governed by their own Laws, as Appian 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. 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. Nay, 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 Cafe, 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 pretently to be reputed Personal, for as it is well observed by Pedius, and Ulpian, the Person is often inferred in the Contract, nor that the Contract is Personal, but to whom that Contract was made. If it be added to the Treaty, that it shall stand for

much less the Reflection I have just now made, which is drawn from the ordinary Use of Terms. For how dependent ever the Carthaginians might be, the Question here is, whether, without any Prejudice to Honesty, the Treaty can be so explained as to underhand by Carthage, the Carthaginians, independently of the City, in which they were fettled. Now, can it be said that, if at the Time of the Treaty, it had been asked what was meant by the Word Carthages, the two Parties would have agreed on that Sense of it? A Man must be very obliging, who pretends to justify a Perfidy so manifester, as that of the Romans in the Cafe 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 ventures our Author without understating him.


16. (1) On this Question, see Pufendorf, Lib. VIII. Cap. IX. § 6, &c.

2. See Chap. IX. of this Book, § 5.

Disput. Lib. II. Tit. XIV. De Pug. Leg. VII. § 5. The Roman Lawyers require that, in Cases of Doubt, a Prefumption be made that the Agreement is real, and not barely personal. See Mr. Norden’s excellent Treatise, De Pugn. & Tranfag. Cap. IV. and Mr. Schulting, on the Title De Pugn. § 15.
ever, or that it is made for the good of the Kingdom, or with him and his Successors, for this Clauze est l'irivius, and to his Pafority, is what is usually expreifed, as Libanius says in his Defence of Domoftene, or if it be, for such a limited Time, it will from hence fully appear, that the Treaty is real. Such does the Treaty between the Romans and Philip King of Macedon seem to have been, which when Perfeus his Son denied to be obligatory on him, occasioned a War. 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 perfonal. Treaties made for the Preservation of Peace and Commerce are favourable, nor are those for War always odious, as some think, but the irivius, that is, such as are entered into for mutual Defence, come nearer the favourable; and are more odious and burdensome. Besides in a Treaty that allows any War, it is premised 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, I do not fay any Thing of that here, for this belongs to private Societies, and depends upon the Civil Law. And therefore whether the Ilides, Lattia, Hetetrians, and Sabines did right or wrong, in going off from their Treaty, upon the Death of Romulus, Teleia, Ancus, Prutes and Servius, cannot properly be determined by us, because the Words of the Treaty itself are not extant. Nor much different is that Controversy in Iaffius, whether the Cities which had been tributary to the Medes, 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 Bodin'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 Perfon of him who takes it. For the Oath may bind only the Perfon, and yet the Promife 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 Promife to bind, tho' for the greater Reverence and Solemnity, tho' Promifes are confirmed by Oaths. When P. Valerius was Conful, the People of Rome had sworn to meet at the Summons and Order of the Conful; he dying, L. Quinctius Cincinnatus succeeded him;

4 Livy, Lib. XLII. It is premised that a Regard is had to the Prudence and Honesty of the Person one is treating with. See Paruta, Lib. V. and VII. Grotius.

5 Livy, Lib. XLII. Cap. XXV. art. 10. As this Difficulton is not very certain, it is befer to fay, with Mr. Thomasius, (Jurisprud. Divin. Lib. III. Cap. VIII. § 27.) That, in Cafe of a Doubt, all public Treaties made with a King are to be considered as real; because, in Cafe of a Doubt, a King is supposed to act as Head of the State, and for the good of the State.

6 Digbt. Lib. XVII. Tit. II. Pro Socis. Leg. LII. § 9.

7 See Dionyfius Halicarnasenus, Lib. III. Grotius.

8 See Dionyfius Halicarnasenus, Lib. III. Grotius.

9 The fame Author in his third Book mentions The Apulians and the Latins; and in his fourth, Tarros Hordones, and the Latins. Ammianus, Lib. XXVI. Super King of Peru fettled upon Armens, endeavouring, but unfruitfully, by Force of Arms, to bring it again under his Jurisdiction, pretending, that after the Defeat of Sowian, who was the Perfon he had concluded the League and Peace with, nothing ought to hinder him from recovering what he could prove belonged to his Armens. See fuch another Instance on the 68th Page of his Roman History, in Menander Protectors. Add to this what the Switzers paid 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 ancient League of the French with the Scots. Grotius.

10 Lib. I. Cap. VII. art. 2. Where the Historian tells us those Cities thought their State or Condition changed and therefore revolted from Cyru. Boecler, in a Corollary, at the End of his Dissertation intitled Miles Capiteis, Tom. I. Dissert. p. 990. conjectures that this was a large City, which was attacked, under the Name of the Conqueror; which is sometimes the Meaning of that Term; and thus the Question is easily decided. But on that Poore one would think there would have been no Pretend for withdrawing themselves from Cyrus's Government; as least the Pretend would have been very vritting. Besides, supposing the Word Tributaries, 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 ancient 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. See Pufendorf, B. IV. Chap. II. § 17.

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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 Disregard for the Gods which poissys the present Age: Nor did every one, as now-a-Days they do, make their Oaths and their Laos floop to the Conjunction that left formed their Turns; but rather fuit and accommodated their Manners to them.*

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 Possiclion, the Right to the Crown still remains in him, according to that of Lucan, concerning the Roman Senate:

--- Non unquam perdidi Ordo Mutata tua jura loco

Nor has the Order ever left its Rights Upon any Change of Place. Pharsal. Lib. 5. Ver. 29, 30.

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XVII. League with a King remains good, tho' he be expelled his Kingdom.

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XVIII. But it does not reach the Usurper of the Crown.

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XVIII. But on the other Hand, if with the Conſent of the true King we make War on an Uſurper, or any other Perſon who oppreſſes a free People, before that People has ſufficiently declared their Approbation, we do nothing againſt any Article of Alliance; becauſe tho' they have got Possiclion, yet have they no Right. And this is what T. Quintius urged to Nabis: We never entered into any Friendſhip or Conſideracy with you, but what Engagements we have are with Pelops the just and lawful King of Sparta. For in Treaties the Qualities of King, Successor, and Such like, properly imply a Right, whereas the Term Uſurper always imports an odious Caution.

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XIX. 'Twas a Quæſtion formerly of Chryſippus's, Whether a Reward promis’d to him who first gets to the Goal, and two get there together, is due to both, or to neither. And here indeed the Word first is ambiguous, for it may either signify him who out-runs all the reft, or him whom none out-runs. But became the Rewards of Virtue and Excellency are Things of a favourable Nature, 2 the juicer Opinion

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12 Lib. III. Cap. XX. num. 7. XVIII. (2) So Valerius would not allow of the Gabick King’s Exceſse, who faid that he had fent fome Auxiliary Troops to Procopius who had oppreſſed the imperial Dignity. Ammianus in his twenty feventh Book calls it a very trilling Exceſse. You have the fame Story in the Greek Writers, but under the Name of Synthians, for fo they called the Gods. So that if Julianian denied that he fhould break the Articles of Alliance made with Gaius Ric, if he took up Arms againſt Gelimer, who had deprived Idricher the rightful King, both of his Crown and his Liberty. See Cardinal Tuccitus, pp. upon the Word Tyrannus. Concl. CCCCV. Num. 6. Ca- cherianus, Deiſ. LXXIX. Num. 35. Grotius.

The Exceſse, made by the King of the Gaths, was not grounded on their Obligation of fending Succour to the Poſſefsor of the Empire, whoſther laſtly fo 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 Conſtatine. Ammianus, Lib. XXVII. Cap. V. Julianian’s Declaration, in regard to Gelimer, King of the Vandals, may be found in a fecond Letter which he wrote to that Prince, as produced by Procopius, De Bell. Vandalic. Lib. I. Cap. IX.

2 Livy, Lib. XXXIV. Cap. XXXII. num. 1. Boecker, in his Differtation De Actis Civitatis, Tom. I. p. 974, 971. charges our Author, with Want of Exactnes in this Place, as this was only a Pretext made Ue of by the Romans, who had treated with Nabig, as a lawful King. But our Author fays nothing tending to approve of the Ap. location of the Maxim to the present Cafe. It is fufficient

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for his Purpofe that the Perfon, whose Words he produces, fupposes this Maxim as true in itself.

XIX. (1) See the Chapter in Pufen Dob, which answers to this, § 14.


1 Properly speaking, the Bufines 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 fuppoſed that only one Perfon out-runs the reft; it being very uncommon for several to reach the Goal at the fame Time. So that it may be faid in general, that when a Reward is pro- poled for the Man, who fhall do fuch or fuch a Thing first, only one Perfon is thought of who shall be before the reft : The Competition of two or more, who may be equally firf in Regard to the reft, is out of the Quæſtion. So that the whole Bufines is to know what would probably have been the Will of the Perfon, who gives the Prize, had he thought of this Cafe. In Order to this, it is to be considered whether the Thing in Queſtion can be repeated or not, at the fame Time. If it can, as in the Cafę 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 Perfon, who propofed the Prize for the Race; designed that, if two reached the Place appointed at the fame Time, they fhould start again. This is an almost certain Method for fatisfying his Intention: as it is a hundred to one that this Cafe will not happen twice together. Rewards being most honorable, when fewer declare them, it is to be pre- fumed that, when a Man, considering a Thing as difficult, designed to reward the Perfon, who should
Chap. XVI. War and Peace.

Opinion is, that they should share the Prize between them. * Seipi, Cesar 3 and Julian acted more generously, in giving the entire Reward to each of those who had at one and the same Time scaled the Walls; and let this suffice for the Interpretation to be given to the proper or improper Signification of Words.

XX. 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 often left 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, that Signification is not so much in Ute; 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 Privy, 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 Rhetericians, in their common Place, * sect. 8, serm. 3, &c. But, whether the Case be here, or there, it is certain that the Reason of which they give us one Instance, and that is, When we always express the same Intent. And hither also that other Head, * sect. 8, serm. 4, of Reasoning, may be referred, where we gather, as Quintilian says, What is not written, from what is written. And what the Lawyers teach us of Things done fraudulently.

3. Take should first perform it, he intended that the Recompense promised, 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 Recompense is to be given, cannot be repeated at the same Time, as in the Case of scaling the Walls of a Town besieged, it should be considered whether the Prize can conveniently be multiplied, or not. If it can be done without laying too heavy a Burthen on the Person who promised it, as when the Prize is a Crown of small Value, or other Things of the like Nature, which are looked on as bare Marks of Honour; there is very good Reason to prehume that the Promiser would only have consented to that Multipli- cation. But if the Prize cannot be thus conveniently multiplied, the Enquiry should be, whether it is such as may be divided or parts only, or 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 call Lots for the Prize, or leave the whole to one of the Parties, on Consideration of some Satisfaction to be made to his Com- petition. So that without having Reason to the Distinction of favourite and other, the Case before us, and others of the same Sort, may be de- cided by reasonable Prepositions of the Donor's Intention. Popenord, in the Chapter which speaks on this Subject, has the Question somewhat differently from our Author; but not with all the Distinctions, and on the Foundation I have here employed.

4. " Seipi, having prraised Lutus, called him to the Assembly and declared, he was very well satisfied he had made the Walls together; and that he presented them both with Moral Crowns, in Consideration of their Bravery." Lib. XVII. Cap. XLVIII. Num. 13. This Fact is also related by Zonaras, who took it from Dion Cassius, Excerpt. Petri, p. 629, where the learned Dr. Valoh has added what was wanting in the Frag- ments of the Original Author, from the more per- fect Text of the Copist.

5 I know not whence this Fact of Cesar 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 Histo- rian tells us that, after a Battle with the Persians near the Town of Grifhten, the Emperor, calling several by their Names, whom he observed to manifest themselves in that Action, gave them Naval, Civic, and Castriffen Crowns, Lib. XXIV. Cap. VI. p. 443. Edit. Paul. Gron. Our Author was induced to imitate the Caire here the same as that which happened under Seipi, because the Corone Navalis, and the Corona Castrifensis were usually given, the former to him, who first boarded the Enemy; the latter to him who first entered the Enemy's Camp; or that may be seen in Justinus Lapidus, Dr. Millet's Rom. Lib. V. Dialog. LVII. and CHARLES FAS- CAL, De Corinis, Lib. VII. Cap. III. &c.

XX. (1) Seneca in his excep. contr. VI. 3, has very well observed, that a Circumnjcription always puts a Prize of Recovery upon you under the appearance of Law; what you can differenciate is harmful; what he concealed is designed to trick you. Quin- tilian, Contr. CCCXLIII. For we never run...
3. Take for an Example 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 Ramps 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, disposed of his Estate to such a one, in case that Jealousous 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 in Cicero, and Valerius Maximus 4.

4. Cicero in his Oration for Cassius 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 Where there is manifestly one and the same Reason of Equity, that is, where the Case agrees with the Reason which was the only Motive of him who speaks, the same Rule ought to be establifshed. So likewise the Interdict, From whence you shall have exercised me by Force of Arms, takes Place also against all manner of Violence, which affects our Life and Perfon, 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 Declarations, Murder 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 Juvenal in the Affair of Pyrrhus's Estate, where because by the Law of Athens a Will could not be made without the Daughter's Consent, he infers, that no more could an Adoption without her Consent.

XXI. And to this Law, (Circumscription be means) but when a just Right is fluffed out by force, Law 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 constrained when his own Laws, when he thought by the little flift of putting in his Son for a Share, to get more into his Hands. There is the same Story in Valerius Maximus, VIII. Chap. VI. See another Instance in Tacitus, Annal. XV. of some pretended Adoptions. Another you have in Emanuel Commendes's Novel, in the Ju Gracje-Romanam, Grotius. 2 Fustis Arbilius in Seneca's tenth Cntro. Lib. XI. For it was no doubt, the Intention of their Oaths, that they should not whiles living be separated; when they 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 Café 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, Infit. Orat. Lib. VII. Cap. VI. I know no Place in Valerius Maximus, where that Writer speaks of the Will made in Favour of Curtius. Nor doth any Thing of this Kind occur, where it ought to be looked for, De rebus Tijdarmatis & Infortunati, 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 Trestife De Specialibus Legis, that Adultery is committed with a Woman, who is only betrothed to some Body else, and for this Reason; al §ον πολλακάς τικέ χαίρειται, because a Contract is at binding as a Marriage. So in the Maiolic Law under the Name of an OX every Time Animal is meant, and under the Title of a Pig, any Hole or Ditch, Extod, xxii. 28. 35. Chasius, Cato, Gracius, Mancius, Part V. Confid. XLI. 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 Emperor Severus and Antoninus enjoined that the same is to be done in Cafe of the Violation of a Woman betraved, as in Adultery, because neither any Matrimony whatever, nor the Hope of Matri mony is to be violated. Digest. Lib. XLVIII. Tit. V. Ad Leg. Jul. de Adulter. corrend. Leg. XIII. §3. See Collato Maiolicarn & Romanarn Legum, Tit. IV. §6. with Mr. De Potter's Note. 6 In this Quotation, from Declam. CCCL. our Author reads, Si inciderit in Lartoning; if a Man fall among Thieves, Mr. Barberry quotes this Paflage according to Oerberth's Edition, which reads Lartino. 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 Cadet. 7 Our Author misappplies this Paflage 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 Cafe is this.
XXI. And from hence that eminent Question in Gellius may eaily be answered, about an Order or Commiision; whether it may be executed, tho' not by the very same Method, yet by some other equally profitable, or perhaps more advantages than that which was prescribed: which may be done indeed if it be certain, that what was so prescribed was not prefcribed under any precise Form, but with some more general View that may be obtained as well for some other Way; as is answered by Secovla, when he said, that he who has an Order to be Bail and Security for another Perfon, may give an Order to the Creditor to pay that Perfon the Money. But if that does not sufficiently appear, we had much better obferve what Gellius alledges there, that we quite fet aside the Authority of him, who gives us our Commiion, if indeed 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 inconfident with his Design. An Original Defect in the Will is discovered, either from the Aburdity which would otherwise evidently follow, or upon failure of the Reafon which alone did fully and efficaciously move the Man, or from a Defect of the Matter. The fift is grounded upon this, that no Man is to be supposed to intend Things that are absurd.

XXIII. The focond is grounded on this, that what is contained in the Pronomie, where fuch a particular Reafon is added or plainly implied, is not considered simply in itfelf, but as it falls under that Reafon.

XXIV. The third on this, that the Matter in hand is always prefumed to be in the Mind and Thoughts of the Speaker, tho' his Words seem to admit a larger Sense.

Laws of Athens allowed a Man to di|po|fe of his Eftate by Will, as he pleased, if he left no legitimate Male Iflee; but with this Reftric|tion, that if he left legitimate Daughters, he could give his Ef|tate only to thoes who fhou|ld marry them. Therefore fays the Orator, a Father can neither adopt a Min nor leave him his Eftate, without giving him his Daughters at the fame Time; and consequently if Pyrrhus, having, as is pretended, a legitimate Daughter, had adopted Endius, without marrying his Daughter to him at the fame Time, fuch Adop|tion would be null, according to the Laws. So that the Argument is not founded on a Necel|lity of ftreching the Law beyond the Sense of the Terms: but on what is clearly implied by the very Sense of tho|se Terms. For they fuppofe the legitimate Daughters to be natural Heirefles, on Default of Male Iflee; except the Father had named a Man for his-heir, that he should have given one of his Daughters. Whence it plainly follows, that the Father could adopt none alone, at the fame Time giving him one of his Daughters; fince the Adop|tion of a Son implied a Right of Inheritance, exclusive of all other Perfons. In this Paflage the Words tui tamen are rendered in ilarum artificis, as their (the Daughters) Difpo|sal. And give te by a|lignos, Infulis filibarum, non conflitus, without the Knowledge and Consent of his Daughters. This fal|fe Sense is followed by our Author. But what immedi|ately follows is fufficient for discovering the Mit|t:ake. For the Orator adds, 'in tio by sepatam vulgatam, but if he has given him Daughters, who is fay|ring, i.e. with his Eftate. The late Mr. Pu|fendorf, who, as I have obferved since I wrote this Note, occasionally quotes the Paftages of fium, in his Dif|stinentum Tract, Difput. ii. p. 129. has given the true Sense of it, in a Manner worthy of his Attention, but without correcting the Translator's Mitake, to whom he elsewhere does Judge it fal|f in general in that Volume, Difput. i. 665, &c.

XXI. Where also of executing an Order in fome other Manner than what was pre|scribed:

XXII. Or it refrains the Sense, and that either from some Ori|ginal Defect in the Will, which is dif|covered, by the Aburdity of it.

The Paflage of Philo|ppus here referred to by our Author, is in the Miscellaneous Histories, Chap. XXII, which speaks indeed of the fame John; but he exceeds the Orders of Cy|titian, not thole of Belfiarus.

Dig. Lib. XVII. Tit. I. Mandatis sal centra, Leg. LXII. § 1. See, on this Law Anthon|ny Faure's Rationalia, Tom. v. p. 133.

Lib. i. Cap. XIII.

XXII. (1) This Diffufion has been critifed, as I have obferved on the Chapter of Pu|fendorf, which answers to this, § 19. Note 2. But I am now of Opinion that the Author may be juftified, by fhewing his true Meaning, which I think is this. There are fome Cafes, which there is good Reafon to believe the Perfon who fpeaks either did, or at least might forefee them; and yet that he never in|tended they fhould be included in the general Terms of the Promife: tho' he has not expressly excepted them: becaufe he fuppofed fuch an Exception clear in itfelf. This is what he calls an original Defect of the Will. There are other Cafes, which could not be forefeeen, but are fuch as if they could have come into the Mind of him, who fpeaks, he would have excepted them. This is the Accident inco|nfient with his Design.

2. We have an Infufion of this in a Roman Law, which forbids Po|ranus, 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 if such as are capable of having Children; so that if a Master ful|ly reserve such an Oath of his freed Men, who is an Eunuch, he shall not be|nified by this Law. Dig. Dig. XXVIII. Tit. XIV. Leg. VI. § 2, Gratus.
This Way of Interpretation too is placed by the Rhetoricians, under the Head, προφανεία, concerning the Letter and the Design, and is intitled, when the same Meaning is not always expressed.

XXV. 1. But we must observe in Relation to the Reason or Motive of the Will, that under it may be comprehended some Things not actually in Being, but only in a Moral Possibility of existing, and when this happens, no Restriction is to be allowed: So should it be stipulated, that no Army or Fleet should be brought to such a Place, none ought to be brought thither, tho' there be no Intention thereby to do any Harm, because in that Agreement, not so much any certain Damage, as all Dangers and Inconveniences whatsoever are respected.

2. 'Tis also a very usual Inquiry, whether Promises are to be understood with this tacit Condition, If Things continue in the same Pofture, they are now in; that is, what is not to be granted, unless it plainly appears, that that present Pofture of Things was included in that one only Reason we are talking of; and we frequently read in Histories of Emassadors, 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. The Matters of the Art of Speaking, when an Accident is inconsistent with the Design and Intention, refer this also to the same Head, προφανεία, concerning; and this Inconsistency is of two Sorts, for the Will is discovered, either by natural Reason, or from some Sign of the Will. Arisotle, who has very accurately handled this Part, thinks that, in order to make a Discovery from natural Reason, the Understanding ought to be ended with good Sense, or the Knowledge of what is right and just (a Virtue peculiar to it) and the Will with Equity, which he very wisely defines, A Correction of that wherein the Law, by its being too general, is defective; which may also be applied to Testaments and Contraéts in their respective Way. For since it is impossible to foresee and specify every Accident, there is a Necessity for referring the Liberty of exempting such Cafes, as the Speaker would, were he present, himself exempt; but this must not be done without Abundance of Circumstantiall; for that would be to make one's self Sovereign Arbitrar 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 preciously 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) that are naturally exempted, tho' they are no ways comprized in the Sense of the Law. Thus he who has promised to restore a Sword, that was left him, ought not, if the Perfon be mad, to restore it, but by so doing he endanger himself or some other Innocent Persons, nor are we to deliver a Thing to him, who depofited it with us, if the right Owner demand it. I approve (says Tryphonus) of that justificaly that gives to every Man his own, but so as not to take from him, who has a better Claim to it. 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 flock 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 burdensome. And this, either in Respect of the Condition of Human Nature absolutely considered, or in regard to the Perfon and Thing in Question, compared with the very End and Design of the Engagement. Thus a Man who lends a Thing for some certain Time may demand it before that Time, if he happens to be very much in Want of it himself, because by the Nature of such a beneficial Act no
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 a Grant of Exemption from Taxes and Tribute must be understood of common yearly Taxes only, and not of those extraordinary Subsidies which the preceding Neciosity 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 Person they are made to; nor if they do you more Harm than they do them Kindness. For it is not for the Peron to judge whether a Thing be useful or not to the Person he has promised it, unless it be in a cafe of Madnens, as we have observed before; nor is every Inconvenience to the Person promising sufficient to release him from his Promise; but it must be 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 infantly appear in Court, and there manage his Cause for him, and in the mean while your Son falls dangerously ill, it would be no Breach of Duty in you not to perform what you promised.

3. And it is in this Sense, but we must not stretch it any farther, that we are to take what we read in Seneca, Then shall I break my Word, then shall I be justly charg'd with Levetiy, 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 that the Roads are ferred 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 Cafe ought to be excepted. Among these Signs there is none more convincing, than when we find that the Words in another Place, tho' they are not directly opposite (for that would be the aitroversia or Contradiction we mentioned before) do yet by some unexpected Turn of Things happen to claffh and interfere in the present Conjuncture: This the Greek Rhetoricians call the εἰς ἄνειαν ἀτέχνη, i. e. circumstantial Disagreements.

XXVII. (1) See ROSENTHALUS, De feudis, Cap. V. Concl. LXXVI. Num. 2. HEB. Illigisum XVIII. Num. 16. Part I. GOTHMAN. Conf. XI. 12. CL. §. Fehndon XXIX. 2. ANDREW KNICH. De legatis partis XI. Cap. V. Num. 20. HEN. BOCKER. De edictis. GROTIUS.

2. De Offic. Lib. I. Cap. X.


4. De Officis. 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 benedictis. I will go yap with him, the the Weather be cold, because I have promised it, but not if it rains. I will go to a Wedding tho' my Stomach be a little out of order, because I have promised it, 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 Richness in my falling off, if any Thing new and unexpected has happened. Why are you surprized that I should alter my Resolution, 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 in a certain Day: And yet all those who do not appear are not liable to the Penalty. There are some invincible Objec- tions that excuse a Non-performance. The English of ten made use of this Evation, (see CAMDEN, Ann. 1554.) both in their Disputes with the Dutch and the Hanse Towns. GROTIUS.

XXVIII. (1) I find in HERMOGENES, καθώς προέρχεται μάρτυς. Partit. Sept. IV. p. 16. Edit. Gen. 1614. QUINTILIAN calls this, Celfius cafe & events. Inflit. Om. Lib. VII. Cap. VII. as the learned Gronovius observes on this Place. XXIX.
XXIX. 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 lighted, so neither do they seem to me to be ranged and methodized as they ought. We shall dispose them in the following Manner. 1. That which is only permitted must give place to that which is commanded; for he who permits a Thing seems to permit it only in cafe no other Obstacle intervene than what is then thought of; and therefore as the Author to Horuntius 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 express, or that the Command includes some tacit Prohibition. 3. In Covenants which are in the Repeal, before-mentioned equal; that which is most particular, and comes nearest to the Matter in hand, must take place. 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. 5. What has either more honourable, or more advantageous Materies shall carry it. And in the last Place, What is last spoken ought to be most regarded.

XXIX. (1) De inventions, Lib. XI. and MArius Victorinus there. Grotius.

2. Quintilian, Declam. CCCCLXXIV. 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 left Force with it, than that which commands. See CICERO, De Leg. II. Chapter CONNANUS has, Lib. I. Cap. IX. Grotius.

I have observed in my first Note on § 33. 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 Chaper, admits of the Reftriction, Whenever the Matter of the Permission or Prohibition is proppeled under the same Terms, and so that the Generality or Particularity lies on the Side of the Permisso to whom the Thing is permitted or prohibited; or taken the Matter of the Permission or Prohibition 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 acciden tally applicable to the Law prohibiting, we are always to make the Permission, as Grotius speaks, on Supposition, that there is nothing, besides the Thing in question, which binds making an Advantage of the Permission. Till then, it is said, the Rule takes Place. But, First, this Premption may be opposed by another Premption as well grounded. 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 Cafe, in which they may be opposite to the Permission. Secondly, I should be glad to find 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 Rule I find urged by those who have undertaken to explain the Rule under Consideration is this: Every Roman Citizen is allowed to have a Concubine. Another Law says, No Soldier shall have a Woman with him in the Camp. It is said, the Law left 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 he 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 fame, in the Sense of the Law, which grants it.

3. See the Commentators, and particularly James Gofvprov, 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 diversi Regulis Juris, Leg. LXXX.

4. The Reason is, because when we impose a Penalty, we ought to consider what is the stronger or weaker Reason, for doing the same Thing. The Author in this Place without Reason, in the last Paragraph of the Chaper 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, ulla Lex potestis late fit, nam potestas quando grandior 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. Comm. 2. But when the Opposite 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 of Posterity of Time is out of the Question, and of the Rest the only Rule is, that one 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.
Chap. XVII.  

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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 their 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, § that upon Oath shall be preferred? 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 Murena alleged against the Agreements made between Sylva and Mithridates 1. To me it is plain, that unless it be otherwise agreed on, 3 the Writings are to be deemed as the Memorial only of the Contract, and not as any Part of the Substance of it. For if otherwise, it is customary to express it as in the Truce with Nabis: From the Day that these Articles when copied over are delivered to Nabis. 1

XXXI. But I cannot allow their Opinion, who hold that the Contracts of Kings and States are to be interpreted, as much as possible, by the Roman Law, unless it appear, that among some People that Civil Law has, in such Things as concern the Right of Nations, been received even for the Law of Nations, which is not to be presumed without very good Grounds.

XXXII. As to what Plutarch in his Symposics 1 propostes, Whether we are to regard his Words who offers a Condition, or his who accepts it, most 3 for my Part, I think, that since he, who accepts it, is in this Case the Promiser, his Words, if they be absolute and without Reserve, are what give the Form to the Agreement. But if they are only affirmative with respect to the others Words, then according to the Nature of relative Terms, his, who offers the Condition, shall be looked upon as repeated in the Promise which the Acceptor makes. As for the rest, it is certain, that before the Condition is accepted, he who offered it, is no ways obliged; because there is yet no Right acquired, as is evident from what we said before in Relation to a Promise. And this offering of Conditions is still less than a Promise.

6 ACONITUS in Ovid.  

The Father promis'd, and the Daughter swore  
He unto Men, and she to Heaven appeal'd:  
'Tis the Name of perjur'd, that of Liar dreads,  
And does your doubt which is the juster Fear?  
GROTIUS.

7 This is grounded on a false Supposition; as has been already observed on Puffendorf.  

2 L. in q. r. and L. praef. Gell., D. de fide Infiru- 
mentorum, L. pactum quod bona fide, C. de pactis.  
So BARTOLUS, JOHANNES FABER and Salice-

TUS, whose Opinion prevailed in Court against Balillus and Caledvns, exposed, C. de fide Infiru- 
mentorum, the Law of Contract. MYNSERUS,  
Deed. X. Conf. XCI. NEOSTAD. De pact. anti-
petual. Obser. XVIII. And therefore what Lig- 
nicius produces out of GUICCIARDI, 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. 
GRO-

TUS.

3 LEIVY, Lib. XXXIV. Cap. XXXV. Num. 3.  
XXXII. (1) The Question is there decided in 
Favour of the Person who makes the Offer. 
Sym-
pis. Lib. IX. Quaest. XIII.

CHAP. XVII.  

Of the Damage done by an Injury, and of the Obligation thence arising.

I. We have already shewn, that a Man may have a Right to a Thing three 
several Ways, either by Contract, by an Injury done him, or by Law.  
Of Contracts we have fully treated. Let us now come to that Right, which  
arises by the Law of Nature from an Injury received. We here call any Fault  
5 B  

or
of the Rights of

Book II.

I. The Word Damnum, Damage, probably derived from demus to take away, is in Etymologies, when a Man has less than his Right; whether that 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 Perfons and Effects of those who are subject to it, than any private Man has over himself, 3 and what belongs to him. So an Orphan has a Right to require his Guardian to take strict Care of his Affairs, 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

II. But from a mere Aptitude or Fitness, which is improperly called a Right, and belongs to attributive Justice, arises not 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 transfregre the Rules of Justice, who out of Courtesies 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 done. Cod. Lib. V. Tit. LI. Arbitrium Tutelae. Leg. VII.

4 And consequently they may require Amendments 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 Subordinate Action allowed by the Roman Law to an Orphan against the Magistrates of the Town, who either had not afforded him a Guardian, when required so to do, or had not taken due Care, in the Choice, or required due Security. See the Title of the Laws tractatus conuenientes, Digest. Lib. XXVII. Tit. VIII. and Cod. Lib. V. Tit. LXXIV. 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 Consequence excused making all Reparation in his Power for the Damage he has done private Persons, by a confiderable Failure in the Execution of his Office, whatever Impunity the Laws may allow him in that Cafe. The Whole of the Matter is, that Magistrates being Men, we ought to make some Allowances on that Consideration; and consequently we are suppos'd to have to bear the Loss in Cases where the Damage is done 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.

to the Commonwealth to make choice of such a Person as is fit for the Office, and the Commonwealth has properly a Right to require this of him. Wherefore if the Commonwealth shall by his bad Choice suffer any Damage, he is obliged to make it good. So likewise any Citizen that is not unqualified, although he have no proper Right to a Place or Office, yet the Right of being a Candidate truly belongs to him. And if he be hindered, either by Force or Fraud, from exercising this Right, he may require Satisfaction, not according to the full Value of the Place, but the uncertain Damage he sustained thereby. He has the same Right to sue for Satisfaction to whom a Tetrarch 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 Tetrarch of his Liberty of bequeathing it, is an Injury.

IV. A Man is underobliged 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 Expenses of improving the Thing and gathering the Fruits, from the Rule that forbids us to enrich ourselves by another Man's Loss.

V. But the Hopes also of the Gain or Increase are to be computed, not as high as if it was already made, but according to the nearer of our Hopes of obtaining it, as for Instance, in the Cafe of a Town 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.

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 Secondly. Primarily, as he who commands it to be done, he who gives the necessary Consent for doing it, he who affists in the Action, he who protects him that committed it, or becomes in any other manner a Party in doing the Injury.

VII. Secondly, He that advises the doing it, or commends and flatters him who does it. For what Difference is there, faith Cicero; Philip, IV. between the Man that persuades us to do a Thing, and him that approves of it, whom done?

VIII. By not doing what he ought to, a Man is likewise bound to make Reparation. Primarily, or secondarily. Primarily, when his Station or Office he ought to hinder the doing it, by giving his Commands to the contrary, or to enforce him that has the Wrong done him, and does it not; such a one is called by the Chaldee Paraphrast 704 A Strengthen of Witchedeph.

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 flood 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 Execution 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. Folcid. Leg. LXXXIII. § 2. See on this Law Cujas, Recit. in Paul ad Edictum, Tom. V. Opp. p. 826, 827. Edit. Fabrard.

VII. (1) In the Original we find one qui alio modis in ipso criminibus participat. I believe, says Mr. Barbeyrac, that the Author designed to write alio modis, tho' all the Editions of this Work read as before. For he doth not pretend that these of the interior Classes have no Share in the Crime. The contrary appears from what he says in the tenth Paragraph. And in Reality, without supposing that, by Virtue 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 those 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. § 37, third and fourth Editions.

VII. (1) That is, in such a Manner, that the Advice, Commendation or Flattery contributes something toward the determining him who commits the prejudicial Action. 2 Tullor in his Oration to the Gods in Procopius, Gothic. III. 27 ceterum, &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 foro corrupto. Tho he would certainly have run away, or been something of himself; yet if upon discovering his Intention to another, that other shall command his Design, he is bound to make Satisfaction; for we ought not by our Commendations to encourage another to do Mischief. Groton.

VIII. (1) See what I have said on this Law in the Chapter of Pufendorf which answers to this, § 3. Not. 2. As for the Digest of Paulus, the King of the Gods there speaks of a good Action but the Application may still be just; as the Thought is grounded on the same Principle.

5 AMMANNIS in his twenty seventh Book applies this Saying to Prohbo the Prefect. And by the Lombard Law, Lib. IV. Tit. IV. even the Adviser is a Party concerned in making up the Matter. See Rom. i. at the end, and the ancient Doctors on that Place by Groton.

VIII. (1) Nicetas Chronifer, in his Michael Commentaries, 2 ceterum, &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. Groton.

IX. Secondarily,
Our Author observes 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 ἡμιερός, Levit. xx. 3. A Word which signifies confirming others in Evil. And the Rabbins think Perisons of that Charaacter mentioned Levit. xxvi. 21.

IX. (1) From certain particular Relations, by Virtue of which a Man is obliged to prevent the Evil others may do; and much more so 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 Langedal, Lib. I. Tit. IX. 5.

Grotius.

2 See this explained on the Chapter of Pufen-dorf, on the Subject, § 7.


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 Proprietors of the first House, but also the Owner of the neighbouring House, and the Tenants of both, whose Goods are burnt. Digist. Lib. IX. Tit. II. Ad Leg. Aquilam. Leg. XXVII. § 8.

3 Excerpt. V. 5. Grotius.

Right to commit that Violence which was the Cause of Death. Wherefore, when a Man may lawfully kill another, tho' he be thereby guilty of a Breach of Charity, as he, who being assaulted by his Enemy, would not fly from him, but killed him in his own Defence, yet he is not bound to make Reparation. As for the Rett, the Life of a Freeman cannot be appraised, but that of a Slave, who might have been fold, may.

XIV. He that slays another, is obliged, in like Manner, to pay for his Hurt; and to make him Satisfaction for the Loss of his Limb, because he is here 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. The fame may be faid of falfé Imprifonment.

XV. So an Adulterer and Adulterés are not only bound to free the Husband from the Expendence of Keeping the Child, but to make the legitimate Children Reiparation for whatsoever Damage they shall fustain, by any Share or Portion that Child shall claim in the Inheritance. He that either by Force or Fraud defowers a Virgin, is bound to pay her so much as the is damaged in her Hopes of Marriage. Nay, moreover, if he obtained his Desires by promising her Marriage, he is bound to perform that Promis.

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 fustain'd, as well in what he has ceas'd to gain, as in what he has positively loft. 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 height, nor the lower, but a moderate Computation. Among thefe we may also rank fuch as defraud their Prince of his lawful Taxes or Customs. In like Manner are thefe Men bound to make Reparation, who either by an unjust Sentence, or by falfé Accufation, or falfé Testimony, have done their Neighbour an Injury.

XVII. As also he that procures a Contract or Promifé by Force, Fraud, or unjust Terror, is bound to relae the Perfon who made the Contraft or Promifé, from any Obligation of Performance; for fuch 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 Contrafts, the other from his natural Liberty or Freedom of Action. And in this Clafs we may infer thofe who will not do what by their Office they are obliged to do, without a Bribe.

XVIII. But he that hath given just Caution, why he ought to be compell'd by Force or Terror, must blame himfelf; for an involuntary Act, arising from a voluntary one, is accounted morally a voluntary one.

XIX. But

XIV. (1) L. u. d. de his qui off. vel. def. The fame was obperved among the Hebrews. B A B A K A M A, Cap. VIII. § 1. and among the English and Danes; see a Treaty of theirs in the learned Pontanus's Discours of the Sea. Grotius.

The Treaty here referred to by our Author, contains nothing concerning the Café of Mutillation. I find only a Clause, which says, that if an Englishman kills a Norwelian, or a Norwelian 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. 145. Lib. II. Cap. XXI. of the Book quoted by our Author, which was printed at Harderow, in 1637, under the Title of Lucii Pontani, Differtationes Historiae, quibus praecipue quotannis & quaduum Mare liberum vel non liberum clauiumque accipienda dissipatur. &c. The Fine, there mentioned, is, perhaps, the Werregid, or Werregild, of the ancient Saxons; on which fee a Difciption by the late Mr. H u r t i u s, De Heredit. eccel. vindici, § 8. p. 265. Tom. III. Comment. & Opuscul.

2 See the Law quoted in the preceding Note; and what is faid on Pufendorf's Chapter that answers to this, § 8. Note 2.

XVI. (1) See the Chapter of Pufendorf so often quoted, § 11.

XVII. (1) No Doubt he is bound to do this; but tho' he should refuse to do it, the Promifé would not therefore be more valid. The Author here reffons on a falfé Principle, as we have obperved on Chap. XI. of this Book, § 7. where we refer to the Treatife of Pufendorf, where he is confuted.

2 That is, they are obliged to return the Money if he who gave it demands it.

XVIII. (1) That is, if he has not freely confented, as he ought to do, by Verue of the Right which the Perfon had to oblige him to it. See Pufendorf, B. III. Chap. VI. § 11. &c. The Author means, that a Contraft which a Man had a Right to employ on another, doth not hinder his Content, tho' forced, from paying for a free one; because he has given Occasion to the Contraftant, by a voluntary Reflufal. But his Thought is expreffed in fuch 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...
XX. How far the Civil Powers are bound for Damages done by their Subjects, wherein the Reprefentation is handled concerning Prizes taken at Sea from Allies, contrary to public Command.

XX. 1. Kings and Magistrates are bound to make Reparation, if they do not use such Means, as they may and ought, to prevent Robberies and Piracy. For Neglect of which the Scyrians were formerly condemned by the Amphictyones. I remember I was asked the Question, concerning a Case that happened when our States had granted Commissions to several Privates, some of whom had made Prizes on our own Friends, and deferting 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 not farther obliged, than to punish or deliver up the Delinquents, if they could be taken, and to make over to the Perfons injured, a Right to the Goods of thefe Pirates: Inasmuch as the States were neither the Caufe of this Depredation, nor had any Hand in it, but had expressly prohibited the Injury 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 fuch a Licence be accounted the Caufe of this Injury done to our Friends, since private Men may, without any fuch Licence, equip Ships and put out to Sea: Nor could it be foreseen that fuch Men would prove Rogues; nor can we altogether avoid the employing of dishonest Men; for then it would be impractical to raise an Army.

2. Nor are Kings bound to make Reparation, if their Soldiers, either by Sea or Land, shall do their Allies any Damage, contrary to their Command; which is plains this Paffage, 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 fuch Contraint; 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 Ufe of Reason, but fo as that they have voluntarily put themselves in that Situation. It is fufficient that we fay, that in the Cafe before us, when a Man is reduced to the Nefcefity of employing Contraint, for obtaining a Thing which he had a strict Right to demand of us, fuch forced Content is to be reckoned voluntary, becaufe it ought to have been fo. This Contraint has not the Mark which gives it a Power of making Engagements void; I mean Injuftice in him who uses Violence on Menaces. But if he who is constrained voluntarily submitted to the Direction or Authority of the Perfons whom he oblige to contrain him, the free Determination which preceded the Refufal, in Consequence of which the Content was extorted, still farther removes all that is odious, and contrary to Liberty in the Contraint. In fhort, he who then confealed against his Will, has no more Reafon to complain and reftar, than a bad Paymaster would have, who is fentenced by the Court, or forced by Arms, to feaf his Creditor, or promise to do it at a certain Time.

XIX. 1. De Offic. Lib. III. Cap. XXIX. 2. See that Historian, Lib. III. Cap. XIII. &c. XX. 1. See Chap. XXI. of this Book, § 2. and B. III. Chap. XVII. § 2. Num. 6. 2. There were some Merchants of Tmiffbby, who escaping from Prifon, where they had been detained after they were flriped, caft the Inhabitants of Sele- bras before the Tribunal of the Amphictyones. Pu- tarth, in Fid. Ginnis, Tom. I. p. 483. Ed. Wach.

This, probably, was debated in the Assembly of the States of Holland and Utrecht, when our Author was depuited thither, as PENIOOFARY of Rotterdam.

proved
proved by the Tenthonies of 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 then 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 caused by his Slave or his Beast. For the Master that may require any Reparation, supposing there is wherewithal to make it; on the other Hand, the Master of the Beasts ought not to indemnify him so as to suffer Damage himself; For, both 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, add he, the Master on which the Argument may be based in this Case is false. For when the Right is irrecoverable, 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 Law. 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 independly 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 does 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 Profission of his Beast. A Beast, as it is an Animal void of Reason, can do no Damage, properly so called: When it is feed, 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 philopical Ideas. I think as far as the State of Nature is, when the Damage 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 this Obligation of repairing the Damage he has done, no one can either excuse 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 does not appear made otherwise by the Obligation. Now it cannot be flown, that the Establishment of Property of Goods implies this Disposition, and there is the left Reason to prove it, as Slaves
Of the Rights of

Book II.

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. Altero by the Laws of many Nations, as by our own, such Damages are to be equally divided between them both, by Reason of the Difficulty of proving the Fault.

XXII. But, as aforesaid, we may suffer Damage, even in our Honour and Reputation, as by Blows, ill Language, Curfes, Calumnies, Scoffs, and such like. And in these, no less than in Steals 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 confounding one's Fault, by ' declaring the Innocence of the injured Peron, by giving Marks of eeme for him, and the like; ti'o if the injured Person desire it, Reparation may be made for such an Offence by Money, that being the common Standard, whereby every Thing that is profitable may be measured.

Slaves would be encouraged, and in some Measure privileged, to infult Men, if the Matter was not obliged, either to repair the Damage done by them, or deliver them up to the Peron injured. A Matter 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 infulted by the Slave, of the Satisfaction they might have taken on his Peron, 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 Vlician, in Cassiodorus, IV. 41, who was touched with Repentance, and repented of an unjust Accusation.

Grotius.

CHAP. XVIII.

Of the Rights of Embassies.

I. W E have hitherto treated of those Rights that belong to us by the Law of Nature, adding some Few that arise from the voluntary Law of Nations, as it is an Addition to the Law of Nature. Let us now come to consider, what Obligations that Law of Nations which we call voluntary, doth of itself lay us under. Whereof the chief Head is, Of the Rights of Embassies. For in all Authors Mention is made of the sacred Rights of Embassies, of the sacred Character of

therefore Quintus Mucius used to say, that he who struck an Embassador, ought to be delivered up to the Enemy that employed him. By the Julian Law against publick Violence, not only those who infilt an Embassador, but as infult any of his Retinue, are declared liable to the Penalty. As Utian rapiens in Leg. Julia, D. ad legem. 'Julian de su publica. Josephus, Antiq. Histor. Lib. XV. mightly cries up the sacred Privileges of Embassadors, who, he says, are honour'd with the same Name as the Angels and Messengers of G O D. Varro, Lib. III. De Lingua Latina, The Persons of Embassadors are sacred. Cicero, Ver. III. The Rights of Embassadors are secured both by a divine and human Guard, and the very Name ought to be so sacred and venerable, as to be safe and inviolable, not only among Allies, but amidst the Arms of contending Foes. The Author of Polybius's Life, When he thought himself secured by the Rights of Embassadors, which every Nation used to regard with its profoundest Reverence. Diodorus Siculus, (in Excerpt. Puer. N. 243) calls this, θεοφύλον.
of Embassadors, of the Right of Nations due to them, a Right both divine and human: The Right of Embassadors is accounted by all Nations sacred, it is called the Sacred League of Nations, and the human League; and the Persuas of Embassadors are filed Sacred.

A Name that Nations always sacred held. Status.

And Cicero, in his Book of the Anwers 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 but impious, as it is acknowledged by all, says Philip, in his Epistle to the Athenians.

II. But first of all we must take Notice, that whatever be the Privileges of this Sort of Right of Nations which we are now to treat of, they belong only to those Embassadors who are sent by sovereign Powers to each other: For as to such as are sent by Provinces, Cities, or any other subordinate Powers, we are to judge of their Privileges, not by the Law of Nations, which is common to different Nations, but by the Civil Law. An Embassador, in Livy, calls himself The publick Messenger of the People of Rome. And in another Place of the same History, the Roman Senate declares, that The Right of Embassadors is not granted to a Citizen, but to a Foreigner. And Cicero, to shew that they ought not to send Embas-
2. Tho', therefore, that are 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, for that Part where they are free. But Kings that are conquered in a declared open War, lose, together with their other Privileges, the Right of sending Embassadors. Therefore Paulus Amelius kept the Heralds of Perseus, whom he had subdued, Prisoners.

3. But in Civil Wars, Necessity does sometimes make Way for this Right, tho' irregularly. As supposle a Nation be divided into two Parties, fo 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 tho' those of Vetfaus's Party accused by Tacitus, in their Civil Sedition they had violated the Rights of Embassadors, in tho' sent by Vitellius, Rights faced even amongst foreign Nations. Pirates and Robbers, that do not constitute a settled Government, have no Right of Nations belonging to them. Tiberius, when Taefarinas sent Embassadors to him, was highly provoked, that a Traitor and a Rogue should pre-

3 Orat. Philip. V. Cap. X. See Boecler's Note on Velleius Paterculus, Lib. II. Cap. VII. 4 Strid. Lib. VII. ver. 369, 370. 5 Cromerus XXX. Grotius. 6 As in the Carthaginians, mentioned Chap. XV. § 7. Num. 5. To this Article are referred feudal 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. Epift. 364. viz. that of the Chancellor Qaefet, when, tho' a Subject, after the Death of Gutfaves, received so great a Power from the States of Sweden, that he was authorized to send Embassadors 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 Virtue 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 propofed to him on that Occafion, when he was sent to Paris, with the Character of Embassador from the Crown of Sweden. 8 This Quotation is useful, in regard to the Conqueror, who will be far more severe 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 manifeffly 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 Inconvenience, 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 Uturper, 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 Gronovius, 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 Embassadors 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 Amelius contended himself with returning Perseus so Ambassadors over their Mouths. I find, however, that Perseus sending afterwards these Embassadors with Letters, Paulus Amelius 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 facted and inviolable only as far as he pleased.

10 See Johannes Marniana, Lib. XXII. 8. about the Embassadors of the City of Toledo to the King; and Cranzzius, about the People of Flan-

faders to Anthony, says, "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 Toke,
I foreign call."
fume to treat with him, after the Manner of an Enemy, as Tacitus relates. Yet even such Men have sometimes the Privilege of sending Embassadors granted them by a Treaty; as had formerly the Outlaws and Highwaymen in the Pyrenean Mountains. 13

III. 1. But there is a twofold Right, we find, attributed to Embassadors, viz. first to be admitted, and then to have Violence offered them. Concerning the first there is a Passage in Livy, where Hann, the Carthaginian Senator, thus in
evokes against Hannibal. 4 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 de
nied Admittance. 5 For the Law of Nations does not require that all Embassad
ors should be admitted, but that none should be rejected without Cause. Now Admittance may be denied, either on Account of the Potentate sending, the Per
son sent, or the Subject of the Embassy.

2. Melissus, the Spartan Embassador, was commanded, by the Advice of Pe
ricles, to depart out of the Athenian Territories, 6 because he came from an armed En
emy. So the Roman Senate denied the Carthaginian Embassadors Admittance while their Army was in Italy. And so did the Achaean to those of Peresus 7, while he was making warlike Preparations against the Romans. The like did Tuf
tinian 8 to the Embassadors of Teutons; and the Gothi in Urbin to those of Bellai
rius. 9 And Polybius tells us, that the Embassadors of the Cynetian were driven out, wherever they went, as representing a vile Nation. 10 An Instance of the se
cond Cause we have in Theodore, the famed Athenian, to whom Lyphiomus de-

12 Annu. Lib. III. Cap. LXXXII. Num. 2.
2 See the Notes of Cellarius on the Place. 3. 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 surprised that our Author has not taken Notice of it. It is not allowable to offer Violence to an Embassador; therefore, for his own Security, he calls himself, not the Speaker of a Prologue, but an Embassador.

2 Lib. XXXII. Chap. X. Num. 6.
2 We are farther to observe, with Thomasius, 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 Institution Jurispru
dendi of 1744, 3. Lib. III. Cap. XIX. Num. 15, &c. as also his Notes on Huber, De Jure Civili
tatis, Lib. III. Sect. IV. Cap. II. § 10, where he quotes a Treatise which he much values, but which I have not seen, published under the signed Name, and entitled Justinii Persseuta, Ditjour du Jure Legationis Status Imperii, Eclezapolit. 1700.

4 See Camden in the Year MDLXXI. The fourth Question proposed there, Grotius.
5 Pericles was of Opinion, that no Herald or Embassador should be received from the Laciedem
nians, while they remained in Arms. Thucydi
des, Lib. III. Cap. XII. Edit. Owen. The Laciedem
nians had refused to make up the Quarrel in an amicable Manner; as appears from the Conclu
sion of 8. I. and the Athenian still continued to offer them that Way, for they told Melissus, that when the Laciedemnians had laid down their Arms, and were returned to their own Country, they might then send them Embassadors, who should be well armed. It was evidently their Resolution to come to a War; and Melissus was considered as one sent only in the Character of a Spy, for which Reaon he was conducted out of the Coun
cumstances like that, there is good Reason for re
fusing Audience to the Embassadors of a Power, which has taken up Arms. He had no Delight 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 Anneid, con
cerning this Court of the Romans. Grotius.

Our Author here means the Court of enquiring whence the Embassadors came, and what was their Business, before they received them. The follow
ing Passage is what he had in View; at least I know no other that can be meant. Ille intra tecta vocari imperatis. H. (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 Bu
iness, after which the inferior Magistrates went out to them; and loyally, the Senate informed them
selves of their Demands without the Walls of the City; and thus, if it appeared proper, they were ad
mitted. On Verre 168.

7 Livy, Lib. XII. Cap. XXIX. Num. 20.
8 Procopius, Gothic. Lib. III. Cap. XXXVII.
9 Livy, Lib. II. Cap. XIX. Where, however, another Reason is alleged.
10 The People through whole Country they paf
d, would not suffer them to enter their Towns; and some, looking on the Places through which they passed, as desolate, made great Preparations. 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. Angl. 
nied Audience, when he came upon an Embassy from Ptolomy. 11 And others have met with the like Treatment, only through personal Hatred. The third Cause we have mentioned, takes Place 13 when either the Design of the Embassies is suspected, as was deferently that of Rabahshek, the Affyrion, to Hesekiel, to stir up the People to Sedition; 14 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 15 forbade the Aesilians to send any Embassy without their General's Permission; nor was Perseus permitted to send any Embassadors to Rome, but only to Licinius; 16 and, in like Manner, when Jugurtha sent his Embassadors to Rome, they ordered 17 that they should depart out of Italy within ten Days, unless they were come to deliver up their King and Kingdom. And thus may those Embassadors in Ordinary, that are continually resident at most Courts, deferredly be rejected as unecessary, and a new upstart Cuiton, not known to former Ages 18.

IV. Concerning the latter Right of Embassadors, viz. 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 Perfons of Embassadors, and then of their Retinue and Goods. As to their Perfons, 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 Embassador 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 Embassador 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 Embassador, 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 Embassador according to his Pleasure. Others would have us appeal to Kings and Nations that are entirely disinterested, and to be determined by their Arbitration; which indeed may be done in Point of Prudence, but cannot be claimed as a Right.

2. Nothing of Certainty can be concluded from the Reafons each of these give to confirm their Opinions; for this Right is not grounded upon fire and infallible Principles, as a Right of Nature, but takes its Meafures from the Will and Pleasure of Nations. 2 And they were at Liberty to have provided for the absolute Security and Place thirty Miles distant from his Court. Gugci- 

11 Lycurgus 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 Dio-

13 So Andrew Borgia Caesar's Ambassadors, was denied Admittance into Spain, MARIANA, Lib. XXIX. There is another Influence of this in CRO-

15 Iden. Lib. XXII. Cap. XXXVI. Num. 5.

16 The Emperor Charles V. commanded the Embassadors of France, Venice, and Florence, sent to declare War against him, to be conducted to a

3. 17 See Mr. Thomassin's Jurisprud. Divina, Lib. III. Cap. IX. § 25, &c.

4. (1.) Menander Profei-
and Protection of Embassadors in all Cafes, or only with such and such Referves and Exceptions: For if, on one Side, it be ufeful to punifh great and capital Offen-
ders; it is on the other Side advantageous to facilitate Embaffies, which cannot
be better done than by procuring to Embassadors the greateft Security posfible. We
are therefore to consider how different Nations have agreed in this Point; which
cannot be proved by Inftances only. For Inftances enough may be alledged on both
Sides. We muft therefore have Recourfe both to the Opinions of wise Men, and
Conjectures of the Will and Pleafure of Nations.

Question, and fhow how far it extends. But our Author had not sufficiently confidered the Principles of the Law of Nature, which would have furnished him with clear and certain Reafons. See what Mr. Tho- masius fays on the Subject: who, in my Opin-
ion, has treated it better than any one, in his jurisprudential Divina, Lib. III. Cap. IX.—
He firft distinguifhes between Embassadors, who have done nothing amifs, from thoé who have behaved
themselves ill, and then fuch as are fent by the Power in anther, with which it is at Peace, from
thofe who come from an Enemy. Firft then, there is no Difficulty in regard to Embassadors, who com-
ing to a State with which their Mafter is at Peace, have injur'd no one, and consequently, and most
evidently, the Mafons of the Law of Nature require they fhould be perfectly fecure; fo that, if fuch an
Embassador be intollrated or affronted in any Manner whatsoever, his Mafter has a just Reafon for declaring
War. The holy King David furnifhes us with an Infurance of this Kind, 2 Samuel Cap. X. As to
Embassadors who come from an Enemy, and who have done nothing amifs, there Security depends entire-
ly on the Laws of Humanity, before they are admitted as Embassadors. For an Enemy, as fuch, has a Right
to affront his Enemy. So that, independently of Agreements or Treaties, by which a Prince or State
becomes in fome Sort a Friend for a Time, they can be obliged to fpare the Embassador of an Enemy
only by Virtue of the Sentences of Humanity, which we ought always to retain, and which oblige us
to have a Regard for whatever tends to the Pre-
ervation of Peace. When therefore fome Act of Hostility is committed on an Embassador fent by an
Enemy, before he is admitted as fuch, no fresh Caufe of a War is given; only that, which the Enemy
himfelf had, is thereby confirmed, fending the War juft and lawful. I make this Suppoftion, be-
cause if the War was unjust, that is, if he who fent the Embassador had really injur'd him whom he
fent him, and thus given him Reafon for taking Arms againft him, the Act of Hoftility committed
by the Latter on the Embassador of the former, do not make the Right change Sides; unlefs the Ag-
greffor fent his Embassador to offer his Enemy a reasonable Satisfaction; for then this ought to be
considered as a Caufe of Nefceffity, which carries an implied Obligation with it. But when an
Enemy's Embassador is once admitted, the Power thus admitting him does thereby manifeftly engage itfelf, not ufually in a tract Manner, to give and procure him entire Security, while he behaves him-
self well. So that if this Engagement is broke through, a juft Caufe of a War is given, or at leaft the
Right is transfefted to the other Side; because all Agreements give a perfefl Right. Nor are
Heraldfs, who are fent to declare War, to be excepted at this Time, or at any Time for this Manner. For, according to the Codum of civil-
ized Nations, this Declaration implies a tract Pro-
teflation that we design toufe the Way of Arms in a Manner confumable to right Reafon, and with an
honorable and a good Peace. So much for innocent Embassadors. But Secondly, in regard to
fuch as have rendered themselves culpable in any
Manner, they have committed the Fault either of
their own Hand, or by their Mafter's Order. If
the former, they forfert their Right to Security, when the Crime is evident and heinous. For
the Embassador whatever can enjoy more Privilege than his Mafter would have had in the fame Cafe; and
fuch a Crime would not be pardoned in the Mafter. By heinous Crimes we are to understand fuch as tend
either to diflurb the Government, to take away the Lives of the Subjects of the Prince to whom the
Embassador is sent, or to do them fome confiderable Prejudice in their Honour and Eftates; particularly,
if the Perons 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 himfelf
conftuted against the Government, or favoured the
Prix, or whether he has taken Arms with the Re-
bel or the Enemy, or engag'd his Enemy to do no
Revenge may be taken on him, even by killing him,
not as a Subject, but as an Enemy. For his Maf-
ter himfelf would have no Room to expect better
Treatment. It he makes his Escape, his Mafter is
obliged to give him up, on Demand. But if, the
Crime, how manifeft and heinous ever it may be,
sends 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 Mafter
had been guilty of any Crime of the fame Nature,
whence he ought to be demanded of him, and
Arms are not to be taken against him till he has re-
fuld it; the fame Reafon of Equity requires that,
the Prince, at whose Court the Embassador commits
fuch a Crime, fould fend him back to his Mafter,
defining him either to give up the Offender or punifh
him. For to detain him in Prison, till his Mafter
shall either recall him in order to punish him, or de-
clare that he abandons him, would be to tell a
Difference of the Mafter's Juflice, and in fame Sort
affront him, becaufe the Embassador till repreffes
him. Besides, when a Man has no other Remedy, he
another, he has, commonly speaking, no Right to
feize his Perfon. The Cafe is different when the
Crime is committed by his Mafter's Order; for
then it would be imprudent to fee the Embassador
back, becaufe there would be good Reafon to be
lieve that the Prince who commanded the Commif-
fon of the Crime will be far from either furrender-
ings or punifhing the Offender. The Perfon of the
Embassador therefore may be feized till the Mafter
shall repair the Injury done both by the Embassador
and himfelf. As to thofe who do not r epreffent the
Prince's Perfon, fuch as bare Miftiery, Trumpets,
&c. they may be killed on the Spot, if they come to
abuse a Prince by Order of their Mafter. Noth-
ing is more alarif than what some marriage, even
that all the Embassadors by Order of their Mafter
ought to be charged on the Mafter only. Were it fo, Embassadors would have more
Privilege in the Country of another Prince than their Mafter hisfelf, fhoild he appear there. And,
the other hand, the Sovereign of a Nation, who would have left Power in his own Dominions, than
a Mafter of a Family has in his own House.

Chap. XVIII. War and Peace.

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3. We have two most famous Opinions; the one of Livy, the other of Scaliger. That of Livy is upon the Embassadors of Tarquin, who had promoted a Conspiracy in Rome; Albo, faith he, they seemed to have done such Things, as directly to denounce them Enemies, yet the Law of Nations prevailed in their Favour. Here we see the Law of Nations extended even to those Embassadors that commit Acts of Hostilities. The Saying of Scaliger 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. Bomilkar, faith he, an Affiliant in the Embassy sent to Rome, was adjudged a Criminal rather by the Rules of Equity, than of the Law of Nations. Where Equity is to be underived of the Law of Nature, which sufers every Offender to be punished, that can be convicted, but the Law of Nations makes Exceptions in behalf of Embassadors and Perfons 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. But if an Embassador were only to be protected from unjust Violence, this would be nothing extraordinary or peculiar. Besides the Protection of an Embassador from Punishment outweighs the Benefit, that could accrue to the Publick by his Punishment. For the Power, from whom he came, 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 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 Right. Confid. Mr. Coccıius, as quoted in the foregoing Note. Thus the two Pagelles, quoted by our Author, rather prove the contrary of what he concludes from them; tho' his Application of them is approved of by Vico, in his Embassador, B. I. Chap. XXVII. Tom. I. p. 821, 822. Edit. Hague 1681. In Reality, on examining all that the Authors 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 applied 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. This but is not to be extended beyond what the Right and Custom of Embassadors require. Now in Order to this, it is necessary that we cannot consider an Embassador as having forfeited his Privileges for all Crimes of States, but only for such as are incontrovertible and heinous.

7. The Question does not here turn on the Advantage that may result from the Punishment, when the Crime is once committed, but on what is necessary to be done for preventing the Commision of it. The Security of Embassadors ought to be undertook, that it implies nothing contrary to the Security of the Powers to whom they are sent, and which 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 considerablc Misdemeanor, 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 feckers of his Convincing or their Application, or because they hope to find Means to retire elsewhere before he can be apprised of their Crime.
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, his Punishment will not keep off the War. Besides, the Safety of Embassadors is but very lightly 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 fend, and those that receive the Embassador, are commonly different, nay, often quite contrary, it could scarce ever happen, that something might not be laid to the Embassador's Charge, that would carry the Colour of a Crime 9. And tho' some Crimes be so manifest as to admit of no doubt, yet the Danger, there generally is, in punishing Embassadors, is sufficient Reason for a general Law against punishing them at all.

5. Wherefore I am fully persuaded, that tho' it has preceded 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, (be brought along with him, faith Cicero of a certain Embassador, The Majesty of a Senate, and the Authority of a Commonwealth) to may they by the same kind of Fiction be imagined to be out of the Territories of the Potentate, to whom they are sent 10. Hence it is, that they are not subject to the Laws of the Country, where they reside. Wherefore if any flight Crime be committed by an Embassador, it is either to be connived at, or he is to be commanded to depart out of the Kingdom, as was done to him, faith Polybius, who procured the Escape of the Hostages from Rome. Hence we may take Notice by the Tarentines, who had been guilty of the fame Crime, was scourged for it; but this was done at a Time when the Tarentines being conquered by the Romans were become their Subjects. But in case the

8. It is a Matter of Prudence to consider whether there is Room to believe the Embassador's Matter will approve of his Conduct or not. But, in Regard to the Right, the Uncertainty in this Case privilèges a Prince to punish a Crime, for which he is not affured 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 Matter of the Embassador would do in the Affair. Our Author does not however here advise undertaking a War on the Prince, for revenging his not punishing his Minifter; as Coccetti undertakes him in the Differtation above quoted, Cap. III. § 8. He only means, in Anfwer 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 Matter 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 Punishments, as an Outrage committed on the Perfon 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 judicious to undertake it which our Author without Doubt fappofes. On that Foot then his Anfwer is not amis. But it must be allowed that the Objection, and consequently the Anfwer, are nothing to the Purpose; for the Reason given in the preceding Note.

9. This Inconveniency would be to be feared, if a Right was given, to the Power to whom an Embassador is lent, of punishing the whole Fault, and without distinguishing the Culpable, mentioned Note 2. But even supposing the word, the Inconveniency will be at least counterbalanced by the Diminution 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 Society and Interest both of him who sends, and of him who receives Embassadors. The Design and Effect of Embasses equally demand this Attention.

10. Orat. Philip. 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. Coccetti in his Differtation more than once quoted, Spec. 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 Minifters, fent 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 submit himself to it in the Person of his Embassador, who represents him. See Puffendorf, B. VIII. Cap. IV. § 21. and Chap. XI. § 3.

12. Stephen, King of Poland, did fo to the Miniftries, Thiodorius, Lib. LXXII. Ann. MDLXXXI. And Edward, to the Scots and Spaniards. You have both thofe Inflances in Camden at the Year MDLXXI. and LXXIV. Grotius.

13. In all Probability our Author has here copied Almeric Gentili, who relates this Fact in his Tractat De Legationibus, Lib. II. Cap. XXI. But I find nothing like it in Polybius, but even in the Fragments collected from all Parts with extraordinary Diligence, that Gentili on this Occasion lays Ut in fictis habet Polybius.

14. He was afterwards thrown down from a Rock together with all the Hostages that were re-taken. See Livy, Lib. XXV. Cap. VII.

15. So Charles V. commanded the Embassador of the Duke of Milan, as his Subject, not to stir from his Court. Guicciardini, Lib. XVIII. Grotius.
Crime be great, and tending to endanger the publick Safety, the Embassador is to be remitted to his Principal, with a Demand, either that he punishe him himself, or deliver him up to be punishe'd; as we read of the Gauls, 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 Cafes of extreme Necessity, will also hold good in this Maxim of the Law of Nations, which renders the Perfons of Embassadors sacred and inviolable. But these Cafes of extreme Necessity do not confit in exacting Punishment, which in several other Cafes 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 les's in the Place, Time or Manner of inflicting the Punishment, but in preventing some horrid Design, especially against the Publick. Wherefore, to prevent any imminent Danger, an Embassador may be both arrested and examin'd. As were Tarquin's Embassadors by the Roman Consuls, special Care being taken that the Letters and Papers then in their Custody should not be put out of the way or loft.

7. But if an Embassador make an Assault with Arms, it is lawful to kill him, not indeed by Way of Punishment, but in our own Defence. So the Gauls might have killed the Fabii, whom Livy calls Violators of Human Right. Wherefore Demophob (in Euripides) refil'd Eur'yphren's Herald by Force, when he attempted by Violence to carry off the Suppliants; and when the Herald demanded of him, Don't thou an Herald strike who's better sent? He answered, Yes, if that Herald offers Violence.

The Herald's Name was Capreus, and because he offered Violence, he was slain by Pelopidas, was not Embassador 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 Embassador, who was put under an Arreft with Mairargues, when the treasonable Designs of the Perfon left mentioned were discover'd. 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 Montaillard. Our Author probably had read the Latin Translation of that Work, printed at Frankfort in 1637, in which the Whole passes without Diffinition 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 Page opposite Note 17. of this Paragraph.

23 This Objection is made by the Grotius in our Editions; and I know not by Virtue of what Authority it is attributed to the Herald, both here and in his Excerpts et Traged. &c. Grotius, p. 317.

24 And in this Scene we take what The'obaldus the Gris says to Justinian's Embassadors in Procopius, Grotius, c. 26, § 2, p. 143, § 3. All the World look upon the Character of Embassadors to be in every respect Sacred and Honourable, which Honour they may justify claim as long as by their good Behaviour they maintain the Dignity of their Employment. But Men generally agree, that it is lawful to kill an Embassador, if he offers an injurious Behaviour 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 not least possible to suspect them of Adultery, since they never flirted abroad with
by the People of Athens, as Philoctatus records in the Life of Herodotus. The same Way does Cicero resolve this Question, whether a Son ought to accuse his own Father, who is a Traitor to his Country. If the Danger be imminent, he ought by Way of Prevention, but if the Danger be past, he ought not by Way of Punishment.

V. 1. But this Law, which we have been speaking of concerning the Protection of Embassadors from Violence, only obliges him, to whom the Embassador is sent, and that only upon Condition he admits it, as if from that Time a Sort of tacit Agreement commenced between them. But one may, and often doth, forbid Embassadors to be sent; or treat them as Enemies, if they come without his Permission. So were the Athenians threatened by the Romans; and at another Time they ordered the Veientine Embassadors, to depart immediately out of their City, otherwise they would shew them no more Mercy, than Tarentum 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. This Law therefore doth not oblige those, who's whole Territories Embassadors premise to pass without their Passport. For if they be going to their Enemies, or coming from their Enemies, or attempting in any other manner Acts of Holfility, they may lawfully be killed. Thus did the Athenians

out a Guard, they very prudently subjoin, &c. &c. &c. For what the Embassador does, if it be nothing but what he has received from his Principal, tho' the Misfortune be not altogether felt as it ought, he is no ways culpable, but he who employs him must bear the blame; for the Embassador does in this Case only discharge the Commission he was entrusted with. See Camden too in the more Scalop Page of the Year MDLXXX. 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 Exauce made by the Embassadors, the Reason by them adduced is to be understood with some ascribed. If an Embassador has received Orders to make some Propofal or Declaration, which he very well knows must be disagreeable to the Power, to whom he is sent, and which he feels implies, either in itself or in that Power's Way of thinking, some Injustice, or even forbidding Absurdity, provided he deliver his Commission in a civil Manner, he ought to be considered only as an Infrument, and is only to be diffmissed, without the least Violence; particularly, if he expresses some Concern at being charged with foolish a Commission. But if he himself intusses 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 Exauce will only more strongly authorise 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. That Author says that the Herald attempted to force from the very Altar some Heroicidus who had fled to Athens; and that the same dielicius, who put him to Death, made publick Mourning for him. De Fr. Soph. Lib. II. iin Herod. Cap. V. p. 550, 551. Edit. Olivar. 25. His Words are these: If a Father plundered his Temple, or makes an Attempt on the publick Treasury, shall his Son impeach him to the Magistrates? That indeed would be a Crime; he ought rather to appear in his Father's Defence, if he is accused. But ought not one's Country to be con

"fidered preferably to all other Duties and Obligations?" or "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 taken? He shall entreat his Father to delit; if Insinuates 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 Page has been already quoted, Vide, on the third Paragraph.

2. On the contrary, it appears that the Vilians made that Compliment to the Embassadors from Rome, as the learned Gronovius has observed. See Livy, Lib. IV. Cap. LVIII. Num. 6, 5. 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, & sim. Veiitiniis editionis, &c. that published in 1632. reads, & sim. Romani Veiitinius editionis, &c. because our Author afterwards added another Example: & Romans & Samnitiis, &c. &c. The first Addition would have been unnecessary, if he had not all along thought that the bruith: Answer was made by the Romans. So that he never perceived his Mistake, as appears from another in the Clofe of the seventh Paragraph: For telling the fame Story of two Things which happened at different Times, he, in the first Edition, ascribed to Sicics alone what relates on the Credit of Livy and Varro. Maximus. But he afterwards distinguished the Facts and Persons, as they appear in the two Authors quoted. This Remark is of some Ufe for justifying the Liberry 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 feiz'd upon the Embassador of Syracusia, which were sent to some other States; Thucydides, Lib. VII. So too the Argives feiz'd the Embassadors sent by a few fictitious People from Athens, and brought them to Argos. Id. Thucyd. Lib. VIII. And the Epirots intercepted the Athenian Embassadors going 5 F.
nians serve the Embassadors, that were going between the Perfians and Spartians, and so did the Illyrians thole between the Ilyrians and the Romans; and much more may they be imprisoned; as Xenophon ordered some to be committed; Alexander thole, who were sent from Thebes and Sparta to Darius; the Romans, thole of Philip to Hannibal; and the Latins, thole of the Volsci.

2. But suppose Embassadors do meet with bad Treatment, without any such Reason, 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 Jaffin, 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.

VI. But if the Embassy be admitted, the Law of Nations gives Protection to Embassadors, 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. The Spartans, who had killed the Heralds of the Persians, are said to have subdued the Rights of all Men. If any one strike an Enemy's Embassador, he shall be adjudged guilty of a Breach of the Law of Nations, faith Pomponius, because Embassadors are held Sacred. Tacitus calls this Right, whereof we now speak, the Right of Enemies, the sacred Right of Embassy, the Right of Nations. So likewise Cicero, Ought not Embassadors to be free from Danger, even in the midst of their Enemies? And Seneca, He violated Embassadors, bying no Regard to the Law of Nations. And when the People of Fidenæ put the Roman Embassadors to Death, Livy calls it Murder, violating the Law of Nations, a Wickedness, an horrid Fact, an impious Piece of Butchery. And in another Place, when their Embassadors were brought in Danger, They had not left among them, says he, so much as the Rights of War. So Curtius, He sent Heralds to them with Proposals of Peace, whom they flew and threw, head-long into the Sea, contrary to Rome, and executed them a Ransom: One of them only was, at the Request of the Romans, spared at Liberty without paying any Thing. Polyb. excerpt. legit. Num. 27. See the Opinions of Polybius, Lib. XI. and of Bæsar, Lib. XXI. about the French Embassadors to the Turk, whom the Spaniards took upon the Pæ, and murdered. And Crantzius, Bæcon. XII. about the Embassadors of the States of Flanders to the French King, whom Alexander apprehended. Belisarius's good Nature and Clemency are mightily applauded for sparing Geline's Embassadors who had been sent into Spain, and were returned to Carthage which was then under the Roman Jurisdiction. Pocròpius, Vind. I. Grotius.

The second of these Instances is not related with the utmost Exactness. They were the Parthians, or Men of a certain Ship of the State, who being employed in transporting those Embassadors, delivered them up to those of Argos. Thrice Embassadors did not pass through the Territories of the Atabians; they were betrayed and put under an Arrest in Thrace, and from thence conducted to Athens. See Thucydidès, Lib. II. Cap. LXVII. It was not known whither those Embassadors were going. The Historian only says, that they were put under a strong Guard, to be used at a Guard. De Exodit. Cyri. Lib. VI. Cap. III. § 7. They were with Darius before the Battle, and were taken in that Battle. Alexander released them. See Arriæan, De Exodit. Alexanderi, Lib. II. Cap. XV.

VI. That even an Enemy to whom the Embassador is sent is bound.


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 by Dionysius Halicarnassensis, from whom our Author without doubt took this Instance. Antig. Roman. Lib. VI. Cap. XXXV. p. 346. Edit. Oxoni. (p. 361. Edit. Syb.)

9 It is quite another Thing, if any one shall, out of his own Territories, contrive to sur prise the Embassadors of another State; for this would be a direct Breach of the Law of Nations. And this Affair is contained in the Thucydides Speech against Philip in Livey. Grotius.

11 Lib. X.XXX. IV. Cap. Num. 1, 2. VI. (1) See some Passages just now cited at § 7. And Donatus upon that of the Eunuch, Cœnus et Cœnus, 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 We Author probably had in View the Passages where the Historian, speaking of the God Mercury, says the Antients attributed to him the Invention of Embassadors, and Treaties made between Enemies, as well as the Caduceus, by Venus of which those who go to treat with the Enemy are allowed to return in Safety. Biblioth. Hifzer. Lib. V. Cap. LXXV. p. 235, 236. Edit. H. Stob. 3 Herodotus, Lib. VII. Cap. CXXXVII. 4 Didot. Lib. L. Tr. VII. De Legationibus, Leg. XV. 5 Annal. Lib. I. Cap. XLI. Num. 3. 6 The Passages is quoted above, in what I have added on Note 2. on the first Paragraph. 7 De Iri, Lib. III. Cap. II. 8 Lib. IV. Cap. XVII. Num. 4. 9 Idem, Lib. X.XXIV. Cap. XXXIII. Num. 23. 10
to the Law of Nations. 10. And with abundance of Reason do these Authors express themselves thus: For even in War many Incidents happen, which cannot be negotiated but by Embassadors, and Peace can scarce ever be made without them. 11.

VII. Another Question is commonly started, viz. whether an Embassador may be put to Death, or have any Violence in any other manner offered him, by the Law of Retaliation, for what his Principal had done to any Embassador sent to him from that Court. And indeed there are many Instances to be met with in Histories of Revenge taken after this Manner. And no wonder; for not only just and lawful Actions, but unjust, passionate, and outrageous ones are mentioned in Histories. Provision is made by the Law of Nations, not only for the Honour of the Potentate who sends the Embassador, but for the Safety of him who is sent: So that there is a Sort of tacit Covenant also between the Embassador, and the Potentate to whom he goes. He may therefore have an Injury done him, when none is done to his Principal. And so that Action of Scipio's did not only argue a Greatness of Soul, but was likewise conformable to the Law of Nations, when the Carthaginian Embassadors were brought before him, and he was asked what should be done to them (soon after the Roman Embassadors had been very hardly used at Carthage) answered, 'Nothing like what the Carthaginians did.' Livy adds, that he said, He would do nothing unworthy of the Roman Maxims. 2 In a like Cafe, 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 Afina, contrary to the Right of Embassy, was put in Chains by the Carthaginians.

VIII. 1. The Attendants likewise and Baggage of Embassadors are in some Measure to be accounted Sacred. Hence amongst the antient Romans, when an Herald was sent to make any Treaty, he said to the King: 1 Doft thou admit me, O King, extended even as the Royal Messenger of the People of Rome, together with my Attendants and the Baggage? And by the Julian Law, 2 not only those who did the Embassador himself, but even those that did his Embassador any Injury, were declared guilty of a publike Violence. But these Privileges only belong to them by Way of Accessory, and consequently no longer, than the Embassador pleases. Therefore if his Attendants commit any great Crime, he may be required to deliver them up to Justice. 4 For they are not to be taken from him by Force; which being once done by the Achaian to some Spartans who were in the Roman Embassador's Retinue, the Romans cried out, They have broke the Law of Nations. 5 Whereunto we may also refer the Opinion of Solinus concerning Bonifacius before quoted. But if the Embassador shall refuse to deliver him up, then are we to proceed in the same Manner as is prescribed against the Embassador himself.

2. But whether the Embassador himself shall have Jurisdiction over his own Family, 6 or may make his Houfe a Sanctuary for all such as fly thither for Refuge, 4 Serranus in Henry IV. Grotius.

10 Lib. IV. Cap. II. Num. 15. 11 This Remark is made by Philo the Jew, De Legis, ad Caesam, p. 1006. Edit. Paris. VII. (1) Diiodorus Sicyulus, in Excerpt. Petrf. Echtem, ex, B.A. de popvlo et noftrn pollotem, Scepio said they ought not to do to them such as they condemned the Carthaginians for: And accordingly the Romans, tho' they knew what the Carthaginians had done, let them go. See Appianus. And Cononatus disdained Titius sent to him from Magnesia, tho' Magnesia had detained Philip sent from Cononatus. Tozzi Max. Lib. II. See also some Stories in Cromer, Lib. XIX. and XXI. and Paruta about the Embassadors of France fcape in their Journey to France, Lib. VII. Cap. 453. 2 Lib. XXX. Cap. XXV. Num. 10. 3 Lib. VI. Cap. VI. Num. 2. 27. (VII. (1) Livy, Lib. I. Cap. XXIV. Num. 5. 2 Digest, Lib. XLVIII. Tri. VI. Ad Leg. Jul. de vi publica. Leg. VII.

3 See Praxid. Canenius's Epiftles, p. 75. and 279. Grotius.
depends upon the Concession of the Prince, in whose Dominions he resides. For the Law of Nations does not give him those Privileges.

IX. That the Moveable or Furniture of an Embassador, which are all reckoned Dependences of his Person, cannot be seized upon by Way of Pledge, or for discharg 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 to either of 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, as are provided against Debtors residing in foreign Countries.

X. Neither is there any Reason to fear (as some may imagine) that if Embassadors have such Privileges, no Body will give them Credit. For Kings, that cannot be compelled, never credit Debtors; and Nicolaus Damascenus says, it was a Cufum 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 fell nothing, but what they were paid for immediately, or to depend upon the bare Word and Honesty of the Buyer. And Seneca wittes this Cufum would prevail in all Places. Would to G O D, faith he, that we could prejudice 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 Companys and Bargains were not kept under Hand and Seal; but that Honesty and Confidece were Security for their Performance. Abpian relates of the Perfons, That they hated & usuryes, &c. The lending and borrowing of Money, accounting it an Inlet to a thousand Frauds and Fallshoods.

2. Alexius reports the same Thing of the Indians, with whom agrees Strabo, in these Words, Συνομ σε μικρούς, &c. That there are no Courts of Indicature, but for Murders and Injuries, it not being in a Man's Power to bind thine. 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 Laws Suits. It was also enacted by Charondas, that no Man should have his Action at Law against him, whose Promis: he thought fit to take for what he sold him: Which Plato likewise approves of. And Arifotle observes γαρ τινας, &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, τις κατακατακατακατομμυρίων, &c. There are Laws in some Countries against seeking Redress for the Breach of voluntary Contracts, as if be, with whom we have made any Contract, and whom Word we have taken, were only privately to be dealt with. What is alluded against this Opinion out of the Roman or Civil Law, does not belong to our Embassadors, but only to Deputies of Provinces or Towns.

XI. Profane Histories are full of Instances of Wars, undertaken for the ill Usage of the Rights of the Embassador.

7 On this Subject see an excellent Different by Mr. Thomasius, De Jure Austri Legatorum edibus competente, which is the Sixteenth of those printed at Leytge.

IX. (1) That is, an Embassador's Goods may be seized, whereas they are found, and the Right of Reprisal may be used, of which our Author treats B. III. Chap. II.

X. (1) That Author speaks of the Indians, in Stobæus, Florileg. Serm. XLIV.

2 De beneficiis III. 15. Grotius.

3 This Herodotus in his Clio has called τις κατακατακατομμυρίων. Grotius.


5 S. De legibus. Grotius.

6 Erbit. Néron. Lib. VIII. Cap. XV.

7 Ibid. Lib. IX. Cap. I.

8 What our Author observes here in regard to the Perfons, on the Testimony of Herodotus and Appian of Alexandria, is nothing to the Purpose. They speak of Perfons who run in Debt; but do not in the least Insinuate that the Perfons had no Action at Law to oblige Payment.

XI. (1) The Romans did upon this Account make War upon the Sarmatiae; APPIAN. Excerpt. legat. IV. and X. upon the Iberians and the Germans; POLYBIUS. Excerpt. legat. CXXV. and CXXXIV. upon the Eifrians; DION. Excerpt. legat. XII. upon the Corinthians; LIVY. Lib. III. upon the Tarantine; DIONYSIS Hylacarm. Excerpt. legat. IV. You have several Examples of the French and Germans in Amonius, Lib. III. Cap. LIXI. and LXXXII. and in WITTCKIND, Lib. II. Grotius.

In the Injustice here produced from DION CASIO, our Author has changed the Perfons. The Eifrians were only the Occasion of the War, which the Romans declared against Tenta Queen of Iberian, on her abducting and even putting to Death the Embassadors sent to her from Rome, to interfere in
C H A P. XIX.

Of the Right of Burial.

I. 1. From the same arbitrary Law of Nations arises the Right of Burying the Bodies of the Dead. Dion Chrysostom, among those Customs which he opposes to written Laws, places this of Burial next to the Rights of Embassadors. And Seneca the Father, among those Laws that are unwritten, which yet are more certain than any that are written, infers this of Interring the Dead. The Jewish Historians, Philo and Josephus, call it The Right of Nature. And Ido- dore Pelopseas, One of the Laws of Nature. As all common Customs, agreeable to natural Reason, are usually termed Laws of Nature, as we have observed elsewhere, Common Nature, says Elyan, commands us to bury the Dead. And in another Place, Earth, and a Grave, are a common Claim, and equally due to all. Euripides, in his Suppliants, calls Sepulture The Law of Mankind. Aristides, A common Law. Lucan, A Ceremony that all Men are intitled to. Statius, The Law of all the Earth, and the universal Agreement of the World. Tactius, The Commerce of human Nature. Lylius the Orator, The common Hope of all. He that hinder's it, is said by Claudian, To drost himself of Humaneity. And by


3. He places this Duty in the same Rank with those of giving Alms, and raising a Person who has fallen, Lib. I. Contro. I. p. 85. Ed. Grec. maj. 

4. The Author, probably, had his Eye on the Parallel of this Author, which shall be quoted Note 29. on this Paragraph. I know not any Place where Puflo 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 Dead, 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.


9. Ied. 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 Adroclus, near Thebes. Suppl. v. 378.

11. Speaking of the same Scythes 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. 262. Edit. P. Steph. 


13. Thesand. Lib. XII. v. 642, where he immedi- ately after speaks of Nature, which ought, in Con- junction with the Gods, to favour an Attempt tending to avenge its Rights. For the Cate is the same here as in the Passages quoted Note 10 and 11, v. 644, &c.

14. It is where he speaks of the Manner how Tiburis treated those who were charged with being in Sestius's Party. After having put them to Death he forbade their being buried. Annal. Lib. VI. Cap. XIX. Num. 7, 4.

15. The Orator says this also, on Occasion of the War between the Athenians and Thaeans, because the latter refused Burial to the Slain of Adroclus's Army. Orat. XXXI. Cap. II.

16. The Poet speaks of Gilden, who added this Act of Barbarity to what he had been guilty of, in killing the Sons of his Brother Mefores. Bell. Gilden. v. 395, &c. Concerning the succinct and elegant Phrases here employed, Eumare hominem, fraenum, &c. see the learned and judicious Observa- tions of the late Mr. Cuper, Lib. I. Cap. VIII. He there quotes the Words, without mentioning
Of the Rights of

Book II.

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by the Emperor Leo, To disgrace his Nature. And by ?Iphere of Peltium, 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, ?N?:s ev? auwos, The Law of the Gods. 20 And in ?Sophocles, Antigone makes this Answer to Creon, who denied Polyxenes Burial,

For these Decrees were neither made by Jove, Nor by the Infernal Gods, from whom Mankind All other Rights derive. Nor did I think The Power of mortal Man fo great, that Laws Not written, but acknowledged by the Gods To be eternal, could violate. Why then should I, deter'd by mortal Rage, Neglect to see the heavenly Powers obey'd?

3. ?Icrates, 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 Bacchanaia by the Dramatick Poets, what Misfortunes happened to ?Adrastos before ?Thebes, when, attempting to reduce ?Oedipus's Son, but his Son-in-Law, he left most of his Army, and gave his Captains leave? He with Disgrace surprising, and not being able to obtain a Truce to bury his Dead, came a Subpliant to Athens (which was then governed by ?Theseus) and begged of him not to let those brave Men lie unburied, nor let the ancient Cylion to be defiled, and the Law of the Country, or rather the universal Law observed by all Mankind, to be violated, not being instituted by an human, but a divine Power: Which when ?Theseus heard, he forsooth sent his Embassadors to ?Thebes. The same Author immediately after, 22 blames the ?Thebans for preferring the Decrees of their State, before the Laws of the Gods. He likewise makes Mention of the same Story in other Parts of his Works; and 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 everywhere, in ancient Authors, this good Office of Burying the Dead, highly commended. For Ciceron, 24 and Lactantius,

the Poet's Name, and seems to suppose them spoken of Creon. Whereas it appears, that he Himself this for a Passage in ?Statius. He had in his Memory confounded the Words of ?Claudian with those of the ?Thebes of ?Statius, Lib. XII. nor. 165, 166. Or, perhaps, he had lately read the Chapter inAlterius Gentilis on this Subject, where that Lawyer having quoted the Passage of ?Statius, adds, And another Latin Poet, speaking of another Creon, says, he decreed 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 Mistakes, when he quotes by his Memory.

17 That Emperor doth not speak precisely of Retali- fion 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 de- fray the Expenses of a Funeral, and, consequently, must lie several Days above Ground. Newes. LII.

18 Epig. CCCXCI.


20 Supple. v. 165.

21 ?Plutarch, in his ?Thucides, will have it, that they obtained the Privilege of Burying from the ?Thebans, by Contra?l, and not by Force of Arms. But ?Pausanias, in his Attic?, says, it was by Force of Arms. ?Grotrius.

22 Our Author here mistakes ?Isocrates's Thought. The Orator, to shew the Difference at that Time paid to the Athenians, says, that those who had the Command at ?Thebes, threw 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 ?con ? av?i? referred to the City of ?Thebes, whereas it relates to Athenes.

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 ?Hipparchia, which infers, 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 ?Quintus, 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 Mithake. 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 the long Note of ?Peter Daniel, on a Passage of ?Petronius, whom he quotes, § 2.
Chap. XIX. War and Peace.

Valerius Maximiæus, 26 of Humanity and Civility; Quintilian, 27 of Compasion and Religion; Seneca, 25 of Humanity and Compasion; Plutarch, 59 of Commination of common Nature; Tacitus, 24 a Commerce established in human Nature; Ulpian, 23 an Act of Mercy and Piety; Mædianus 3 terms it, the Memory of our mortal State; Capito, 23 an Act of Mercy; Euripides 3 and Laëntius, 33 of Justice; and Prudentius, 56 of Liberty, or Charity. Opitius Milevitanus 37 accuses the Donats of Impiety, for denying Burial to the Bodies of Catholicks.

where that Commentator explaining the Words trobuita 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 Qunctilian, one from Chap. XVI. where it is said, that God Men abate of their Right, even to Favour of Strangers and Enemies, on a Principle of Honour and Humanity. I find this quoted by Peter de Fauar, in his Semigria, Lib. II. Cap. I. p. 1 almost with the same View. The second is in the same Oration, where the Orator speaks almost to the same Purpofe. Here our Author has confounded in his Memory, thefe Passages, with thofe relating to Burial. My Conjecture will be confirmed by another Inadvertency of the like Nature, which I shall observe in Not 27, on this Paragraph, and which flows from the fame Source. Our Author may have been led into this Mistake by a Reflection we meet with in the Oration immediately following that for Qunctilian. I shall the more willingly fix it down here, as it is remarkable; and I am not at all surprized in this Chapter where it would have been natural to infect it. Cecerto, speaking of Parricides, says, "Our Ancestors did not judge proper to expofe the Bodies of their Wretches to wild Beasts, left fuch Food might conciliate their Pardon; nor to throw them naked into the River, left they should defire that Element, which ferves to purify other Things. They left them to the Cruelties of the Ufe of nothing common to Mankind. For what is fo common to Air to the Living, Earth to the Dead, the Sea to the Appearant Angels, the Sun and Stars to them only who are thrown on it." Orat, pro S. Rejoe Almarin, Cap. XXVI. The Punishment of Parricides was to be thrown up in a Leather Sack, and thrown into the Sea. Cap. XLII. Who has this Exprefion too, Lib. VI. Cap. XII. That laft and greatest Act of Piety is to bury Strangers, and the Poor, Quotius.

25 Lib. V. Cap. I. which is entitled De Humanitate & Clementiae, where fome Important Principles are produced of Perons who have buried their Enemies; none of fome of which are afterwards quoted by our Author.

27 Here we have the other Mistake, which will confirm what I have laid in Not 24. Our Author had been quoting, in his Marius, Qunctilian, Lib. XII. Cap. 46. Infinitt. Orau. But this Chapter contains nothing relating to Burial. But he had seen the following Page, thus quoted, both in Peter de Fauar, Semigria, Lib. II. Cap. I. and in the Comment on Petronius above mentioned, that the Father of Eloquent 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 Monarch of Humanity, but even "out of Love for the Employment." Lib. XII. Cap. XI. Among other Passages of the Declara-

28 De Beneficil, Lib. V. Cap. XX. It is where he introduces the Patriarch Jacob making great Complaint of the idle News told him by his Sons, concerning Joseph’s Death. The Attor- ned Extravagant Nofes not to be such as his Want of Burial; and addressing himself to his dear Son, he says to him, among other Things. Had it been absolutely neceffary for thee to die in 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 infuficient enough to leave the Body unburied, perhaps fome Traveller finding the Corps, and touched with Compassion for human Nature, would have taken Care of, and buried it. Lib. de Joseph, p. 536. Edit. Parisi.

29 The Page is quoted, Note 14.

31 It is therefore to be enquired and confi- dered with what View the Charges of (the Funer- al) were determined. Whether the Peron who took Care of it did it as a Duty to the Deceased, or his Heir, or on a Motive of bene Humanity; whether he followed the Dictates of Mercy, or "Piety, or Affection. The Difgn of doing such Mercy may be also distinguished; for the Perfons 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 Expanse," Etc. Diet. Lib. X. Tit. VII. De religiis & jumptibus funt, Leg. XIV. § 7.

32 "The Heir is to be rather commended than condemned, who doth not obey the Tithenar’s Will, by throwing his Body into the Sea, but "being mindful of the Communis of human Nature, "buries it." Diet. Lib. XXVIII. Tit. VIII. De condition. Infinitniius, Leg. XXVII. 33 That Historian doth not speak precisely of Burial, but of Antinius’s Goodness, who ordered the Bodies of even the lowest Rank of Men to be buried at the publick Expanse; whereas that Compliment was usually paid to Persons of Distinction only. Tit. Anton. Cap. XIII.

34 Suppl. v. 779, 526, 530. See likewise So- phocles, Ant. 135, 136.

35 "In what does Justice confift 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 jilt, "as it is not done for a Man who is fensitive of "nothing, but to GOD alone, in whole Prefence "a juft Action is a most acceptable Sacrifice." Inf. Div. Lib. VI. Cap. XII. Num. 34.


37 Lib. VI.
Of the Rights of

By Dint of Arms, to Manners and to Man.

Status. 38

Such Men, faith Spartianus, 39 have no Regard to Humanity; Livy calls it a Cruelty, 40 to which it is scarce credible, that any Man's Anger or Revenge should hurry him; and 41 Homer, ἀνέκδοτος ἔργον, An indented Thing. 42 Laelius condemns the Wildom of those Men, as favouring too much of Impiety, who would make it superfluous to bury the Dead. Upon the fame Account Eteocles is called impious, by Status. 43

II. From whence this Custom of Burying the Dead took its Rise, whether they were first embalmed, as among the Egyptians; or burnt, as among the Greeks; or only interred, as they are now, (which Cicero, 4 and after him 5 Pliny, hold to be the most antient Custom) is not agreed upon. Moschion attributes it to the savage Cruelty of the Giants, who used to devour the dead Bodies of Men, the Abolition of which brutal Practice is signified by Burial; for thus he speaks, 3

Henceforth the Law ordain'd
The Dead in Graves should be deposited,
Not be hurrying to the View of Men:
Disjunct Memorial of once barbarous Feasts.

2. Others are of Opinion, that Men, by Burying the Dead, do, as it were, of their own Accord, pay a Debt which the Law of Nature would otherwise require of them, tho' they were unwilling. For that, Man's Body being taken from the Earth, should be restored to the Earth again, not only declared by God to Adam, but all the Greek and Latin Writers do universally acknowledge it. Thus Cicero, 5 out of Eupripides's Hypsipyle:

38 Thoeb. Lib. XII. v. 165, 166.
39 Vin Caracalla, Cap. IV.
40 He is there speaking of the Treatment given to the Body of Alexander, King of Ephraim, which being cut in two, part of it was sent to Constauntia, &c. Lib. VIII. Cap. XXIV. Num. 14, 15.
41 The same Author, in his 24th Itiad, says, that Jupiter, and the Gods, were angry with Achilles, for not using Hector's Body so handomely 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 confirme in command manding that Adion." Injut. Divin. Lib. VI. Cap. XII. Num. 27.
43 Thoeb. Lib. III. v. 97, 98.
44 "I. (x) '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 Bolom." Dr Legibus, Lib. II. Cap. XXII.
45 Hift. Natur. VII. 54. where there is also this Passage, By burying is meant any Kind of private disposition of the Body; but by Interment, when it is laid in the Ground. Grotius.
46 See, concerning the Signification of the Word Sepulture, the fine Observations of the late Mr. Cooper, Lib. I. Cap. VII.
47 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 Strabo's, 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, κοινωνία τῆς, διαφόρα έργα, τάμης καλόν ενδιαφέρεσθαι, ηερον έκδοκίαν καὶ έπειταδικοί είναι, ηερον έκδοκίαν καὶ έπειταδικοί είναι, Ηη έπειταίν έηνε μηνεμε ένδιαφέρεσθαι. Edys. Tit. XI.
48 Job x. 9. And Philo against Flaccus, ἀνέκδοτος έργον, &c. Nature has ordained the Earth as Man's proper Place, not only while he lives, but also when he is dead, that he who receives us at our coming into the World, may receive us too at our going out. But as there is no audible 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 Creatures, 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 Rees, has this remarkable Observation. Geor. Lib. IV. ver. 255, 256. And Graves of Dead, that never must return To their loved Hues in decent Pomp are born: Their Friends attend the Hearse, the next Relations mourn.
49 Earth.
50 Servius says, With all the Solemnity of a Funeral, Grotius.
51 Tufcul. Quaest, Lib. III. Cap. XXV. The Original of this Fragment is prefixed by Philarch, Conjur. ad April. p. 110, 111.
Chap. XIX. **War and Peace.**

— 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 Perfon of Theseus, speaks thus in his Supplicants:

1 Permit the Slain to find a peaceful Grave:  
2 All Things to that, which gave them Birth, return.  
3 To Heaven's joys up the pure ethe rial Mind,  
4 The mortal Part to parent Earth defends;  
5 'Tis fit it should be so. For Life to Man,  
6 Not as a Property, but Loan, is given:  
7 And firm the Earth her foster Child refumes.

Lucretius likewise calls the Earth,

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 habitable 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 forfaken of all the World, the, like a tender Mother, takes us into her Bosom, and covers and secures us there.

3. Some think, that the Hopes of a Resurrection were by our first Parents signified to their Posterity by this Emblem of Burial. For Pliny teftifies, that Democritus taught that Men's Bodies ought to be deposited in the Earth, by Reason of a Promise given them of their being restored to Life again. And Christians also do often attribute this Custom of decently burying the Dead, to their Hopes of a Resurrection. Thus Prudentius;

What means that sumptuous Manseolum there,  
And this fine flately Tomb erected here,  
Unles within those holy'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 Compunction of Men, Edith Quintilian, dead Bodies are preferred from the Depredations of Birds and Beasts. So Cicero, Being

6 Suppl. v. 533, et.
7 Lib. V. 51. 1266.
8 Hist. Nat. Lib. II. Cap. LXXIII.
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 usualiy said of Hell, and the State of Souls in another Life, as childish Fables, he adds, "Of the fame Sort is Democritus's idle Affurance, that the Bodies of Men would be preserved and live again; "but he himself never returned into the World." So that Pliny is not here speaking of Burial, of which he had treated in the preceding Chapter, but only of some Notion of a Resurrection of Bodies, which the Philosopher had framed to himself. On this see Mr. Le Clerc's Philological Index to Stanley's History of the Oriental Philosophy, at the Word Resurrection. Our Author had read, or remem-
And GOD himself threatens some wicked Kings, by his Prophets, that they should be buried with The Burial of an A§, and that the Dogs should lick their Blood. Nor has Laelentinius Regard to any Thing in Burial but the Dignity of human Nature, when he faith, We will not suffer the Image of GOD to lie as a Prey to wild Beasts and Fowls of the Air. 13 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. 14

5. But suppose there was no Fear of any such Injury, yet to suffer a Man’s Body to rot above Ground, and to be trodden under Foot, is an Indignity offered to human Nature. Agreeable to this is that Saying of Socrates, in his Controversies, ouch is, ἂν το κάδων καλλιά, &c. That to bury the Dead is a very decent Thing; and instituted by Nature itself, left the Bodies of Men after Death being naked, should be exposed to Shame and Reproach, whilst they disfigure 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 ancient 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 Letoucr, We bury the Dead, faith he, 15 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, 16 as to Humanity, that is,
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 Ancsors. 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 interfering Ajax, where Ulysses thus says to Menelaus, 22

O Menelaus, do not fully all That you have spoke, by injuring the Dead.

The Reason whereof is given by Euripides, in his Antigone, thus,

To ev'ry Mortal, Death's the End of Strife; For what Revenge can you defire more?

So in his Supplicants,

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 Verfe the Author to Herennius has quoted, and gives this Reason for it, For that, faith he, which is the left and greateft of Evils has already befallen them 24. With whom agrees Statius.

We've been at War, 'tis true; But Wrath and Hate by Death are done away. 25

The same Reason is given by Optatus Milevanus, That your Paffion was inplaçable while your Enemy lived, yet it should end with his Death; for he is now silent with whom you iufted to contend. 26

III. 1. And therefore it is agreed upon by all, that Burial is due, even to our publick Enemies. This, fay Apian, 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 Chryfogome, This is a Right religiously observed, even amongst Enemies, tho' their Emnity was irreconcilable before. Lucan, treating upon this Subject, faith, 5 That funeral Rites are to be celebrated, even for Enemies. And Sopheter, to the fame Purpoze, What War, faith he, can be fo barbarous as to rob Mankind of its left Honour? What Emnity can extend the Revenge of Injuries fo far as to dare to violate this Law? Whereunto we may add that of Dion Crys-

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23 Ancod. XI. (104.)

24 Neither their Words, nor the Verfe quoted from Virgil, can be found through the whole Book of Rhetorick, written by an ancient Author, and which has long perlied for a Work of Cicer- ro. I am confident I can here shew what gave Occasion to the Mihàke, which is an indisputable Proof, that our Author sometimes falls into one, by quoting on the Credit of others. ALBERICUS GENTILIS, in his Treatìale De pace Belli, Lib. II. Cap. XXIV. p. 459, having produced several of the Authorities here employed, adds this Paflage, as taken from the third Book of the Rhetorick adddressed to Herennius, No Man ought to be angry with the Dead. Thus Ulysses, &c. and thus Rinn- on, &c. For that which is the left, &c. and thus Apollo in Homer (Iliad) Lib. XXIV. against Achilles, &c. but there is not one single Verfe of Virgil, in the whole four Books of the Rhetorick in Question; and that Lawyer everywhere makes Use of this Reason for proving, by the By, that the Work does not belong to CICERO, Whose Author is not CICERO, says he, if he has any Thing from VIRGIL, p. 551. It is evident therefore, that our Author had no other Voucher for his Quo- tion than ALBERICUS GENTILIS; but I know not whence the Perfon laft mentioned had taken the Words he produces. I have looked for them to no Purpoze in QUINTILIUS, and the Collection of the ancient Latin Rhetoricians, published by Pi- THON, at Paris, in 1559. 25 Thesalld. Lib. XII. v. 573, 574.

26 Lib. II. contra Parm. III. (1) De Bell. Public. p. 105. Edit. Angl. (63 H. Step.) 27 That Author faith, that 4 Men of Goodness 1 and Humanity bury fuch of their Enemy as fall 1 in Battle, even at their own Expenfe; and that 1 those who extend their Emnity even to the Dead, 1 make an Agreement with the Enemy, for allowing them to pay them the laft Duties." In Flc. P. 974.

28 Ancod. Lib. I. Cap. XXII. Num. 3. 29 Orat. lege. See another Paflage of that Orator, quoted § 1. Note 2. 30 The Paflage has been quoted in Note 12. on Paragraph 1.
Of the Rights of

Book II.

follo\n, whom we have j\n now quoted: By this Law, faith he, the Dead are not
accounted Enemies, nor does any Man extend his Anger and Revenge to the Bodies of
the Slain.

2. * Instances of this are every where to be met with. Thus Hercules buried his
Enemies; Alexander, th\ne he had slain at I\thas, * Hannibal made a Search for the
Romans, * C. Flaminius, P. Emilius, * T. Gracchus, * and * Marcellus, to give
them Burial. * You would have thought, says Silius Italicus, * that it had been some
Carthaginian Captain that had been slain. * The very fame was done by the Ro-
mans to Hannu * the Carthaginian; * to Mithridates by Pompey; * by Demetrius,
to many of his Enemies; * and by Anthony to King Arbela\nus. * This was Part of the
Oath, which the Greeks took, when they made War with the Per\fians. I will
bury all my Fellow-Soldiers, and if I come off Victorious, the very Barbarians.
And all Histories abound with Instances of a Supp\nen of Arms obtained for taking
away the Dead. The Athenians in Pausanius lay, * That they buried the Medes them-
\selfs, because all dead Bodies, whether of Friends or Foes, have a Right to be interred.

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, * if a
Man were found dead and unburied, he was commanded to bury him himself.
And Christians have so great Regard to this Duty, that, rather than fail of
performing it, they have thought it lawful to be moulded down or fell their consecrated
Plate, which they never did, but for the Relief of the Poor, or the Redemption of
Captives.

4. Some Instances indeed may be found of the contrary, but they are only such
as are condemned by the General Voice of Mankind.

6 JOSEPHUS in legibus; Θαπείδεοε δ' ἦν \\νοδομειπ. Let even your Enemies be buried. Agamem-
non, in the seventh Ides, buries the Trojan; * Ant-
genius, in Plutarch, does the same to Pyrrhus. See that Author in his Life of Pyrrhus. * GRO-
TIUS.

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. XI.
8 Hannibal ordered an Enquiry to be made for the
Body of Flaminus, in order to bury it, but it was not found. L IVT, Lib. XXII. Cap. VII.
Num. 6.
9 Livy says no more than that, * According to
some Authors, the Body of that Roman Confluf
was fought for and buried." * Ibid. Lib. II.
Num. 6.
10 Another uncertain Fact. * There are se-
veral Accounts, fays Livy of Grecceus'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 Car-
thaginian Camp; which is the most common
11 See Plutarch, in his Life, p. 316. Tom. I.
Edit. Webh. CICERO likewise observes that
The cruellest of Enemies did not allow his dead
Body to be deprived of the Honour of Burial.
Dr Smith, Cap. XX.
13 Our Author takes this from VALENTINUS
MAXIMUS, Lib. V. Cap. I. Num. 2.
Anfield. (250. H. Stepb.)
15 As, for Example, after the Victory he obtain-
ed at Salamis, over Persia. 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 he knows 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 Parpofe.

The Original hands thus: ἀλλὰ τὸν ἐκ τῆς μάχης
tελευτερειόν τοῦ εὐκράτους πάλιν ἀβάλω ἡ κυριεῖ-
τα τῆς πόλεως ὧν ἐπετράπετο τὸ αὐτοκοι-
νευτικὸν πάλιν αὐτόκτονα πάλιν. That is, I
will defend all those of the Allies, who fell in the
Battle; and when I have gained the Victory over
the Barbarians, I will not reck any of the Towns
p. 218. Edit. H. Stepb. 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 point-
ing, as if it had been, πάλιν ἀβάλω ἡ κυριεῖτα
tῆς πόλεως τῆς ἐπετράπετος. Here then is a
very remarkable Instance of the Neceffity of tracing
the Source of Quotations; and comparing the Paf-
fages cited with the Originals.
18 See below B. III. Chap. XX. § 45. GRO-
TIUS.

See an Example of this in Note 21. on § 1. of
this Chapter.
20 See LEVITICUS, xxiii. 1. &c.
21 SERVIUS observes the same out of the Roman
Penitential Law. GROTIUS.

In his Comment on the Sixth Book of the Hœnind, he says, that, "Though the Penitents were
not allowed even to fee a dead Corpse, it had had
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 GU-
ther. Dr F. M'Manus, Lib. II. Cap. VIII.
In which Piece, however, this remarkable Passage of SERVIIUS is not inferred.
22 " No one can complain that Captives are re-
deemed: No one can be displeased that the Tem-
ple 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 not re-
lit by being interred. In these three Cafes, the Vefcls
of the Church, even after they have been confe-
mated, may be broken, melted down and fald." AMBROSE. De Offic. Lib. II. Cap. XXVIII.
War

O serve me from this Rage, 'tis all I ask!

Is in Virgil.

Stript of the Man, the cruel Wretch deny'd
The Brain a little Dust:

In Claudian 24. Wherewith agrees that of Diodorus Siculus, It is pleasant Cruelty to wage War with the Dead, who were lately of the same Nature with ourselves 23.

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 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 Agamemnon, 2 who to the Sin of Adultery had added that even of the King's Murder, was notwithstanding by Orpheus the slain King's Son buried. And even among the Romans, Ovian 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 Diolefan and Maximillian the Emperors declare, in a Refcript, 5 We do not, say they, deny Burial to those Criminals, who have deservedly been put to Death.

2. In some Histories indeed we meet with Instances of those 6 who have been cast out unburied, but this is oftener done in Civil, than in foreign Wars; and those we sometimes see the Bodies of notorious Malefactors hung in Chains, to deter others; yet whether this be a laudable Custom or not, is much disputed, not only by Politicians but Divines.

3. On the contrary, we find those commended who have ordered the Bodies of those very Men to be buried, that had denied Burial to others; as Paufanias King of the Spartans, who, being solicited by those of Aegina to retaliate the Barbarity of the Persians towards Leonidas, rejected their Council, as unworthy of himself and the Grecian Honour. 7. These thus speaks to Cress in Statius.

Go forth and meet, the worst of Ills, thy Fate, Tit of a Grave secure.

The Pharisies buried King Alexander Januarius, who had used the Bodies of their dead Countrymen very barbarously. And tho' GOD hath sometimes punished some Perfons with the Loss of Burial, yet this he did by his own peculiar Right,

23 Servius interprets this, the Fury of his Enemies, which would even after his Death defile to inflant him. Grotius.

24 See the Passage quoted in Note 16, on Paragraph I.


IV. (i) It is where he is speaking of the Cruelty of the Idomæans in the Slaughter they made among the Jews during the War. Bud. fud. Lib. IV. Cap. XV.

2 Homer says that Orpheus having killed Agamemnon, his Mother's Gallants, made a funeral Entertainment at Argos, according to the Cufom of those Times, for the Burial of his Mother and her Gallants; that is, he killed them both, tho' the Poet has avoided telling us of the Mother, in express Terms, as the Scholiast observes Ovian. Lib. III. Ver. 309, 310. Paufanias tells us they were buried without the Town. Lib. II. Cap. XVI. p. 59. Edit. Wech.

3 Diog. Lib. XLVIII. Tit. XXIV. De Caeteribus pauciorum, Leg. I.

4 Ibid. Leg. III. This Custom of the Romans is mentioned in Phil. against Placius. Grotius.

5 This Josephus in his Account of the Death of Alexander King of the Jews, has termed d' benefi, η κακήν αυτού, to inflant the Dead by Non-Intemipt. Add Quintillian, Deiam. IV. Grotius.

7 We learn this from Herodotus. See how he makes Paufanias answer Lampis, one of the Considerable Men in the Island of Eginia: 8 Sir, I admire the Goodness of your Intenions, and the Concern you express for my Character; but must oblige 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 Thucyd. Lib. XII. Ver. 780, 781.

5 I
as his Authority is above all Laws. And whereas David kept the Head of Goliath to shew it, as a Token of his Victory, this was done to an Alien, to a Contemner of the true GOD, and under that Law wherein the Word Neighbour was confined to the Hebrews alone.

V. 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 Josephus informs us. And no Wonder, since no other Punishment can possibly be inflicted upon them who effect Death itself to be none. Thus were the Miletan Virgins deterred from killing themselves, and the meaner People of Rome formerly, tho' Pliny disapproves it. Thus did Plato command the Body of Clements, 5 who had killed himself, to be hanged up. And it is every where customary, says Aristotle, to brand those with some Mark of Ignominy, who murder themselves; which Andronicus Rabdies explains, of prohibiting them Burial. And this Law, among many others enacted by Democritus, Queen of Cyprus, is highly commended by Dion Chrysostom. Neither is it to the Purpose to object with Honor, Elcybus, Sophocles, Meeelibas 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.

2. For the Plutarchi do argue excellently well against the Stoics, 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 fait Custody of the Body, and not to be dismiffed, but by the Command of him, who first gave it. Which Point is fully disdissed by Plutinus, Olymipidoras and Macrobias upon Scipio's Dream. Brutus, following this Opinion, 9 had formerly condemned the Fact of Cato, tho' he afterwards imitated it himself.

V. (1) It appears from Josephus that even such as had laid violent Hands on themselves remained unburied only in the Case of De Bella Jud. Lib. III. Cap. XXV. As to Helgenius, quoted by our Author in his Margin, he is not speaking of the Jews, but of other Nations. "Some of which, as he observes, exposeth 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 fame Passage of Hel- genius.

6 At Athens in Efehian's Days, if a Man had murdered himself, his Hand was buried separate from his Body. Efebian, in Cofphem. Add to this, Hesog. Lib. III. Cap. XVII. Grotius.

2. Concerning a Law which ordered that the Bodies of Tyrants should remain un- buried, observing that that Sort of Punishment was thought necessary, because the Idea of it affoed several more strongly than that of Punishments inflicted in their Life time. Deciam. CCLXXIV. This is no Criminal 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 Vases mentioned in Note 12, on Paragraph 11, he says: 8 and "when Agelob was killed he (the Poet) says he "would not have been buried, had Meleager been "present; for such was the Law concerning Ty- rant's. p. 73. Edit. Barnes. 9 See my Preface on Pufendorf, § 27, at the End, p. III. of the Second Edition. 10 On this Subject see Pufendorf, B. II. Cap. IV. § 19.
Chap. XVIII. W ar and Peace.

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It is neither pious nor manly, faith he, to yield to adverse Fortune, and to fly away from those Calamities, which we should manfully bear. And Megaslynes observed, 11 that the Fact of Calamus 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 Peripatetic approve of it, as appears by the 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 "wóxágó " to be let go, or, to be dismissed, as is plain not only from Luke ii. 29, but from the Septuagint Version of Gen. xv. 2. and Numbers xx. about the End 14. Which way of Expression is also usual among the Greeks. He that dies, faith Themistius (de Animâ) is said by them to be dismissed, and Death they call a Dismission. We meet with much such an Expression also in Plutarch (de Confolatione) until GOD himself shall dismiss us.

4. Yet some of the Hebrews except one Cæfar out of the Law against Self-Murder, as a Kind of commendable Departure. θέλεις ἐξαιρόμενον, 15 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 "phóus our very well represented to his own Countrymen; 17 they are of Opinion, that the Will of GOD, made known to us by pure Tokens, is the only lawful Reason why a Man should haften his Death. To this Purpose they allege the Example of Sampson, who found, that the true Religion was made a mock of in his Periob; and that of Saul, who fell upon his own Sword, that he might not be insulted by His and G O D’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 Cæfar 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, in which as it is recorded in the History of the Maccabees. Inftances are likewise to be met with in Ecclesiastical History of those that killed themselves, 18 left being put upon the Rack they

Procopius, Gothic. IV. άποκεντάριον, &c. It is an unprofitable, rash, and imprudent Thing for a Man to force his Way out of the World, and this Thoughtful Brevity of courting Death is looked upon by all Men of good Sense to have only unjustly the Name of Courage. Nor is it altogether unworthy your Reflection, is confider whether in a thing not only to not end on unprofitable Part against GOD. Grotius. 11 STRABO, Geog. Lib. XI.

12 This was no less the Opinion of the Arian than of the Indians and Peripatetics, as you may learn from Jon iii. 51. Grotius.

13 Lib. V. Cap. XII. Num. 11.

14 Our Authors, in his Notes on the Gospels, adds that "MARCUS ANTONIUS uter the Word άποκεντάριον to the fame Purpose, which signifies to quit a Service or Employment. The Passage is in Lex. X. § 22, on which see Gataker’s Comment.

But as to the other Expression of the fame Emperor, there quoted by our Author: Αυτός δέ λεγει, χάριν δέ άποκεντάριον, χάριν, I believe his Memory failed him. It is probable he had the following Words in his Mind: Αυτός δέ λεγει, χάριν δέ άποκεντάριον (as Gataker rightly reads, instead of έχειν) has άποκεντάριον χάριν, έχειν χάριν, in referring. That is, Depart therefore out of Life cheerfully, like a Man who has proceeded in his Dispute, and be not uneasy at what Obstacles you have met with. Lib. VII. § 47. The learned and accurate English Commentator on MARCUS ANTONIUS quotes no Parallel Passage, for which our Author makes him pay, and where the Word άποκεντάριον is used in the Sense here indicated. We find only άποκεντάριον ζα άκοινον, 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 άποκεντάριον and άνάθεσις are used concerning Death, would not have forgot to express a Passage in his own Author. Nor does he quote it in his Differentiae De Novi Testamenti Syntax, 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 JOSPHUS, where he treats of the Death of Phaigel and Herod’s Intent to kill himself. And PHILo introduces the "Jews speaking thus to Phaigel: He died not Manly, &c. Those Hands shall be buried in our own Blood, that will we mingle; then on the Dead let your Commands be laid; Heaven will forgive us, whilst we are decided between Respect to the Emperor, and a Resignation of our forted Lives. And this will be our Cæsar, if disposing this Paltry Life not worth the keeping, we voluntarily quit it, and walk off with Unconcern. Grotius.

16 An Exposition used by the Staici. See Diogenes Laertius, Lib. VII. § 159, 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. 4 If any one, Lys, he throws out of his own Body the Divine Deposition, do you imagine he will escape the Justice of an offended a GOD? It is thought just to punish Slaves who run away, even from wicked Masters; and shall we not think ourselves guilty of Insanity if we run away from G O D, the best of Masters?” Bell. "Jud. Lib. III. Cap. XXV.


should
should abjure the Christian Faith; and of Virgins, who, to preferring 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 what St. Austin thinks of these People.

5. I find also, that another Exception to the general Rule of burying the Dead prevailed among the Greeks, which the Locrions objected against the Phocians, viz. that it was a Custom common to all Greece to cast out facrilegious Persons unburied. The like doth Dion Prusianus report of such as were impious and notoriously wicked. And Plutarch, that the very same Punishment was established by Law in Athens 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 Thefeus, which is recorded by Euripides and Iocrate, in the Places before cited.

VI. There are also other Rights belonging to us by the arbitrary Law of Nations, as what we have been possest of a long Time, what comes to us by Contract, tho' made upon very unequal Terms, and to succeed to the Estate of an Intestate Person. For all these, tho' they have their Rise in some Measure from the Law of Nature, yet do they receive an additional Confirmation from human Laws, whether against the Uncertainty of Conjectures, or against some Exceptions, which

Those Persons ought to have considered that GOD was powerful enough to support them in the midst of the most cruel Torments; and that, even tho' they permitted him to link under them, he was good enough to have Regard to the Frailty of human Nature, and pardon them a forced Abjuration, on sincere Repentance. So that this Reason did not Privilege them to think themselves exempted from the general Law. They committed a certain Sin, to avoid an uncertain one.

19 Ciceron in his Oration De Provinciis Consulatis, gives an Account of some Maid of Quality who threw themselves into Wells, and so by a voluntary Death, kept themselves from being ravelled. Such another Story does St. Jerome against Jovinian relation of the Midian Virgin, and there is an old Epigram to the same Purpose, Antholog. Lib. III. Tit. De juvenibus, beginning with α'λλ'ος ὑπὸ μάλα καὶ ἰδιός. And the Jews tell you of a Woman in a Ship importuned to Adultery, who when she had affed her Hufband, whether Bodies that are drowned in the Sea, would rise again, and he had demonstrat, that they would throw herself into the Sea. We have many Instances of this Kind among Christian Women. As, the Women of Antichus under Diocifian, Sophronia under Maxentius; see the Martyrologes, Zonaras, and Suétus Aurelius. Procopius, Períc. II. adds other WOmen of Antichus under Caligula. And St. Ambrose commends the Virgin, who at the Expence of their Lives maintained their Honour. St. Jerome in his Commentaries at the End of the first Chapter of Joseph says, And therefore in Persecutions it is not lawful for me to kill my life, unless when my Chafity is in Danger without it, Grétius.

I know not whom our Author means here by Suétus Aurelius. Neither Suétus Aurelius Victor, or the Writer, who passeth under his Name for 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 Letus, who mentions the melancholy Expedient made Ue of by Sophronia for avoiding the Brutality of the Tyrant Maxentius. As for the rest, Eusebius also speaks of that tragical Death of the Lady's Name, but only mentions her Husband's Dignity, Hyst. Eccles. Lib. VIII. Cap. XIV. and in his Life of Constanoble, Lib. I. Cap. XXXIV.

20 To whom we may add St. Chrysostom, Gal. I. 4. and the third Council of Orians: 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 evixit. Dei, Cap. XVII says, But, however, if the Gaffe be so, that they deferved themsel's, purify that they might not suffer any Indignity of this Nature; who of common Humanity could be so barbarous as not to pardon them? And the Captulator Franciscus, Lib. VI. 70. It has been debated and refolved in Relation to him who hang, or murder himself, if that anyone, compassionating his unhappy Circumstances, will on that Account give any Aims, he may, if they despeare of, and find Peters for him: But as for them themselves let them be without either Offerings or Mafles: For God's Judgments are unforfeable, and his Ways past finding out! See there too, vii. 441. Grétius.


22 Orat. Riddin. Concerning sacrelegious Persons and Traitors, see Meursius's Themis Atica, Lib. II. Cap. II.

23 But when Nicetas has in his third Book of the History of Alexius Hyanus's Brother, related the Death of Johannes Conens Craffus, who by Sedition had affed the Crown, he speaks of him in the following Manner; μὲν ἐς τὸν θάνατον, &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 Taking a little Breath and Inhuman. Grétius.

Besides the Crimes mentioned by our Author, there were others for which Men were deprived of Life, See Potter's Archaeologia Graec. Lib. IV. Cap. I.
natural Reason might perhaps suggest; as we have already shewn when we treated of the Law of Nature.

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.

CHAP. XX.

Of Punishments.

I. 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 discourse, for as much as its Origin and Nature being misunderstood has given Occasion to many Mistakes. Punishment then in its general Acceptation is the Evil that we suffer for the Evil that we do. For tho' some Sorts of Labour or Work are often imposed on Persons by Way of Punishment, yet considering the Pains and Trouble that attend such Labour and Work, they may properly enough be ranked amongst the Evils we suffer. As for those Hardships, which some People undergo on account of a contagious Distemper, for being maimed, or for any other Uncleanness (many Kinds of which are extant in the Jewish Law) so as, for Instance, to be driven from all Company and Conversation, or to be made incapable of any Office or Employment, they are not properly Punishments, tho' for some Resemblance they have to them, and by an Abuse of the Word, they are so called.

2. Among tho' 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 RATIONAL LAW, as we have said elsewhere. To the same Purpose is that Saying of Plutarch, τον εις εαυτον δικαιον, &c. 2 Justice is the Attendant of GOD to take Vengeance of those who transgress the divine Laws, 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 HieroX 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 HieroX calls Punishment the 5 Medicine of Wickedness. And Lactantius says, They are guilty of no small Error, who misapply Punishment, either Human or Divine, by the Name of Bitterness and Matlce, imagining that he ought to be esteemed guilty, who only punishes the guilty.

1 (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.
3 ST. IRENAEUS's Expositor in his third Book, Chap. XIV, has set down his Words thus: And GOD, as a very antient Reporter, was having the beginning and the Means of all Things at his Disposal, brings them to a just Perfection, visiting them according to their respective Natures, always attended with Justice ready to punish those who presume to deviate from the Law; the A L M I G H T Y has given GROTIUS.
4 Agreeable to this is that of Belgarvius in PROCOPIUS's Vandal. I. άνειρον διην, &c. Let it to be the joint Maxim of Justice to punish Murderers. Add here AGATHIAS, Lib. V. where he speaks of ANATOLIUS, GROTIUS.
5 It is where he says: 2 We ought to take particular Care not to offend; but when a Man has been guilty of some Crime, he ought immediately "to be taken to Punishment as the Remedy for Vice," p. 124. Edit. Neddham. 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. Neis 2.
3. But that all Punishment, which is properly so called, must necessarily be the Consequence of some Crime or Demerit, is what St. Austin has observed, 7 All Punishment, if it be just, must be the Punishment of some Crime; which is true even of those Punishments that are inflicted by God himself, tho' sometimes thro' our Ignorance, The Offence is concealed where the Punishment is evident, as the same Author speaks.

II. 1. But whether Punishment belongs to attributive or expiatory 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.

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 6 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 an Equality between the Offence and the Punishment; whereof Horace thus.

Why dost not Reaion paife and mend the Thoughts, And see our Rage proportion'd to the Faults?

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.

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 shewn, that the true Nature of attributive Justice consists neither in such an Equality, nor in a Proportion from the Whole to a Part, properly speaking, but in considering an Aptitude or Merit, which doth not contain in it a Right Necessarily 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 expiatory, 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,


II. (1) Seneca, De Ira II. 6. He would be unjust to bear one and the same Retribution, when the Crimes are unequal. Tacitus, Annal. III. Tho' his Crimes are beyond Measure flagrant, yet the Prince's Moderation, and yours and your daughters Example, will qualify the Punishments. There is a Difference between what is only vain, and what is dastardly wicked; what is only ill fain, 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 Solicitude upon Horace, if great Punishments be laid upon small Crimes, great Crimes and either remain unpunish'd, or some new Punishments must be invented for them. And Lex Ufquebat, Lib. XII. Tit. III. Cap. I. For some Laws, tho' they take Notice of great variety of a Faults, are yet not so distinguishing in their Punishments of them, but several Crimes are obnoxious to one and the same Penalty only. Nor is the Punishment at all proportioned to the Tribes, since a greater or a less Crime ought not to be alike in their Sufferings: And especially when the LORD does in his Law expressly ordain, that the Number and Measure of Stripes shall be according to the Degree and Nature of the Offence. See below in this Chapter, § 28. and 32. and in B. III. Chap. XI. § 1. Gratianus.

2 Lib. I. Sermon. III. Ver. 78, 79.

3 Ibid. Ver. 117, 118.

4 It is highly requisite that the Laws should order 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 forever he may be of Alms, has not, strictly speaking, a Right to demand it, unleas in Cafe of extreme Necessity. But when he has received a Piece of Money, it is entirely his own and according to the Laws of expiatory Justice; so that if any one, or even the Person who gave it him, attempts to take it from him, he is guilty of injustly properly so called.

6 For no Man demands Punishment to be inflicted on himself; on the contrary, every one avoids it as much as is in his Power.
That a Debt is due upon a Contract. The vulgar Exprension, whereby we say, that Punishment is due to a Malefactor, which is very improper, has led them into this Error. For he to whom any Thing is due, hath a Right against him from whom it is due. But when we say that Punishment is due to any one, we mean no more than that it is fit he should be punished.

3. Yet it is true, that commutative Justice is primarily, and of itself convervant about Punishments, forasmuch as he that punisheth, if he punisheth jufly, must have a Right to punish, which Right ariseth from the Crime of the Delinquent. And herein there is another Thing that comes near to the Nature of Contracts; for as he who tells a Thing, tho' he mention nothing particularly, is yet provem to fland obliged to perform the Conditions that naturally belong to such a Sale: So he that commits a Crime, seems voluntarily to submit himfelf to Punishment, there being no great Crime that is not punishable; fo that he who will direcly commit it, is by Conquefe willing to incur the Punishment; in which Senfe some Princes have pronounced Sentence upon a Malefactor thus, Thou haft brought this Punishment upon thy own Head, and they that take wicked Counsel, are then faid to be punished for their Demerit, that is, to lay themfelves under an Obligation of being punished by their own Will: And the Woman in Tacitus, who lay with another Man's Slave, is faid to have confent'd to her own Slavery; that being the Punishment ordained against such.

4. Michael
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 which is not guilty of the like Crime.

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 only for the Good of God; and why.

Friedemann. And thus the Passage is nothing to the present Purport. See the Recent Sententia of Julius Paulus, Lib. II. Tit. XXI. § 1. with Cujas's Comment, and the Notes of Mr. Schultzing.

III. (1) See what I have said on the Chapter of Pufendorf which answers to this, § 4. Note 3. 2 Th. 2. 2. 1 Cor. 6. 4. Is. 1. & ibi Cajet. So Moiss Maimonides, upon Deum xxiii. Grotius.

3 In Stobaeus, Florileg. Tit. XLVII.


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 Perfons equally guilty. But our Author certainly does not design to extend the Maxim so far as to deprive a Prince, or the Magistrate, of the Right to punish Crimes of which he knows himself guilty. In that Case, it is not so much the Prince, or the Magistrate, that punishes as the Law, or the whole Body of the Society, which has invested those Persons with the Right of correcting and chastising, in their Name, those who shall do any Thing prejudicial to the publick Good.

6 I know not whence these Words are taken. Our Author does not so much as specify the Treaty, 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 Leg. Lib. II. Cap. XXVIII.) Agreeable to this is a Passage of St. Ambrose, in his twentieth Sermon upon the Psalm, Buxi immaculati, at the Verse Miferentissime tu Dominus, a Passage cited Conf. III. Lib. VII. So that of Castorodore VI. 21. Grotius.

8 Apologia Davidis, Lib. II. Cap. I.


2 De Iur. Lib. I. Cap. XVI. and Lib. II. Cap. XXXI.
vident. Diodorus, in his Speech to the Athenians, concerning the Mityleneans, faith, That they had done very unjustly, but yet that they were not to be destroyed, unless it should be judged expedient 4.

2. These Things indeed are true of Punishments amongst Men: Because one Man is so linked in Bonds of Confanguntness to another, 4 that he ought never to do him harm, but for the Stake 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, especially when there is any Demerit in us, tho' they propose no End to themselves beyond themselves. And thus do some Hebrews explain that of Solomon, which is pertinent enough to the present Purpose, 6 The LORD hath made all Things for bimself; even the Wicked for the Day of Wrath: That is, even then when he punisht he the Wicked, he does it for no other End but only to punish them. And altho' we do admit of the more common Acception, 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 Αὐτός ὁ Θεός, A Being of himself, because not born or created of any. The holy Scriptures, at least, do teftify that GOD inflicts Punishment sometimes upon protigiate abandoned Sinners, for no other Reason but to punish them. As when he is said 8 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 affirm against Plato.

3. But when one Man punisht he another, equal to him in Nature, he ought to propose some End to himself. And this is what the Schoolmen 9 mean, when they say, that the Design of an Avenger in punishing, ought not to terminate in the Sufferings of the Criminal. But before Plato declared, that those who


4 Cashodore, De ambicition, If by Accident one Hand hurts the other, that which it hurts 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 Passidge 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. L. p. 325.

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, different 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 killing it away, but either in Defence of his own, when unjustly attacked, or in Order to execute 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 Perfon whom he deprives of Life is innocent, he executes an Act of his sovereign and absolute Right on him; but if he has deferved Death, it is then an Act of his absolute Right, and an Act of Punishment. Considering this as an Act of Punishment, no other Reason is necessary for ingaging GOD to punish. Even tho' the Punishment may have no Tendency either to correct the Criminal, to fet an Example, to satisfy the Perfon injured, or prevent the Damage that may accrue to others; it is not therefore less lawful. It is enough that the Perfon punished was wicked, 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 entirely, Dei enim Attimis recte esse pujiant etiamq. quum nulla sit proponent extra typos, 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 to far, as to pretend he may punish the Innocent, and even condemn them to eternal Torments. Had they Gentlemen been Perfons of the least Equity, and had they been pleased to observe what our Author says in the following Chapter, § 14, they would have never taxed him with so odious an Opinion.

7 Our Author, in one of his Letters, translates the Passidge thus, GOD has so disposed all Things, that they answer one to the other, and the wicked Man for the Day of Adversity. Letr. 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 disposes all Things for what is proper for each; even the wicked Man (is disposed) for the Day of Adversity.
punish any Man with Death, or Banishment, or a Fine, Do not do it purely for the Sake of Punishment, but of some Good, (so that every one, that is guilty of a Crime, should be punished, but not as it is fit, but as it is profitable. So likewise Aristotle, Some Things are simply good, others through Necessity.

And an Instance of the latter he gives in exacting Punishments.

V. i. What therefore was said by the comick Writer

'The Offender's Pain is to the Offended Ease.'

And by Cicero, that Pain is mitigated by Punishment. And by Plutarch, that Satisfaction is a Kind of Medicine to a sick and inflamed Mind: Is agreeable indeed to that Part of our Nature, which we have in common with Beasts; for Anger, as well in Men as in Beasts, is 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, and sometimes against Things altogether without Sense, just as when a Dog bites the Stone that is thrown at it. 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 fecable 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 lusurious Riches, and many other Things of the like Nature.

2. And in this Sense Revenge is condemned, not only by Christian Teachers, but by Philosophers too. Thus Seneca, Revenge is barbarous and inhuman, and the it commonly is 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, he is more guilty that revenges himself, than he that first did the Injury. And Maurinius, 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, faith, 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 Disaffection of Mind.

3. It is therefore contrary to Nature, for one Man to be pleased and satisfied with the Pain or Troubles he brings upon another, barely as it is Pain or Trouble. And there-

8 In the Gorgias, Tom. I. p. 468.
9 In his second Book, De Irae, Chap. XXXI.
10 and in B. I. Chap. XII. I will prosecute him, not through Reafonnent, but because it is what I ought to do.
11 See the Voyages of John de Lery, p. 203.
12 See what Seneca has upon this Subject, Lib. I. Cap. V. De Ira. Grotius.
15 See the Sentences may be found in Stobaeus, Serm. XIX. De Patience. 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.
fore the weaker any one's Reason is, the more prone he will be to Revenge: "In

veteal, 12

But ob! Revenge than Life is sweeter far:
13 Thus think the Crowds, who, eager to engage,
Take quickly Fire, and kindle into Rage;
Who ne'er consider, but, without a Pause,
Make up in Paffion what they want in Caufe.
Not so mild Thales, nor Chryfipps thought,
Nor that good Man who drank the paff'rous Draught
With Mind serene; and could not wish to fee
His wife Accufe drink as deep as he:
Excited Socrates! Divinely brave!
Injur'd be fell, and dying be forgave,
Too noble for Revenge; which still we find,
The Pleasure of a weak and little Mind;
Degenerous Paffion, and for Man too base,
It feeds its Empire in the Female Race.

The same Observation is made by Laconius: Foolisb and unexperienced Men
faith he, if they have any Injury offered them, are burrned on with a blind and in-
considerate Fury, to revenge themselves upon those that hurt them 15.

4. It is evident therefore, that one Man cannot jutly be punished by another, for Punishment's Sake. Let us then enquire what those Benefits of Punishment are

that can make it lawful.

VI. 1. To this End the Division of Punishments made by Plato, in his Gorgias, may be of some Use to us, which the Philosopher Taurus has followed, as he is quoted by Gellius, Lib. 5. Cap. 14. For that Division is taken from the End of Punishing; and whereas Plato had proposed but two Ends, 1 Reformation and Example, Taurus adds a third, 2 vamaj, which (as Clemens Alex. Firminus defines it) 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 of this Satisfaction to that of Reformation, which he says is intituted For the Sake of the Person demanding it. Nor has 4 Plutarch

12 Seneca. De Ira, Lib. I. Cap. XIII. But Children, old People, and Perfons indisposed, are always very fierce; and indeed every Thing that is weak and out of Order, is naturally given to Complaints. Groitus.

14 Terence, in his Heeera, Hou de Children bite and scratch for the smallest Frijes! And why? Marry because their Understanding are weak, and not able to divert them; and poor Women truly are even as our Wood at Children. Ammius Marcellinus, Lib. XXVI. speaks of An-
ger thus, The rage defines it, the faying Ulcer of the Mind, and sometimes a perpetuall one, that usually arises from a Weaknefs of Mind, which they conclude with a great Deal of Probability, from hence, be-
cause the inform and the declining are more pesifually than the found and strong, Woman more than Man, ant-
tient People than young ones, and the unfortunate than the happy. Groitus.

15 Lib. VI. Cap. XVIII. Num. 22.

VI. (1) The whole Paflage is as follows. It
is thought three Ends ought to be considered in the Punishment of Crimes. The first is what we call Nudation, veluti, of consummation, when the Punishment is intituted with a View of chaffing and amended, so that he who has chanced to offend, may be more careful and circumfet. The second, which those who are nice in the Distinction of Terms call timores, is when the Offender is to be punished for the Prevarication of the Dignity and Authority of the Perfon of

fended, left an Omifion of such Punishment should injure his Honour, and expofe him to Contempt. For which Reason it is impofited that Word is here ufed. The third End of Punifh-
ment, is what the Greek term Eccleciias, when such an Act is neceffary for the Sake of Exam-
ple, that others may be deterred by the Fear of a known Punishment, from the Commination of the like Crimes, which it is proper should be publicly forbidden. For which Reason our An-
cients alfo ufed the Word Example, for the\n
graceful and most severe Punishments. These three Reasons for Punishment are laid down by fe-
veral Philosophers, and, among others, by our Countryman Taurus, in his first Commentary on Plato's Gorgias. But Plato's, in express Terms, distinguishes only two. 2. Aurelius Gellius, Notit. Attic. Lib. VI. Cap. XIV.

2 St. Chrysostom too, upon 1 Cor. xi. 32, lays down three of, NuboKa, timores, veluti,
\n
Enact, Reformation, Satisfaction, Example. Gro-
tius.

2 The Paflage from Clement of Alexandria, thus translated, TimoKai yev tiv avdKtovviv kawv, hpo \n\ntiav atwv, xepaiav Kjvoptv. Our Author, quoting it by Heart, had changed two Words. This is in his Pedagogus, Lib. I. Cap. VIII. p. 140. Ed. Oem. Pater. We have al-
much the fame Deinition in his Stromata, Lib. VII. Cap. XVI. p. 895.

De fide Numinis vindicta, Tom. II. p. 748.

omitted
omitted it, when he faid, Those Punishments which immediately follow Transgressions, do not only refrain the Audacioufiefs of Offenders, but are the greateft Confufion of the Offended. And this is what the fame Aristotle has placed under that Part of the Law which he calls Correction.

2. But, to examine this Point more accurately. I fay then, that Punifhment may have Regard either to the Good of the Offender, or of him who fuffers by the Offence, or of any Perfons indifferently.

VII. 1. The Punifhment tending to the firit of these three Ends, is by the Philofophers called sometimes Correction, at other times Confufion, and at times Admoniflion; by Paulus the Lawyer, The Punifhment that is ordained for Amendment; by Plato, The Pain that teaches us Prudence; by Plutarch, The Medicine of the Mind, whereby he is amended, and made better, after the Manner of Phyfic, which works by Contraries. For since all human Acts, if they be delibera, and often do beget a Pronefie in Nature to the fame, which at Length turns to an Habit; aU Allurements to Vice are to be cut off as soon as poifible, which cannot be done more effectually than by allying the Sweetnefs of the Sin, and the Sharpnefs of the ensuing Punifhment. The Platonifs hold, as Apolites telleth, That Impunity, and Want of Refent, are more fervous and pernicious to an Offender, than any Punifhment whatever. And Tacitus, that A corrupt Mind is not to be regulated with gentile Methods, when inflamed by inordinate Appetites.

2. That it is lawful for any one who is judicious and prudent, and not guilty of the fame, or of a like Fault, himself, to inflict that Punifhment, which is fubfer- vent to this End, is plain from that verbal Correction which every Body is inculcated,

To chide a Friend in Fault is an unthankful Office, but what is sometimes ufeful.

Plaut.

But if the Punifhment be by Stripes, or have any Thing of Violence and Compulfion in it, Nature does not diftinguifh 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 ficc Tie of Affection towards them) but what Nature could not do the Laws have done, which have reftrainted 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, under the Title, De Emenda- tionem propinuorum, and elsewhere; apposite whereunto is that of Xenophon to his Soldiers, μη σπορα καταστήματα ἐν τοῖς στρατευματισίοις. If I beat any Man for his Good, I deferbe Punifh- ment, but no other than that is due to Parents from Children, and Masters from Scholars. For even Physicians do sometimes fcare, and certify their Pa-

5 See Ethic. ad Nicomach. Lib. V. Cap. VII.


7 Annal. Lib. III. Cap. LIV. Num. 3.


9 The Emperor 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 for wholesome Correction at least may force thole 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 infition; but let the Authority correct the young Man with the Right of a Father, and refrain him by pri- vate Ammonition. But if the Enormity of the Crime exceeds the Limits of domestick Correction, it is our Pleasure that the Offender be submifled to the Cognizance of the Judges.” Cæs. Lib. IX. Tit. XV. De emendatione propinquorum.

tients, when they cannot cure them by gentler Meais. And Laelianus, GOD commands us to keep a strict Hand over our Children, that is, to chaffzie them as often as they transgress, lest by too much Pounds and Indulgence, they become forward and headstrong, and contract vicious Habits.

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, "That it had been better for him, that it had been for ever to them, that they had never been born; so it may be said of incorrigible Tempers, that it is better for them, that it is, is it ever to 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 Advantages of them that die, to die."

4. Some there are, who think, that St. John speaks of such Men, when he said, "There is a Sin unto Death." But because no Arguments can be brought to prove this, but what are fallacious, Charity teaches us not to judge any one rashly to be incorrigible: and therefore a Punishment with this End and View ought very rarely to be made Use of.

VIII. 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 Tacitus's Nature of Revenge describes this Kind of Punishment thus, When the Dignity or Authority of the Offender is so far reduced by a Person, against whom the Offence is committed, as to be supported and maintained, that it is, if it go unpunished, his Authority be disfigured 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." Now there are three Ways of securing a Man's self from whom he injured him; first by putting him to Death; secondly, by putting it out of his Power to do him any further 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

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2 De Iudic. Lib. I. Cap. V. See also Chap. XVI.
13 Praetet. Cap. II.
14 His Words are these: "He (GOD) immediately takes off the incorrigible (Sinner) as a Per- son 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 just. Natur. Ind. Tit. P. 551. Tom. II. Ed. Wach. De just. Num. Frat. P. 551.
16 St. Chrysostom upon 2 Cor. xiii. 9, calls those who are guilty of this, invinc. et invinc. incurably sick. And Julian in his second Book of Concordius: dicitur, &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 Beings, not so much for their own Benefit as that of others. Grotius.

VIII. (1) There is some Reference of this to be found even among the Beasts. The Lion avenges himself of his Adulterer. Pliny's Natur. Hist. VIII. 16. Grotius.
2 These are the Words of Pope, whom Nero had married, in which the Observers to that Emperor, "He ought either to have Odezaus again will- ingly rather than by Compulsion, or consult his own Security by a just Severity to that Lady." Annal. Lib. XIV. Cap. LXI. Num. 7.
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, * where after he had shown that the Law of Nature does not consist in unsettled Opinions, but in the innate Sentiments of the Mind, among the Infirmities he gives of its Dictates it places Revenge, which he opposes to Pardon; and, left 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 Juffius has transmitted 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 a quamvis uia, the Law of Revenge.

3. Samson, making his Defence against the Philistines, 6 does by this natural Right declare his Innocence, if he injured them who had first injured him: And after he had repented himself of it, he justifies himself with the same Reason, saying, 7 As they have done to me, so have I done to them. Thus the Plataeans 8 in Thucydis, ὅπος ἔκμαρτσαντα, &c. We have deliberately punished them, for by a Law that universally prevails, we may without any Crime be revenge on an Enemy, who first affaulds us. And Demophilus in his Oration against Arbiscrates 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, 9 after he had endeavoured to shew that Alexander 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 Arbiscrates 10 the Orator proves it from Poets, from Legislators, from Prophets, from Orators, and all other Authorities, to be lawful to take revenge on those, who have first attempted to do us an Injury. St. Ambrose commends the Maccabees 11 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, faith he, according to the Law of Nations, I should recount how many Christian Churches the Jews burned in the Reign of Julian the Emperor, where 12 he calls Retaliating the Law of Nations. Agreeable to which is that of Civitis in Tacitus, I have been purely rewarded for my Pain, 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 13.

4. But because we are apt to be partial in our own Caesars or of those that belong to us, and to be hurried on too far by Paffion, 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 unresolved by Laws;

3. When, for Example, says the learned Grönvius, the Offender is a Father, a Man not in his right Sense, or a Perfon, whom we ourselves have first injured, and received his Pardon. The first and last Injuries are just; but nothing is more misapplied than the Second. For can a Man do an Injury, properly so called, when he is deprived of the Use of Reason?

Chap. XX.

War and Peace.

The World grew weary of that brutal Strife,
Where Force the Limits gave to each precarious Life. 13 Lucret.

Thus Demosthenes against Caton, 14 argued, "It is ordained by
the Wisdom of our Ancestors, that all these Injuries should be redressed
by the Law," and not by every private Man's Passion and Caprice. So Quintilian,
private Revenge is not only unlawful, but an Enemy to Peace; for there are
Judges and Courts wherein we may appeal, unless there be any who are affected
to vindicate themselves by Law. So likewise the Emperors Antoninus and Theodosius,
for this Cause are Tribunals erected, and the Security of publick Laws preserved,
left any Man should give himself the Liberty to revenge his own Quarrell. And King
Theodoric: 15 Hence spring 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
Impuls 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 Cæsar, 16 yet a private Man, when he
purified with a Fleet, equipped all on a sudden, those Pyrates by whom he had
been taken Prisoner, dilverting some of their Ships and sinking others, and when he
found the Proconsul negligent in punishing the Captives, he returned to Sea and
cruciified them himself. The fame will take Place in Delfars, or where Men lived
after the Manner of the Nomad; 20 so amongst the Umbrians, 21 according to
Nicolaus Damascenus, every one is his own Avenger; which is done with Impunity in
Macedony at this very Day, when Complaint having been made to the Judge, he
does not render Justice in a certain Time. Hence came the Cusom of Duelling,
or fighting by single Combat, 22 amongst the Germans before the Christian Religion

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13 Lib. V. 1147, &c.
15 Thus in DARDUS in Episipds's Origs, argued against Origen:

"Are we come here to deface his Wisdom?
If Right and Wrong is all Mankind are known.
What greater Evil than this, when we' are confeder'd
The Juries of the Action once, nor what
The Confusions of Greece allowed?"

For, when Agamemnon his Life had left
B. my unhappy Daughter's Hands (a black
And bore them to Death, and what I can't approve.
He ought to have delivered her of Murder,
And is her legally have judged.
His Father's Hands, and then had all the World
Pity'd his Afflicted, his Prudence praised,
He kept the Laws, and still been thought wise.
But now INTO the same Misfortune he,
As his Mother was, is pung'd.
He justly
Look'd on her as wicked, by killing her.
Himself in yet more wicked for become.
Prithis, Menelaus, let me ask thee
This serious Question:
"Should a Wife her Husband slay, his Son slay her,
"Aim his Child slay, and so succeeding Blood
"Be made to expiate forgoing Gut?
"Where would the horrid Ends ever have an End?"

What left Exequies full of good Sense have ad

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22 See the Note of Henry De Valois on the Page of Nicholas Damascenus, p. 513. of his Peterson.
was planted in that Nation, which in some Places is not yet throughly rooted out. Wherefore the Germans, in Velleius Paterculus, were struck with Admiration, where they beheld the Manner of the Roman Jurisdiction, finding that they could redress Injuries by Justice, and determine Controversies by Law, which used to be decided by Force of Arms.

The Law of Moses permitted the Kinman 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 Jews and Commentators do well remark, that a Kinman might execute the Law of Retaliation with his own Hand for the Perfom killed: but for himself, if any Violence was offered him, either by Wounds, Mutilation or otherwise, he was to appeal to the Judge; 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 Thucydides in Homer, Odyl. XXV. 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. And Plato approves of carrying on a warlike Contest "so long, until the Offender shall be compelled to make the innocent Person, who has suffered by him, just Satisfaction." 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 compelling and reclaiming him, or else that others may not be encouraged, by the Hopes of Impunity, to be at like Injuries; and this is best prevented by publick Punishments, which the Greeks call σασίσαντια, the Latins, Exempla: Which are made, that the Punishment of one may strike Terror into many, as the Laws express, or, as Demosthenes, that others may consider to be afraid. 2. And this is a Right that by the Law of Nature every one is invested with.

Thus Plutarch, Nature, says he, hath designed the good Government to a Magistracy, and I know not whence our Author takes the last Passage quoted in this Note. There is nothing on the Subject in the Fragments of Nicolas of Damascus, not even in the Collection of those Fragments made by our Author himself and sent to the celebrated Mr. De Péréges. See Letter CLXIV. Part I. As to the two Passages of Cassiodore, the Goth on the contrary, are there pospiled as an Example, as being Strangers to the Custom in Question, ascribed to our other Nations. Before the fri of them we read, That you may know the Justice of the Gods, while other Nations retain this prevent Custom, and after the latter, Invite our Gods, who employ their Swords Abroad, but exercise Moderation at Home. 3. Lib. II. Cap. CVIII. Num. 1. Ed. Burman. 4. Seneca, De Clementia, Lib. I. Cap. XX. 5. Thucydides there says, that Hasting killed a Man in his own Country, he was obliged to fly for it; for as the Decease had left a great Number of Relations, he was apprehensive of falling by the Hands of some of them, Ver. 272, &c. 6. The Passage has been already quoted Chap. I. of this Book, § 2. Num. 7. where the Author explains it in a more general Sense. 7. He is speaking of Wars between the different States of Greece. De Republic. Lib. V. p. 471. Tom. II. Ed. J. Stebb. IX. (1) Polybius saw some Lyons crucified for their voracious Defray of devouring Men, that so the Right tried Fear of the like Punishment might be detered from like the like Barbarism. Pliny, Lib. VIII. Cap. XVI. Grotius. 2. The same Author in his 'Pelopid. 8. 37. ἐπαθω- τητος, &c. For it was, as indeed it is fit, it should be, the Original and most antient Custom and what Nature Designed, that he who is capable of giving Afflictions should be the Ruler of him who wants it. And in his 'Pleaephevina: ' ἐκεῖνων τινῶν οντως, 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. Flaminin. The Author of the Caesae of the Corruption of Eloquence talking of Orators, says, Now more than the other private Persons, without Power, face both Senate and People were governed by their Advice and Authority, St. Chrysostom, 2 Cor. VII. 13. speaking of Moses: 4. ὡς ἐπαραγμά- ται, &c. Even before he led them he was by his Merit their Leader. It was therefore very fitfully demanded by the Hebrews, who made thee a Ruler and a Judge over us? What dost thou say? Thus feist his Deeds, and dost thou raise a Controversy about a Tithe? As if a wounded Pervert seeing an excellent Surgeon come to his Affliction in order to perform a necessary Operation, would impatiently ask him, Who made you a Surgeon, or commandest you to perform such an Operation? Why, it was my Art and your Displeasure, Good Sir! Thus was it Moses's Knowledge and Capacity that made him what he was. For Government is not only a Piece of Hero, but an Art, noy, and the sublimest Art. The same Writer is upon this very Subject at the End of the
and indeed a perpetual one; for, by the Law of Nature itself, he who kills justly has a Superiority and Preeminence above others. So Cicero proves by the Example of Nafica, a woman being a private Man; And Horace calls Lollies, not a one Year's Confill, and Euripides in his Iphigenia at Aulis says:

—He, whose Mind
Excellls in Prudence, is a Magistrat. 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, and the killing living Creatures, the Cat fonds thus. If these Creatures either do, or attempt to do, its hurt, who ever kills them shall be innocent; may, he who kills them doth better than he who spares them. And prelently after he faith, Κάθες εὖρις, &c. We have all Manner of Right to kill all these Creatures that without Provocation annoy us. And indeed it is not improbable, that good Men, before the Flood observed this Maxim, till GOD revealed to the Rest of the World, that he intended the brute Creation for their Food and Subsistence. Again, Οτος τοις άπειροις νεκροις, &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 prelently after subjoins, τε κατ' εαυτόν, &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 Paffages Seneca seems to have had his Eye, when he faith, When I command a Malefactor to be put to Death, I do it with the same Air and Mind, 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 ourfes and others against their Teeth and Stings; neither would we hurt and destroy Men, because they have offended, but only that they should not offend again.

The third Chapter to the Ephesians: αύτος ό λόγος, &c. Therefore we immediately kill Vipers and Scorpions, and other noxious Creatures, before they either bite or wound us, or make any Attempt upon us, as soon as ever we see them. When I command a Malefactor to be put to Death, I do it with the same Air and Mind, that I kill a Serpent or venomous Beast. And elsewhere, As we should not kill a Viper or Serpent, if he can, left himself, or some other Perfon, should unawares be bitten by him. See, if you are at Lecture, what follows there. And again, not a great Way further, έκείνος, &c. We kill a Serpent or a Scorpion, the do they not affright 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. § 390, &c. For as, 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 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 Creatures, which is naturally injurious, and bent to hurt whatever goes near it. And this is what Pythagoras means, in Ovid's Metam. XV.

Whatever attempts our Life, without a Crime May itself to Death be drink'd. Grotius.
4. But since an Examination into the Nature and Circumstances of a Fact, doth often require great Diligence, and the proportioning of Punishment to it, much Prudence and Equity, left while every one would presume too much upon his own Wildom, 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 fame 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 ancient Right in those Places, and amongst thefe Persons, who are not Subject to any established Courts of Judicature; and even amongfe those too who are fo 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 forfaken God and his Law, or who attempted to reduce his Brother to Idolatry. The Hebrews call this the Judgment of Zeal, which was first put in Execution by Phineas, 12 and afterwards passed into a Custom. Thus Mattathias 13 flew a certain Jew, who was polluting himself with the Superflitions 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 14 upon any other Pretence, nor the Conspiracy 15 raised against St. Paul. There are many more Influences of this Kind to be met with 16 in Philo and Josephus.

6. Moreover, in many Nations the plenary Right of Punifhing, 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. 17 From what has been said we

10 Apud Stobæum, Serm. XXXVIII.

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 18, and Mr. Le Clerc's Commentary on the Pentateuch.

13 Numb. xxv. The Government of the Jews was not formed at that Time. See Mr. Le Clerc on Ver. 7. of the Chapter here quoted. And a Difertation of Mr. Buderus, De jur. Lex. Inferiorum in gentes Hebrews, § 34, &c.

14 Whole Opinion of this Matter is this, in his Book De Sacrificijs, Kæsiou öv démon, &c. We ought to use him as a publick and common Enemy, without any Regard to his being related to us, and immediately to accuse all, who have a Respect for Religion, with his Perjurings, 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 Grotius observes, is taken from Iosephus's Panath. Orat. But says the Critic, the Orator speaks of the Hebrews, who were not Citizens, but little better than Slaves; he refers us to Nicholas Cragius, De Repub. Locud. Lib. II. Cap. IV. That learned Shop, p. 132. Edit. Lugd. Batav. 1670. only says that the Ephori exercised their Power chiefly on the Hebrews; however he leaves the Words of Iosephus in their General Extent, and without the least Restriction. He only intimates that the Orator may have threatened a little too far, § 130. On considering the Passage in itself, I think that the whole Context of the Oration shews that Iosephus by no Means confines himself to the Hebrews, or publick Slaves. He is speaking of the Population, or common People, in Opposition to the most considerable Persons among the Lacedemonians, παρα πολέμου. He is speaking of free Men, but such as had been deprived of the Advantages which they ought to have enjoyed in that Quality: απο τω δω δω αυτα φασιν οικονομους, και των προποιεσθησαν, περια των τοιο περιποιηθησαν, &c. He is speaking of Persons, whose Minds were become as Cables, as if they had been real Slaves: των δυ δω δω ποιησις διαφεμουσα, και των τοιο περιποιηθησαν, περια των τοιο περιποιηθησαν, &c. They were not therefore really Slaves. In the Passage last quoted, they are termed οικονομοι, Persons, who live near, that is, in the Neighbourhood of Lacedemon. But Xenophon distinguishes these Óικονομοι from the Hebrews, Hist. Græc. Lib. III. Cap. III. § 6. Edit. Oxon. In short the Orator is speaking of Persons, who were usually obliged to serve in the Army, as appears from what he says a little before the Passage in question. Now it is well known that the Lacedemonians employed the Hebrews in that Manner, only in the greatest Extremities, as after the Battle of Lœuvre, or that of Platea. Our Commentator, therefore, doth not seem well grounded.

But he might have observed that the Ephori, being Magistrates, and invested with a very extensive Power, when they put a Man to Death without the Formality
we may plainly see, what the Law of Nature was concerning Punishments, and how long it continued.

X. 1. Let us now enquire whether this Liberty of punishing or revenging Injuries be not restrained by the Gospel. It is no Wonder indeed, as we said 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 Duties of Nature are required. That thofe Corrections which leave no Infamy nor lasting Damage behind them, and in some Ages and Circumstances, are necessary, especially if they be inflicted by fuch Perfons as human Laws permit fo 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 thofe Medicines of the Mind are altogether as innocent, as the disagreeable Potions given to a fick Perfon.

2. But the fame is not to be faid of Revenge. For as it tends only to satisfy the Refentment of the injured Perfon, it is fo far from being agreeable to the Gospel, that it is not allowed of even by the Law of Nature, as we have fhewn above. But the Law of Moses did not only forbid the Jews to entertain any Hatred againft their Neighbour, that is, their Countrymen, Lev. xix. 17. but also to fhew them some Sort of Kindness, even when they were Enemies, Exod. xxviii. 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 fearch Revenge for fome 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 Oppofition which our bleffed Saviour puts between the Law and the Gospel. Ye have heard, faith he, that it hath been faid, an Eye for an Eye, &c. But I fay unto you, Matt. v. 38, 39. For tho' what follows is properly concerning repelling of Injuries, and even this Liberty does in fome Measure at leaft refrain, yet is it to be understood as much more ftrictly prohibiting Revenge; because it quite abrogates the old Indulgence, as onlyuitable to the Time of a more imperfect Dispensation; Not that a just Revenge is evil, but that Patience is much better; as Clemont's Conftitution have it, B. vii. Chap. xxiii.

3. Whereof 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 injure 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 thofe Things as Supplements, agreeable to the Precepts of the Creator. And therefore we

Formality of a Trial, they might be supposed to act by public 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 alleged, for fhewing that since the Establishing of Civil Courts of Judicature, private Perfons have in certain Places, retained fome Remains of the Right of punishing, which each Man enjoyed in the State of Nature.

X. (1) It is a Sin not to refrain the Fives of our Servants and Children, Lactantius, De Frei Del, Cap. XVIII. where there are fome few more Things upon the fame Subject. Grotius.

2. An Eye for an Eye, which, if we may fo fay, is the Justice of the Unjust. St. Austin in his Exposition of PfaIm cvii. quoted, C. fal differentiated XXXII. Quafl. III. Grotius.

We are to diftinguish, however, between the Letter of the Law, and the Spirit or Intention of the Legislator, as has been already observed.

3. Against Marcius IV. And in his Book De Patientia, CHRIST superinducing Grace upon the Law, to enlarge and complete it, gave his own Patience to its Affifiance, because that alone was wanting to make up the Doctrine of Righteousness. And St. Chrysobon, upon Ephes. iv. 13. Vide infra. For this Reason it is faid, An Eye for an Eye, and a Tooth for a Tooth, to try up the other's Hands, and not to flir up them againft him; not only to secure thy Eyes from Harm, but to préserve his too. But what I wanted to know is this: Why, once Revenge is allowed, are thefe-blamed who have Revenge to it? And prefently after, Exu- viorem & dixit, &c. GOD pardons thyfelf whom the sudden Sence of an Injury and Violence offered, may perhaps hurry on to require a profient Satisfaction; and therefore he fays, An Eye for an Eye. But elsewhere, The Ways of the Revenger lead to Death. Now if it is permitted to pull one Eye out for another, the Punishment of the Revengeful be fuch, how much greater fhall it be to them who are expressly commanded to expose themfelves to new Injuries? Grotius.
are to look back, and consider whether the Doctrine of bearing Injuries be delivered in the Old Testament. GOD there, by his Prophet Zachariah, commands, that no Man should remember the Injury of his Brother, or even of his Neighbour. For again he faith, 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, wise, 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 bad 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 different Punishment. But both these Methods were necessary, to answer the different Difficulties and Faith of Men, that he who believed in GOD, might be deterred by the Dread of divine Vengeance; and he who believed not, by the Law of Retaliation.

4. The intent of this Law, which was hard to be understood, CHRIST, the Lord of the Sabbath, of the Law, and of all his Father's secret Counsels, hath revealed and confirmed to us, commanding us even to turn the other Cheek, that he might the more effectually eradicate Revenge, which even the Law of Retaliation had designed to hinder, and which, at least, the Prophets had manifestly condemned, both by forbidding us to remember Injuries, and by commanding us to rely upon GOD for their Punishment. And therefore, if JESUS CHRIST hath added any Thing, to which the Precepts of GOD are not only not contrary, but even favourable; it cannot be said, that he hath overturned the Doctrine of the Creator. And, after all, if we examine this Doctrine of so exact and so perfect a manner 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 also 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 me not to do it, be 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 Execution 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 Ptolemy, in which Author the Jews of Alexandria, upon the Calamity of Flaccus, their bitter Enemy, expressed themselves thus, οὐκ ἐν ζήτησιν, εἰκιστικῶς τιμαθμένος ἡμᾶς, διδαχθέντες σφές τῶν οἱρῶν ἡμῶν αἰμαρτάναι, We

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 Hearts. I know no other Place where this is repeated, and spoken of our Neighbour, as that Father affirms. But the true Sense of the Passage is widely different from that here given. The Prophet means, as our Author himself observs in his Notes on the Old Testament, that we ought to be in such a Dispositions as not to entertain even a Thought of injuring any Man. He is not here speaking of Revenge in particular.
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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. 3 And to this Purpose is that general Command of CHRIST, To forgive all who have offended us, Matt. vii. 14, 15. that is, neither to do nor with them Evil, through a Restitution of the Evil they have done us. For whoever doth so, as Claudian expresses it,

— Feron. e7 Logumque videtur

Vindicem proficere lib.

De Mallii Consulatu, Ver. 224, 225.

Is barbarous, and seems himself affuming

A Vengeance that to the Laws belong.

For which Reason Laelanius, B. vii. 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, 2 makes this Reflection upon it, O what a plain and true Sentence is here impoited by the Addition of two Words! And St. Ambrose faith of the same Sentence of Cicero, That it quæsteth the Authority of the Gospel to confirm it. 7

6. But what shall we say of Revenge, not as it regards what is pain, but what is to come? Surely CHRIST would have us forgive even this; first, if he who has offended shew any Tokens of Repentance, 3 Luke xvii. 3. Eph. iv. 32. Cap. iii. 13. In which Places a more plenary Remission is understood, that is, such an one as reforfe 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. 9 And Mela, Tyrius professes of himself, that for any small Affront (such as a Box on the Ear, mentioned by our Saviour) he would neither bring an Action at Law against any Man, nor encourage any other to do it, because such little Injuries are much better forgiven. 7

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, 10 and other Jewish Writers, observe; but the injured Person, besides his Loss of Time, and the necessary Expences of his Cure, of which Expenses we have a distinct Law, Exod. xxi. 19. (for this import no more than simple Restitution, having nothing penal in it) was wont, in Lieu of Retaliation, to receive a Fine, 16 which was practised too at Rome, as Favonian, 15 in Gellius, informs us. Thus Josephus, the Foster-Father of JESUS, believing Mary guilty of Adultery, 16 had a Mind to get rid of her by Divorce, rather than expose her, and make

5 See Origines against Celcius, Grotius.
6 De Offic. Lib. I. Cap. VII.
7 Offic. Lib. I. Cap. XXIII.
8 See Moses Maimonides, quoted by the learned Constantine in his Book De damnum data, Cap. VIII. § 7. Grotius.
9. In his Dialogue intitled Crito. 4 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.
10 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 Differtation; where however the Thought doth not seem readily the same.
11 He is speaking of those who adhere to the Maxims of Philosophy. The Declaration here mentioned is in a pretty long Passage preferred

by Stobo, and taken from a Tractate written professedly on this Question.

12 Josephus does not say what our Author attributes to him. He only observes that the Law allowed the injured Peron 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 Lofs of an Eye, &c. was to be punished, according to the Eronomy of the Fact. See my Observations on that Subject, in Not. 15. on B. I. Chap. II.

16 St. Austin, Lib. II. De adulterinis Conju- 

5 O
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 Cruelties of Revenge, but even "t from the Severity of a Prosecution. As also Liddianus had before said, A just Man must not even accuse a Person of a capital Crime; And Tullian, talking of those who accused the Christians, faith, We would not have them punished who caluminate 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; 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 those Cases certainly continued in Force as long as the Jews State continued, firmly commanded their Magistrates to punish Homicides, and other great Crimes with Death, Exod. xxi. 14. Num. xxxvi. 31. Deut. xix. 3. And if the Precepts of CHRIST were consistent with the Law of Moses, as that Law required capital Punishments, well may they be consistent with human Laws, which do in this Respect imitate the divine.

XI. 1. Yet some there are, who, to maintain the contrary Opinion, allege 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 Viceregers; which we grant to be true in some Measure, but yet that it is not to be extended so far as 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, 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 perfidious with Obfstinence, are threatened with Judgments much more severe, than those of the Law of Moses, Heb. ii. 2, 3. x. 29. Matt. v. 21, 22, 23. Neither are they threatened 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, unless the Party doe, as it were, punifh himself, 1 Cor. xi. 31. by great Sorrow and Complacence, 2 Cor. ii. 7.


But if a Christian (which is certainly true) may not kill his adulterous Wife, but only dismiss her. Grotius.


18. He says that since Murther is prohibited, a just Man is not allowed to give Evidence against any one in capital Cases; because there is no Difference between killing a Man with the Sword and with Words: Lib. VI. Cap. XX. Num. 16. A Maxim, which taken thus generally, is certainly false.

He has this Exposition too; Dial. with Tychpho, unde usque postactum, &c. Nor in the least willing to retalliate any one a Mischief as our new Legislator has enjoined us. Add to this what is below, § 15. Grotius.

20. Josephus mildly cites up the Pharisees Modern in punishment. 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 Thalamus, Tit. Ketuboth. Grotius.

The Pauage of Josephus, which our Author had in View, is where the Jewish Historian relates how Jonathan, a Sadducee did the Pharisees odious to Hyrcanus, by engaging him to ask them what Punishment was due to Eleazar for injurious Words uttered against the High Priest. The Pharisees only condemned him to be whipt and put into Prison: being of Opinion that "Be Aaron did not desire Death, and being moreover naturally inclined to Moderation in Punishments." And Antiq. Lib. XIII. Cap. XVIII.


XI. (1) In the Original we read Legem primam. In the first Edition it was contra Naturam Legem. This Alteration infinuates that GOD himself revealed the chief Rules of the Law of Nature to our first Parents, who transmitted them to their Descendants. The Author has in other Places made such Correclions, in Consequence of his Opinion, that Tradion has contributed most to the Knowledge of the Principals of the Religion, and Laws of Nature.

2. St. Chrysostom says the fame as well in his Oratio, Adj patrem fidelum, as in his XI. Di s. fratiss. Grotius.


2. And
2. And they farther urge, that Magistrates, in Imitation of GOD, ought, at least, to pardon the penitent. But, besides that it is scarce possible for Men to discern which are true Penitents, and that if outward Shews, and Professions of Repentance were sufficient, no Man but would come off with Impunity, GOD himself doth not always remit all Kinds of Punishment, even to the true Penitent, as appears by the Example of David. As therefore GOD might remit the Punishment of the Law, that is, a violent or an otherwise untimely Death, and yet inflict grievous Punishments upon the Delinquents; 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. 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 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 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 Ephesians, the Philosopher, had said before, εἰστιν ὡς σεαν, &c. Since they cannot be reformed by any other Means, let them, being thus freed from those Chains, bid Adieu to their Villanes.

2. Let them therefore, together with what we have said in the Beginning of this Work, serve for Anfwers 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, includes the Power of the Sword, for the Execution of divine Vengeance; and he faith in another Place, 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 Audaciousnes of others be restrained, seeing all the publick Punishments that are everywhere inflicted upon the Guilty, are scarce sufficient to protect the Innocent.

3. Nor will it be impertinent to propose to the Imitation of Christian Governors, in some Refpects, the Example of Sabacon the Egyptian King, a Man eminent for his Piety, by whom capital Punishments were changed into certain servile Works, with a very happy Success; as Diodorus testifies; And Strabo says too, that there are some People bordering upon Mount Caucasus, who put no Man to death.

4. St. Jerome, upon the first Chapter of Natus, which Passage is injected Cauf. XXIII. Lib. V. Agathias, Lib. V. out of Plato.

ii. Ch. 2. § 7.

Rem. xiii. 4.

Tim. ii. 1, &c.

Lib. i. c. 65.

4. Yes, and of the Roman too, in most Cases; for none of them, after the Roman 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 Roman Law see Litt. 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 Proceeds of Time, it gave Occasion to a Licentienousness, which they were obliged to curb by eluding the Law. See Sigerus, De antiquis jure Civium Roman. Lib. I. Cap. VI. and the Probabil. juris, by Mr. Noordt, Lib. III. Cap. XII.

Death.
Of the Rights of

Death, tho' the greatest Malefactor, is Nor is that of Quinilian to be flighted. No Man can doubt, faith he, but that if Malefactors could be reclaimed, and brought to behave themselves better, as it is granted they sometimes might, it would be more for the Advantage of the State, that they should live than die. It is observed by Bello-

mon, that the Roman Laws which condemned Men to Death, were most of them changed by the succeeding Christian Emperors, into other Punishments, in Order both to impose on the Guilty a severer Method of Repentance, and also by the Length and Tedium of their Punishment, to make it the more exemplary.

XIII. 1. By 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 the he should be punished; or no great Reason to fear, that the Dignity of the Person, against whom the Office is committed, should be frightened or contemned; or if the Office be of such a Nature, as that it is not necessary to deter others from it by the Example, then is it scarce worth the While to put ourselves to the Trouble of pu-

nishing. 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 both Regard to these three Things, which a Prince should likewise have Regard to. 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. Lastly perfect is that Division of Seneca in another Place, All Punishment, faith he, is to be inflicted upon these two Accounts; either, to reclaim the flagitious, or to take them away. And that of Quinilian is yet more imperfect than this, where he faith, In all Punishments the Crime is not so much regarded, as the Example. 5

5 Gellius, Lib XI. p. 730. Ed. Angl. (1520. Peri.) where he says, They banished such as had been guilty of the greatest Crimes, toge-

ther with their Children. Whereas, on the con-

trary, the Derbies: put Men to Death for small Crimes. 6


7 See what is below in this Book, Chap. XXIV: § 11. See Iaac Angius's Oath, in Nicetas, Lib. I. The fame Author says, that not one was executed in Johannes Cammian's Reign. See Malchus about Zeno, and St. Augustine's 15th and 15th Epistle to Marcellinus Como, ci-
ted C. Cumellianens. Cauf. XXIII. Quæst. V. and in the following Chapters; and St. Chrysot-

rom against the Jews, where he speaks of Cain's Punishment. Groteius. 8

8 Chichly into Work. St. Augustine, Epif. CLX. Let them have the Ufe of their Limbs, and let them be employed in fake profitable Service. See also Nectarici's Letter to St. Augustine, it is the 2019. Groteius.

XIII. (1) We have here followed the Order of the Original. Mr. Barbefrac places this Para-

graph immediately after the ninth. For which Transposition he gives the following Reasons, In the Place where we find it, it interrupts the Dis-

cussion of the Questions, which relate to the in-

flicting of Punishments, in Regard to what a Christian's Duty allows; and I cannot but sug-

gest that our Author, desiring to add this Pa-

tagraph, after he had written the others, was not very careful where to place it, and did not after-

wards perceive the Mistake; as was sometimes the Cafe, in Regard to the Additions he made to his printed Work. However this be, on a careful Enquiry into the Context of the Diff-

course, it will appear, that this Paragraph, which comes in naturally where I have inserted it, makes a disagreeable Interruption in the Place from whence I have removed it.

2 Lib. VI. Cap. XIV.

3 De Clement. Lib. I. Cap. XXXII. These two Deiugs of Punishment are also laid down by Pius-

Lo, in Legation, chs 6, & 8 30 3 30. Because Punishment does often correct and amend even the Offenders; but if it does not do that, it will certain-

ly have an Influence on the Standards by. For other's Smardings make many People better, out of a Fear and Apprehension of suffering fo themselves. Gro-

tius.

4 De Ira, Lib. I. Cap. ult.

5 Declar. CCLXXIV.

XIV. From
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 Commitments 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.

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; so that 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 Elberis, 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 left.

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 is it to sentence People to Death, and to think and profess, that the Right of Life and Death over his fellow Citizens, may be freely committed to him, as the most excellent of all others, and a Kind of God amongst Men. For certainly the Danger that CHRISTIAN admonishes \(^3\) us of, in judging others, (because, as we judge others we must expect to be judged ourselves in like Cases, by GOD) is altogether as true in this Affair.

XVII. 1. Another important Question may be asked, Whether human Laws, which permit one Man to kill another, give him a Right to do before GOD, or only Impunity amongst Men. Governm'nts \(^2\) and Fortunis \(^3\) are for the latter, whose Opinion is so much disliked by **J**affarini, \(^4\) that he calls them an abominable One. It is not to be doubted, as we have said elsewhere, \(^5\) but that the Law can do both in some Cases. But whether it does so much or not, is to be gathered partly from the Words of the Abominal, and partly from the Nature of the Thing. For if it makes Allowances for the Transport of Patron, it only exempts from human Punishment, but does not take away the Guilt; as in the Case of an Husb'd \(^1\) 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 publick Person. Of this Kind is that Law in the Code of **J**affarini, under this Title, Quamdo licet uniuscuius *sine judice,* &c. \(^6\) 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, vizi. That it is better to prevent Evil in Time, than to punish it afterwards. We permit you therefore *sine judice,* and what, it is too late to punish by a Cur'.) of Law, *sine judice,* &c. hereby comm.

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\(^{1}\) War par. Cod. t^s ultim.

\(^{2}\) That thro' Austin, already that publick Contr.il.

\(^{3}\) See fame Passion above, B. I. Chap. III. § 3.

\(^{4}\) Grotius.

\(^{5}\) This Part of the Par. above attributed to St. Augustine in the Canon, does not belong to that Father but to St. Jerom, in Exod. Cap. IX. The other Words may belong to some other Eccl. Writer. At least I do not find them in the Treatise De Civit. Dei; tho' the fame Thought is indeed expressed in a different Manner, Lib. I. Cap.XXI. \(^\text{a}\) Tho' only excepted, whom a just \(^\text{b}\) Law in general, or **G**OD, the Foundation of Judgment, in particular, orders to be killed, whoever \(^\text{c}\) lays violent Hands on himself, or on any other, \(^\text{d}\) it is guilty of Murder.

\(^{6}\) That is, and likewise Soldiers themselves; for the Law regards those also who are not such. The same Law fupposes the Fact committed in the Night, and in the Fields. Col. Lib.III. Tit. XXVII. Quaem licent., &c. Leg. I. See Cojas par, on that Text.
Of the Rights of Man

manding, That no Man shall spare a Soldier, whom he is obliged Sword in Hand to defend himself against, as against a Thief and a Robber. And to the same Purpose is the subsequent Law, of punishing Defectors, which runs thus: 3 Be it known unto all Men, That against publick Robbers, and Soldiers who fly from their Causes, Power is hereby given to every Man to execute publick Revenge for the common Safety. And thus is that of Tertullian to be understood 4 Against Traitors and publick Enemies, every Man is a Soldier.

3. And herein the Right of killing Exiles, when found within the Dominions they are banished from, differs from the Laws just mentioned, insomuch as that a particular Sentence must have been already paffed 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 fee whether all Kinds of vicious Acts ought to be punished by human Laws. And certainly they ought not. For first the internal Acts of the Mind, tho' they be afterwards made known to others by Confession or any other Accident, cannot be punished by Men, because, as we have said elsewhere, 2 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 Pena non ingress mereri; 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. 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 Sexes of Men have accounted it Natural for a Man to sin. As amongst Philosophers, 7 Sopater, 8 Hierocles, 3 Seneca; no not of a bare Thought, of a loose Design, which terminates in no exterior Act, by which a Man is disposed to feel 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 very enormous Crimes, specified by the Law, and excepted from the general Rule, in Favour of the Publick. See the Particulars and Proofs at large in the Tertullin 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. 4 "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." Dift. II. p. 20. Cott. Dowt. Depr. 2 So SAYLER, Lib. III. Thesaur. Cap. VI. GROTIUS. XIX. (1) Sesquipedales autem abstinentia, si quidem, Thee Words are in STOEBE, Serv. XLVI. De Magnuseten, &c. Let us add the following from XENOPHON, a much more ancient Philosopher. 5 I see no Man entirely exempted "from Faults." Bif. Grac. 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 entirely justify himself. In his ninth Chapter he had said, Among many other Inconveniences of Mortality, the Darkness...
nece; amongst the Jews, Philo; amongst Historians, Thucydides; and amongst Christians, very many have left us their Testimony upon Record. If faith Seneca, every Man, who is of a depraved corrupt Nature were to be punished, no Man would go unpunished. To the fame Purpofe is that of Sopater: He, who is rigid enough to punish Men as severely, as if it was possible for them to live altogether without Faults, muft certainly exceed the Bounds of Correction. Which Dieterus Stinus calls a Wrong done to the common Frailty and Weakness of Men; and in another Place, he says, It is to forget the Weaknefs, that is common to all Mankind. For as the fame Sopater faith, Our leffer, and as it were daily Slips of Infirmity are rather to be connived at than punished.

2. And indeed it may well be doubted, 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 fin. Every Law, faith Plutarch in the Life of Solon, ought to be made againft Things that are possible to be observed, if it intend to punish a few with Advantage, and not a Multitude to no Purpofe. There are likewise some Sins, which are not absolutely unavoidable to human Nature, but to that or this particular Perfom, or in this or that particular Cafe; by Reafon of such or such a Temperament of the Body strongly inclining the Mind, or by some in- verted Cufom, which yet are commonly punished, not so much for themselves, as for the preceding Fault that occasioned them, because either the Remedies were neglected, or the Depravity voluntarily contracted.

of our Understanding is one, and not only the Necessity of writing, but also the danger of Errors. Afterwards, Chap. XXVII. Who can declare himself free from the Breath of every Law? And in B. II. Chap. XX. We are all of us bad. In his Treatise De Clementia, I. 6. We are all faulty: Some more, some few: 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 Reflections, and have left our Integrity with Regret and Reluctance. Nor do we only for the present do amiss, but we still always do to the left Memot of our Lives. And if there be any one who has so well cleared his Confcience that nothing can any longer either disturb or deceive him, it is even by frequent Misfortunes that he arrives at this State of Innocence.

3. He expounds, in a Speech of Belthis, τι τοιούτοι, &c. Not to fin at all, but to live in perfect conformity with human Nature; we will the Nature of Things allow it. Add to this the Emperor Bafi, Chap. L. Grotius.

I am very much mistaken, if instead of the Emperor Bafi, our Author does not in the left Quotation mention MANUEL PÆLOLOUS, of whom, besides some Orations, we have some Precepts for the Education of a Prince, μεταφρασεις των τιτυλουτων μαθητευς. 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 may be natural, and which parts all Things in Morale: 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 De- gree of Knowledge without the Divine Ablution.

4. In his third Book, De Mæl. To which may be added, ABESMUSAS upon Job v. 7. and Rabb-ki ISRAEL, Chap. VIII. Grotius.

5. The Paraph is in the third Book, where the Historian adds, There is no Law that can prevent Man's committing Faults, either in a public or private Capacity. Cap. XLV. Edit. Oxford.

6. Among others, LACANTUS, who says, If God should punish every Man according to his Deeds, all Mankind would be destroyed; for no one is free from Sin. There are many Inducements to Sin, our Age, Wine, Poverty, Opportunity, and a Prospect of Reward. De Ira Dei, Chap. XX. Non. 4. Edit. Cellar.

7. De Ira, Lib. II. Cap. XXXI.

8. Apud Spoerlem. Serm. XLVI.

9. And in his Fragmenta he says, οἱ ευτυχεῖς ἡσυχῶν τιτυλουτων τιτυλουτων τιτυλουτων, We must not deprive the Infirmity of human Nature. Grotius.

These Paraphs, especially that quoted in the Note, are not much to our Author's Purpofe, except it be on Account of the Expiration, 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 cenfured by Pupendorp, B. I. Chap. V. § 8.


12. These Sins are not absolutely unavoidable. In regard to Things, to which we are inclined by the Force of Conformation or Cusom, the Use of our Li- berty is indeed more difficult, but not entirely impoffible. See Pupendorp, 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 creates a Variety of Manners, and therefore some Peoples Tempers incline them more to this or that, according as one Element does prevail. This is a further Place. He calls this, the Refult of the Conformation of our Birth, and the Completion of our Bodies. Epif. XI. Grotius.


XX. 1. Thirdly,
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 alleges many Reasons, particularly this, which will likewise hold in other Vices of the like Nature: Since, says he, it is highly Praifeworthy 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 be he does him, who restores what was given him in Trust, or than be he does him, who pays his just Debts without being forced to it by Law. And soon after: It would not be so glorious to be grateful, unless we might be ungrateful with Impunity. And to these Kinds of Vices may be referred that of Seneca the Father in his Controversies.

3. I do not desire that the Criminal should be condemned, but only acquitted.

XXI. The Opinion of those who hold that Punishment is allowable before the Establishment of any Penal Laws.

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, that he may justly be punished: 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 to less Profitable or Neceffary, 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
That iiothing Our benefcium by Ahd unlefs Via ferves nothing, XXIIL Topic. 2 the S^.
It we Epift. which Cap. in Ibid. fiorum •- and 3 19- to We That a " according his re-
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xxviii. Now one of these three Things may happen, either that some Pun-
ishment is to be indispensibly exacted, 2 as in Crimes of the most pernicious Example; or that it is not to be exacted at all, when the public 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 wife Man, say the Stoickis, 3 fpare, but does not pardon. As if we might not with the Vulgar, the Masters of Language, call that, to pardon, which they call, to fpare. But in this as in all other Points, as Cicero, Galen, and others have observed, a great Part of the Difputations of the Stoickis 4 is spent in nothing, but Words, which a Philofopher more efcially ought to avoid. For as the Author to Herennius truly remarked, 5 It is ridiculous and a Foult to raise a Controversy about the Alteration of Names: Which Arifotle had expressed thus: 6 We must take Care to fban guilbing about a Term.

XXIV. 1. There seems to be greater Difficulty after the penal Law is made, because the Law-Maker is in some Measure bound by his own Laws; but this XXIV. Ad only after the penal Law is made.
only holds, as we taid before, \* \* 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 much he may entirely 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 \* Rules of political Justice. 

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 Respectes remaining in Force, after the Example of GOD himself, \* \* as LaCaertius observes, 3 when he gave Men Laws, did not deprive himself of the Power of pardoning such as should transgress those Laws. \* \* A Prince, faith St. Aylin, may revoke a Sentence, and absolve and pardon the Person concerned to die; And gives this Reason for it, that he is not judge 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 live besides my self.

3. But neither is this to be done without a reasonable Cause. And what these reasonable Causes are, \*\* 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. But the Causes of exempting any one, from the Penalty of the Law are either intrinsic or extrinsic. \* It is intrinsic, when the Punishment compared with the Fact is too severe, if not unjust.

XXVI. Extrinsic is from a Man's former Merit, \* or some other Thing that

the Lyarion; but that Zalucus (not Socinus) 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 alleges the Example of the Romans, among whom the Senate might both augment and diminish the Rigour of the Laws. On this Point see Mr. Schelling's Dif
cussion De recusationi judicis, Cap. VII. the § 3. This supposes what is true, that an interior Judge cannot, as such, and without the Authority of the Sovereign, either diminish or diminish the Punishment, when it is fixed by the Laws.


3 De Irae Dei, Cap. XIX. Num. 9.

4 S flav arcus, Lib. III. Epist. LXIII. For the Circumstances of Magistrates and Princes are quite different; the Judgment of the Magistrate is thought to be capable, if it be neither than the Law 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 Dif
tinction between a King and a Judge in THEMISTOCLES, Grothus, Cap. VII.

One Author doth not specify the Treatise of St. AUGUSTIN, from which he takes these Words. I am perplexed, however, that he quotes them from COUSAS, \* who, in his Discourse, XXX. XXXII. giving the Paffage more at large, produces it as drawn from a Treatise \* De Pena; \* which doth not appear among that Father's Works. It is proper in this Place to obser

vate 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 A R N E U S, De Republ., p. 271, 272, by D I O N Y S. GODFROY, on the Justinian Code, Tom. VI. De Pena, Leg. XV. by J A M I E S GODFROY, his Son, in Cod. Theodos. Tom. III. p. 307, by C Y R I A CUS LENTULUS, in Augult. p. 149. And I doubt not but many others have done the same, after some one of these Authors. It is very probable that COUSAS 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 Paffage. I find something like it in an Epistle, written by that Father, in the Name of his Clergy, in which exhorting the

Densusific to a Conference with the Bishops of the predominant Party, he avoids there lay down the Regulations of the Conference before the Emperor, that he might form a Judgment of the Merits of the Cause; be
cause the ordinary Judges could only follow and execute the Laws already in being. Epist. LXVIII. As to the Paffage of THEMISTOCLES, here referred to, the Reader may see it at Length in PUFENDORF, B. VIII. Chap. III. § 17. Note 1.

5 De Clementia, Lib. I. Cap. V.

XXV. (1) For Instance, if in a Country where Hunting is prohibited under very severe Penalties, and even under Pains of corporal Punishment, a hot-headed young Fellow, or one who has not, and at present cannot have any Thing else to eat, should kill a Hare in the Road. In some Countries a Man is condemned to be hanged for a very moderate Theft. If any one, being reduced to extreme Poverty without any Fault of his own, should steal such a Sum, it would be an Act of great Severity to put him to Death: Clemency would require, at least, that his Punishment should be changed, and the Rigour of the Sentence forestalled, without any Alteration in the Law itself.

See PUFENDORF, in the Chapter that answers to this, § 17.

XXVI. (1) See TIRARQUE, De Pernis temporalibus, Cap. L. and COVARRUVIAS, Var. Refor-

lat. II. 9, 5, 6. speaks.
speaks in his Favour; or even from great Hopes of him for the future: Which Kind of Cauze will then oft prevail, when the Reason of the Law (at least in that particular Fact he is accused of) shall eafe? For tho' the general Reason 2 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 eaves, as to this or that particular Cafe, it makes the Law be dispensed with, more easilly 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 blameles, or through an Infamity of the Mind, that is superable indeed but not without great Difficulty; to which Circumstances, a Sovereign who projects Christianity, ought to have great Regard, after the Example of GOD himself, who in the Mosaic Dispensation was graciously pleased to provide, that Sins of this Kind should be expiated with certain Sacrifices, Lev. iv. and v. And in the New Testament he has declared both by Words and Examples, that he is ready to pardon such Sins upon Repentance, Luke xxiiii. 34. Heb. iv. t 5. v. 2. 1 Tim. i. 13. And it is observed by St. Crysllstane, that those Words of Christ in St. Luke xxi. 34. 'Father forgive them, for they know not what they do,' wrought so much upon Theophylax, that he freely forgave the Antichrians.

XXVII. And from hence appears the Error of Ferdinand Vagner, 1 who said that the Laws were never to be dispens'd with, but in such Cases as the Maker of them, had been confulted, would have acknowledged that he did 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 con-fit 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 Plea-ure, 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 dispence with the Law for some reasonable or even urgent Cauze, and another to declare, that the Fact was never comprehended under the Intention of the Law. So much for taking away or exempting from Punishments: Let us now see how we are to put them in Execution.

XXVIII. From what has been already said, it appears, that in Punishments two things are to be considered, the Reason why and the End for which. The Reason why, is the Demerit; the End for which, is the Advantage of Punishment. 3 No Body is to be punished above his Debet, according to those Paffages of Horace, 4 which we have before quoted, and that of Cicero, 5 There is a Measure, faith he, and Moderation to be used in punishing, as well as in all other Things. And therefore Papinian calls Punishment the Alderation of a Crime. 6 Artifices faith, Lexif. II. That it is agreeable to human Nature, that Bounds should be set beyond which Revenge should never pass. Demogorgus in his Epistle for Lycurgus's Children, says

2 That is, in regard against the Law, not in regard to every Person who may violate the Law at the same Time.
3 Pufendorf, and other Writers after him und-erstand by that Term the Authority and Will of the Legislator. But this is a Mistake. The gene-ral Reason is no more than the particular Reason of the Law, considered as always taking Place in general, tho' it ceases in certain Cafes in regard to fuch or fuch a Person; as in the Cafe 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 Perfons may be fo rich that the faid Expences cannot do them the least Damage. However, in order to make the Application of this Influence fuit, it must be sup-poied that the Penalty annexed to the sumptuary Laws is corporal, or conffits in fomething which strongly affects the Rich; for if, as is usually the Cafe, 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, left the Eafiness of transgrefing the Law should encourage him to give frequent Examples of such Transgrefion.
4 Gratianus has collected and put together fe-
teral useful Things upon this Subjed, Canj. I. Quest. VII. Grotius.
5 Orat. XX. De Status. See the Story in Zonaras. Grotius
XXVII. (1) Rigler. Contr. Lib I. Cap. XXVII.
2 Ibid. Cap XLIV.
XXVIII. (1) The People of Milos urged very judiciously upon this Affair in a Speech of theirs re-lated by Gicciardin, Lib. XVII. Compare what we have said in this Chapter, § i. and what we shall say in B. III. Chap. XI. § i. Gro-tius.
2 Esid. ad Bruton XV.
3 Digol. Lib. XLVIII. Tit. XIX. De Per-
nis, Leg. XII.
that we are not to observe barely an Equality in Punishments as in Weights and Measures, but to have Regard to the Purpofe 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 Diffpofition 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 fake, he is a Sort of Monfter. The greatest Part of the World are drawn into Sin by their Affections. 2 When Luft hath conceived it bringeth forth Sin. Where under Luft or Appetite, I comprehend alfo that vehement Desire of declining every Thing that may hurt us, which of all others is the moft natural, and confequently the moft innocent. And therefore those Sins, that are committed to escape Death, Imprisonment, Pain, or extream Poverty, feem to be the moft excufable.

2. Agreeable to which is that of Demofhenes, 3 If a rich Man be unjuft, it is fit that he fhould be much more severely punished, than a poor Fellow whose Poverty forces him to commit the fame Crime. For before Judges, who have any Sense of Humanity, Neceffity pleads strongly for Indulgence, whereas they who in Affufence and Plenty do an Act of Injuftice, can have no tolerable Pretence to urge in their Favour. Thus does Polybius excuse the Acaianians, who to avoid the imminent Danger, that threatened them, 4 broke the Articles of the Treaty concluded with the Greeks against the Aetolians. And Arifhotele fays, 5 Incontinence is more voluntary than Cowardice: For that proceeds from a Propofal of Pleafure, this from an Apprehenfion of Pain. And this Pain doth, as it were, 6 transport a Man out of himself, and tends to his Deftruftion, which the Prafution of Pleafure doth not fuch Thing; and therefore Incontinence is the 7 more voluntary Vice. To the fame Purpofe there is a famous Paffage in Porphyry, Lib. III. De non efus Animalium.

3. All other Appetites do tend to fome Good, either real or imaginary. Thofe Things that are really good, besides the Virtues and their Acts, which never lead to Sin (καθαρα δυναι, λαμπρα, λυπη, 7 For the Virtues follow one another) do either themselves afford Pleafure, or are the Caufe of fuch Things as procure it, fuch as Abun

XXIX. (1) CHYRUS TOM X. De Statutis: 8 ξαϊ δι ταν, &c. For every Office does not deferve the fame Correftion, but what might eafily have been amended requires the greater Punishment. And in his third Oration entitl'd Car defamarem fi faet versus Tegemens, he proves from hence that a Slanderer is worse than a Whoremonger, Thief or Murderer. 9 Grotius. In his firft Oration against Stephens, p. 616. Edit. Bafi 1572.

3 This is not exactly related. The Rhetor fays on the contrary, that tho' the Aetolians had been excusable, as well as any other People in the fame Cafe, 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 addrefTed themselves first to them, they immediately confirmed the Resolution taken in the general Affembly, frankly and without Hefitation; and on this Occafion, as on all others, the Consideration of their Duty had more Weight with them than the fear of Danger, Lib. IV. Cap. XXXX. p. 415. Edit. Angelf.


In the Paffage of Porphyry, which our Author calls infignis fons, the Philofopher fays, 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 excufe the Neceffity that reduced him to it; but that he who should do the fame Things, to enrich himself, or live in Luxury and Voluptuousness; in a Word to gratify irregular Desires of Things not neceffary, is deemed afo for Society, an impeni
crate and abandoned Wretch, p. 291, 292. Edit. Ludi. 1620. The Translator of my Edition, Franci de Pogerolles, pleafantly tranflates: Deinde per regionem & urbem incident, &c. For, aut regimen vel urbanum coferit, &c. This I observe by the Way, at an Example of that Interpreter's Blunders, of which he has no Small Number.

5 See the fine Comparifon of Solomon between a Thief and an Adulterer, Proverbs vi. 30, &c. Grotius.

6 Philo the Jew observes, that every Paffion does indeed put the Soul out of its natural Situation, or transports a Man out of himfelf, and is a Kind of Difeafe, but that none of them is stronger and more dangerous, than Concupifcence; because it is the only one, that has its Source in our own Hearts and Minds, whereas the other Paffions arise, as it were, from without, and in a manner make their Entrance in Spite of us. De Deoctis. (p. 764. Edit. Par.) Grotius.

7 This is a Maxim of the Stoicks, who add, that he that has one Virtue has them all. Diogen. Laert. Lib. VII. § 139.
dance of Riches. But Dif\thions that raise us above others, as they are separated from Virtue and Profit; and Revenge, 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. Ex\n\n277. last conceive Evil, there To little the These four, as is Itridufila, as Lib. VI. Chap. vii. 14. Grotius.

9 This Passage has been inserted above with several things proceeding in, Lib. I. Cap. II. § 8. Num. 9. Note 42. The Passage of Lactantius is in In\n\nTo make any other Person, either by directly taking them away, or by causing Damage in any fraudulent Manner.

3. To that of Injustice, which we have laid down as a general restraining Caufe, there is sometimes annexed some other Vic, as for Inflaunce, want of Afection towards

8 Seneca, Epit. XVI. Our natural Wants have few Bounds in 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 Eph. i. 14. Grotius.

XXX. (1) There is a little Note here in the Original, that has a pleasant Mihade in the writing of it. It is: Vide lacrum Igni\n\nLus. v. and Xiphilinus in Dion. D. 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 Lus. mea\n\nD. This figures perfectly well with our Author's View; which is to shew, that there are Circum\n\n5 R have
Of the Rights of

Book II.

towards Parents, Inhumanity to Relations, Ingratitude to Benefactors, which aggravate the Offence. 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 of the Peripatetics was agreeable to natural Equity, 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, that he makes no Account of their former manner of Life, and to whom therefore may be applied that of Thucydides.

They deserve double Punishment in that from being good Men they are become bad: Because, as he says in another Place, They have acted in a Manner unworthy of themselves.

And therefore the antient Christians did very well to require that in proportioning of ecclesiastical Punishments, they should not look upon the 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 Vice, it superadds a special Aggravation to it; as St. Aelfin fews in these Words, 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, If you are for doing what is not yet forbidden, you may fear lest you may be forbidden: But if you transgress in Things actually prohibited, with Impunity, there is neither Fear nor Shame remaining to restrain you.

XXXI. i. The Finites of a Perfon, either to reflect upon the Caufes that might refrain from offending, or to receive the Affections that excited to it, is usually oberved from the Conftitution of the Body, the Age, Sex, Education, and Circumstances of the Act itself. For Children and Women, and People of a dull Diffi-

have confounded the Name of one Evangelift with that of another. Thofe Names which were familiar to him, might easily come into his Thoughts in a mere Citation, writ in buffe and without attending to Things themselves. This Observation will help to discover the Origin of some other Methaphors, which occur either in the Text of Notes of our Author. He might have added a Paflage of Anisius very applicable here, and is in a Discoufe, which he fometimes cites in this Chapter: No Man, fays that Orator, fuffers Injuries patiently; but the moft ferile, and fuch as excite impatientable Reprifal, are those we receive from them who ought to be the farthest from committed them? Orat. last. II. Tom. II. p 144.

2. The following Paflage is cited by our Author in a Note, but without relating from whom: To have been once ignorant of the Duties of Life, is the Effect of human Frailty: But to falfe often into the fame Faults is Madnes. For the more Faults we commit, the more rigorously we deserve "to be punished: Thofe Words are a Fragment of the twenty fifth Book of Diogenes Laertius, and are to be found in Num. 15. of the Collection made of thofe Fragments. Quintilian hath a Thought of the like Nature in Declam. CCCXV. And in Declam. CCCXLVIII. Sec.

If in the Courfe of the guilty Perfon'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 fays, That a Man is to be judged by the general Tenour of his Conduct and Intentions. Cicero also maintains, That in all important and notorious Affairs, Judges are to confider the Will, the Intention, and the Deed of the Perfon accufed, not from the Crime laid to his Charges, but from his Manners and general Conduct. Orat. pro P. Sylla. (Cap. XV.) Gratius.

Our Author does not fay from whence he has taken this Fragment of Asinius Pollio: I can find it neither in Quintilian, nor elsewhere. But as to the Matter itfelf we may add to the Authorities alledged by our Author, and by Pufendorf in the Chapter which answers to this, (§ 22.) Cicero, De iuris pont. Lib. II. Cap. XI. And Apuleius, Apol. Num. 891. Edit. Scip. Gentil.

5. One of the Lacedemonian Ephors fays this in Relation to the Athenians, who boasted of their Pretences against the Moors. Lib. I. Cap. LXXXVI. Edit. Ovend. Sec.

6 Lib. III. Cap. LXVII. 7. The twenty fifth Canon of the Council of Ancrya. St. Chrysostom upon 2 Cor. ii. 10. θυμοναι, &c. From whence we learn that Peace ought to be determined and proportioned, not only according to the Nature of the Sin, but also according to the usual Indignations and Carriage of the Perfons offending. And in his third Book De heresid. § 2. θυμοναι, &c. For we must not put the Punishment to the Measure only of the Offences, but we must inquire into the Disposition of the Offender. Gratius.

3 De vero Relig. Cap. XXVI. St. Chrysostom comparing the Jews with the Greeks or Pagans, fays with Reafon, that the Jews are most criminal, becaufe they have the Law of G O D: And adds, that he who has had most Infraduction, deserves to be punished the most severely when he violates the Law. Gratius.

9 Annot. Lib. III. Cap. LIV. Num. 4. This Paflage is not to the Purpose. For the Historian is not there speaking of the Venue 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 venure to transgress notwithstanding the Prohibition.
tion, and of a bad Education, do not so well distinguish just from unjust, lawful from unlawful. And again, those in whom Choler abounds are subject to Anger, as those of a fanguine Constitution are to Luft; besides, the Inclinations of Youth and old Age are different. Thus Andronicus Redius, * 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 incites 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 without Injustice find another Matter to work upon. To which Purpose it is that of Aristides in the seventh Book of his Nicomachid, * Anger is more natural than a Desire of Superfluous and unnecessary Things.

2. For this must be always observed, that the more the Judgment is hindered in making its Choice, and the more natural the Causes are by which it is hindered, the less is the Offence. So Aristides in the fore-mentioned Book, + 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 Passions. For what may not such a one be supposed to do, if he was to feel the Violence of Juvenile Affections, or were approv'd with the Want of those Things which it is grievous for Nature to be without? With which agrees that of Antiphons,

If when he is Rich, be As such Villany,
What would be do if urg'd by raging Want?

As also what we frequently read in Comedies of the Amours of old Men. From those Causes therefore it is that we are to examine the Merit of the Offence, and accordingly to settle and determine the Punishment.

XXXII. 1. But here we must observe, that what the Pythagoreans affir'd, that Justice is * an ἀδίκος ἁμαρτία, 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 heften the Crime, done a Damage to another, ought himself to suffer the fame Damage and no more. For that this is not so, that very * Law, which is the most perfect Pattern of all Laws, fhears, when it commands Theft to be punished with a four-fold or five-fold Restitution. And by the Athenian Law a Thief, * besides the Penalty of double Damage, was punished for some Days, as Demophanes against Timocrates shews. Laws, says St. Ambrose, + Command that those Things that are stolen from one, be restored by inflicting corporal Punishment upon the Perpetrator, or by laying a greater Malise 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


2 Luft, says St. Chrysostom, requires to be satisfied by the Company, not of this or that particular Woman, but of any Woman whatsoever. In Galat. Terentian observes, that the more difficult it is for unmarried Persons to preserve their Contency, 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 Paffage of Marcus Antoninus referred to a little above, in which that Emperor cites the Philosopher Theophrastus. Grotius.


5 This Sentence, which our Author cites only in two Latin Verles of his own, is taken from Stobæus, and is in the Original thus,

"όν πενήν τον επίρρυτα σιδήρον πρινέλας,
τ' εἶναι δυνατήν σιδήρον προμηθείζονα.
Molion. Tit. II. De Mulitis.

6 When you see (says St. Chrysostom) a rich Man unjust, avaricious, and griping, lament his Fame 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 Harmenopolus expressest it ἔρχεταιε. (Promptuar. Lib. I. Tit. II. § 34.)

1 An Allusion to this Restitution of Double is made in the Revelation xviii. 6. Apollodorus tells us, that the Minyans having unjustly exacted a Tribute from the Thetians, Heracles obliged them to return them double the Value of it. Biblioth. Lib. II. (Cap. III. § 11. Edit. Th. Gall.) Grotius.
2. Among the Indians, as Strabo 6 observes, he that had maimed another, was, besides the sufferings 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 Perdon should suffer alike, as 8 Philo think very well, where he treats of the Punishment of Manlaughter. And we find also that some Offences, tho' not committrom, and therefore left 6 than if they had been committrom, bear a Punishment suited to the Injury designed, as we have an Inflation in the Jewish Law 7 concerning 7 false Witnesses, 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 contriv'd for Crimes actually committed; but since nothing can be fiercer 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.

XXXIII. Now the Greatness of a Punishment is not to be estimated from what it is simply in itself, but with respect to the Perdon, who suffers it. For the fame Fine that is burthenome to a poor Man, is not so to one that is Rich; and a Mark of Intamy 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 4 framed his harmonical Proportion; whereas here is only a simple arithmetical Equality of the Demerit and the Punishment, as there is in Contrads, 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

felt of his Goods. Gravitus. The first of these Laws says, that the Husband shall not only keep his Wife without Power ever to repudiate her, but also pay a Fine of an hundred Shilloms for the Benefit of her Father, that is to say, double the Portion, which the Husband gave to her in the Time to the Father of the Woman they married, as appears from Genesis xxxix. 18, xxvii. 12, and this Portion was generally settled at fifty Shilloms, Exod. xliii. 17. So in the Cane now before us, the Husband, who had endeavoured to dishonour his Wife by accusing her of Incontinency, was consider'd on the fame Foot, as he who had actually deprav'd a Maid of her Honour by ravishing her, according to the Law in the fame 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 only fifty Shilloms. In regard to the second Law, alleged here by our Author, for an Example, Exod. xix. 9, it relates to a Ruff: And ordains, that in case the Perdon, with whom any Thing is deposited, denies or retains it fraudulently, and is legally convicted thereof, he shall pay double to the Proprieter. On the contrary, if the Proprieter has accused him unjustly, he also shall be condemned to pay double the Value of the Thing depofited: Consequently, both the one and the other are punisht, as if they had actually stolen the Thing depofited, as appears from lopj. 7, of the fame Chapter.

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6 Lib. II. De Special Legib. p. 759, &c.

7 De repub. Lib. VI. Cap. ult.

8 De jurisd. Lib. VI. Cap. ult.

9 De leg. special. Lib. II. p. 789.

A D i s c o r d . II. 6 says, to those who prosecute injurious Perdon in a judicial Way, the Laws allow greater Damages by Way of Revenge than they sustained. And Seneca, speaking of the Judgment after this Life, says, 

³ The Punishments

De there exceed the Greatness of our Crimes.
War and Peace

Law this is not done \( \text{αιν} \) \( \pi \text{περαrawnias} \), that is, without too great a Respect had to Persons and Qualities no Ways relating to the Fact; a Fault from which the Law of Mofes is entirely free. And this, as we said, is the intrinsic Valuation and proportioning of a Punishment.

XXXIV. But that which induces Men to mitigate the Severity which the just Proportion between the Crime and the Punishment allows of, is their Charity for the Criminal, unless a juster Motive of Charity to many Perons incline them to the contrary for some intrinsic 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 arifes when there are some general Encouragements to Vice, that cannot be repressed without sharp Remedies. Now the chief Encouragements are Custom and the easiness of committing the Offence.

XXXV. Upon account of this easiness the Law of G O D 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 Juslin says of the Scythians, No Crime with them was more severely punished than Theft; for to them who had neither Houses nor Inclinations for their Herds and Flocks, what Security could there be, if stealing was allowed of? Like to which is that in Aristotle's Problems, Sect. XXIX. The Law-giver 3 considering that it was impiansible for the Owners to have always an Eye on their Goods 4 in those Places, he allowed 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 Feat 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 Ne-

XXXVII. (1) See the Chapter of PTFENDORF which answers to this, § 37.

XXXV. (1) See the Rabbi MAIMONIDES, Director. Dubitatum. II. 41. CICERO says, that the Crime deferves the greatest Punishment, which are the most difficult to be vindicated against. Orat. pro Secv. Rof. Amerin. [Cap. XI.] GROTIUS.

2 Lib. II. Chap. II. Num. 6.


4 At Athens, those who rode in Baths were punished with Death, if the Thing stolen were worth more than ten Drachmas, (that is, about two Crowns) as GROTIUS informs us. Orat. Adver. Timocrates. See also DIGEST. Lib. XLVII. Tit. XVII. De furts balnearii, Leg. I. GROTIUS.

The Law of Soln recited by DEMOSTHENES in the Place here referred to, is in p. 476. Edit. BAST. 1792. That Law does not mention such as steal in Baths, but only those who robbed in the Gymnasia, or Places of Exercise, or the Ports. The learned CASABON however in his Comment upon the Characters of THEOPHRASTUS, (Cap. VII. or VIII.) designates, p. 81. Edit. NED. cites also this Law to prove the same Thing our Author finds in it: Morti (says he) plebiscitur apud Atheniensis furis balnearii, si rei furiae affiliatam esse, virtutem de se ipso se indigne, At Demosthenis contra Timocrates. ALCIAT. before him. PORRY. Lib. II. Cap. XXXVIII. and PETER VITTORIO, Far. Leg. Lib. VII. Cap. XVIII. had intimated the same Thing: The great CUIJS seems also to have been of the same Opinion. Not. in BUR. 1 Recens. Sentent. Lib. V. Tit. III. § 5. Nay further in the Collection of the Athenian Laws, compiled and digested by SAMUEL PETRUS, 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 \( \text{ἐν τοῖς} \) \( \pi \text{τοις βαλναιρι} \), there is \( \text{ἐν τοῖς βαλναιρι} \). 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 Editions 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 \( \text{ἐν τοῖς} \) \( \pi \text{τοις βαλναιρι} \) 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 Perso I have mentioned, that our Author gives us the Fact, as founded upon the Law of Soln: For in another Place, where he mentions it, he only quotes the Passage of ARISTOTLE. See the Forum Spenso at Fun Funfanian. p. 189. Edit. ABEL. But unless there be some good Manuscript, or some other Passage of an antient Author, in which the Law of Soln is found, with the Supplement of the Words \( \text{ἐν τοῖς βαλναιρι} \), 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 thefts in general, where there might be the same Facility to steal; we ought to be governed by what it declares. It might afterwards have been extended to Thiefs committed in Baths, and other publick Places; but that was either by Virtue 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 Soln. As to the \\(^\text{Fures balnearii}\\) among the Romans, they were commonly condemned to the Mines, or other Works for the Use of the Publick. But the Punishment was sometimes less and sometimes also extended even to Death. See CUSIAS and MR. SCHULTING upon the Passage in PAULUS the CIVITAT, to which I have referred above in this Note. Even in ancient Times all Theft was punished with Death, if we may believe SERVENS, from whom our Author cites these Words, in the Passage of his Forum Spenso, &c. before referred to. Capitale enim crimine apud majorum fuit [Forum] ante penam quadruplii. In Sec. VIII. 2265. § 5 [Epist. Lib. IV. Ep. IX. Num. 17. Edit. CELT.]
of 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 this 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 confiding, we told you, in the absolute Remission of the Punishment: Because it is difficult to find the just Balance, says Seneca, * therefore let the Inequality be on the milder Side.* And in another Place, * If it can be done safely, let the Punishment be quite remitted; if not, let it be moderated.* And in Diodorus Siculus, an Egyptian King is * commended for inflicting least Punishments than the Crimes deserved.* Capitolinus * says of Marcus Antoninus, That his Clemency was to award to all Crimes a lesser Punishment than what by the Laws they used to be punished with.* Jesus the Orator said, that Laws ought to be made severe, but * that the Punishments should be gentler than the Laws require.* And it is the Advice of * Ifocrates, That Punishments be inflicted below the Degree of the Offense.*

2. * St. Austin gives Marcellinus, in the Execution of his Office, this Counsel: I am in a great Concern, lest perhaps your Judges should think that Criminals are to be punished according to the utmost Severity of the Laws, 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 not, nor permit it to be done.* The famous Author has likewise this Passage; * So terrible is the Threatening 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 Men's Injuries, as Judges ought to be, to the End they might think that the Mercy of GOD is necessary on account of their own Sins, and that they might not look upon it as a Breach of their Duty, if they shew any Clemency to those over whom they have the Power of Life and Death.*

XXXVI. (1) It is in B.I. where he says, that after the publick Sacrifices, at which the Kings of Egypt were always present, the Chief Priest requited the King's Virtues, amongst which he included that, which consists in not punishing the Guilty so rigorously as they deserve, and on the contrary in rewarding the Good beyond their Merit. Bitherto, H. Steph. p. 45. Ed. 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 Jovius II. writing to the Hans, says, That it was the Custom of the Romans to punifh Offenders less rigorously than their Crimes deserved.* GROTTIUS.

I find this in the Extracts of Embafties made by MENANDER, Protector, Chap. XIV. amongst the Embafties taken from the History of the Emperors Jovius, Jovius, and Tiberius. But the Passage is in an Anfwier of the Emperor Jovius, by Word of Mouth, to the Embaftamens of Bojan, Prince of the Avarians; and not in a Letter writ to that People, who were Part of the Hans.

3. * This is what the Emperor Henry I. designed by the Symbol of a Pomegranate with the Motto Subaret, something fpoft. King Theodore said, that it was dangerous to punish, but always safe to forgive. Nam qui percibat juftitiam, fub frono- rivum fuper ignominiam. CASIDORES, Var. XI. 40. Groftius. Our Author recites the Words of ISAEUS in Latin only, and I find nothing like them in the Writings of that ancient Orator, which all turn upon Civil, and never upon criminal Affairs: But as I found the Passage cited in Greek by FREDERICK LINDENBERG, 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 the Author in this Passage cited upon the Commentator who gives us the Passage of ISAEUS, without saying from whence he took it, in these Words: νατο τον νάζα μεν τονάδη σφικά μενα ζελεαζω, και ου καταλείψω. Since that I have found it in SPODAUS, Serv. XLVII. De Regno ADMINIT: 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.


5. Sic nonam utum ipsius criminium urbes, &c. (Epift. LIV.)

6. Unde mihi follicitudo maxima incutia 6f, &c. Ad Marcellin. Comit. Epift. CLIX. which Passage is cited in the Canon Laws, Cant. XXIII. Quaed. V. Cap. I. See MARIANUS's Letter to ST. Austin, and the answer of that Father, Epift. LIV. and LIX. The former demands, whether it is the Duty of an Ecclesiastical to intercede for Criminals, as the Ecclesiastical believed it to be: Officium Sacer- dotii suprj officii dictius, intercessione pro reis. See what is said in regard to THEODORUS the younger in the Extracts of JOHAN, ANTFOCHEN, taken from the Manuscript of Mr. DE PEIRESC (p. 850.) GROTTIUS.

XXXVII. We
XXXVII. We hope we have omitted nothing that is of any great Moment towards the understanding this difficult and obscure Subject: 1 For the four Things which Maimonides says are chiefly regarded in Punishments, viz. the Greatness of the Offence, that is, of the Damage, the Frequency of such Offences, the Venezuela of the Offence, and the Easiness of committing the Offence, we have referred to their proper Places; as also the seven Things about Punishments considered by Saturninus, tho' very confusedly. For as to what relates to the Peron of the Offender, that Consideration principally belongs to the Capacity of Judging, and as to the Peron who suffers the Injury, this conduces somewhat towards estimating the Greatness of the Fault. 1 The Place where the Injury was done, frequently adds some peculiar Aggravation to the Crime, or is considered under the Facility of committing it. The Circumstance of Time, as it is long or short, to it increases or diminishes the Freedom of Judging, and sometimes helps to throw the Depravity of the Mind. The Quality of the Offence is partly referred to the several Kinds of Defires, partly to the Reasons which ought to restrain a Man from the Crime. The Event, to the Reasons restraining. And the Quantity to the Nature and Degree of the Defire.

XXXVIII. That the Defire of inflicting Punishment is often the Oceation 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 fame Fact is generally both vious 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, they may safely do it, as hurting none thereby but those who are guilty. Separate, that seldomly observed, what we have likewise already mentioned; that smaller and common Offences ought to be pass'd by, not punished.

XXXIX. 1 But what was said by 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 amis, because they could produce no Decrees of the Rhodians; but had only some little Conjectures of a wavering and uncertain Design, yet this must not be receiv'd as a general Maxim. For the Intention of the Will, when it has proceed'd to some external Actions, (internal Actions being, as we have faid before, free from human Punishment) is usually a sufficient Ground for Punishment. Crimes, says Seneca, the Father, in his Controversies, are punished, even tho' not put in Execution. And He who intended to do an Injury, has done already, says the other Seneca. Not only the actual Accomplishment, but the very Contriving of Murder, is punished by the Laws, said Cicero, in his Defence of Mith. It was Periander's Saying, that a Punishment is not in a Man, but in his Offence, which makes him suffer.


2 Sed hoc quatuor confideranda sunt sistem nutr- dis: Cogniti perferri, loci, tempori, qualitate, quantitate, & eventu. DigM. Lib. XLVIII. Tit. XIX. De Peani, Leg. XVI. § 5.

3 Philo the Jew observes, that Circumstances render a Crime more or less enormous. For Example, fays he, it is not the fame Thing whether you strike your Father or a Stranger; whether you speak ill of a Magistrate or a private Perfon, or do an unlawful Thing in a place of sacred Place, upon a Festival or another Day. De legisler. special. Lib. II. (p. 863.) "The fame Thing may be found in a Law of the Jews, Performa posteri termo pulchil Romani. [Out Author reads it thus, with Reafon, instead of Preetorius, in which he follows CuJas's Correction. Obscr. IX. 16.] In confpicuam. &c. DigM. Lib. XLVIII. Tit. X. De injuriis & famìs libellis, Leg. VII. § 8. Grotius.

XXXVII. What the Hebrews and the Romans had regard to in Punishments, may be referred to the Places above mentioned.

XXXVIII. of War made for the executting of Punishment.

XXXIX. Whether a War on the Account of Offence, just begun is lawful, is explained by a Definition.

See the Observations of Mr. Binkershore, Lib. I. Cap. VIII.

4 The more attentively a Man considers a bad Action which he defign to commit, the more ought he to be shocked at the Turpitude of it.

5 The more violent the Defire is, the more careful we are, for Instances, to fetch a large Sum of Money.


2 Except. Controvers. IV. 7. This was not a general Rule. See above, § 18. Nov. 1.

3 De fra, Lib. I. Cap. II. He fays elsewhe, that a Highwayman is fuch, even before he robs and murders Travellers, because he intends to do it. See above, § 18. Nov. 1.

4 Orat. pro Milii. (Cap. VII.) A Roman was accufed
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 "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, in the Speech of the Rhodians; no Customs or Laws of any State in the World punish a Man with Death, if he only intended the Destruction of his Enemy, without having done any Thing towards the Execution of it.

2. But neither is every bad Intention, tho' already declared by some Act, a sufficient Ground for Punishment: For if all Offences, tho' actually committed, are not punished, much less ought those to be punished, that are only projected, and commenced. What Cicero says, does in many Cases take Place, "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 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 Senecæ; 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 Loses, was a Thing by no Means to be suffered. For that Law in the Decalogue, Thou shalt not covet, (tho’, if you look to the Scope of the Law, that is, the, τὸ πνεύματι, or Spirituality of it, it is of larger Signification, to the Law requires a perfect Purity of Mind in all) yet as to what relates to the external Precept, the ἐξήνθεν Καρακήν, 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 fame Precept by the Words, μὴ συνερήσαί, Defraud not, and that, when he had before mentioned, μὴ μιλήσει, Do not speak: And in this Sense the Hebrew Word, and the Greek answering to it, are found both in Mch. ii. 2. and several other Passages.

4. And therefore Offences that are only begun, are not to be revenged by Arms, unless in a Cafe 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; so it may appear, that we have Recourse to this Method only, either to prevent some future Mischief, (of which we have treated above, on the Head Of Self-Defence) or to vindicate a wounded Honour, or to obviate a pernicious Example.

XL. 1. We must also know, that Kings, and those who are invested with a Power equal to that of Kings, have a Right to exact Punishments, not only for Injuries committed against themselves, or their Subjects, but likewise, for those which do not particularly 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, is in every particular Person, does now, since Civil Societies, and Courts of Justice, have been instituted, reside in those who are poiffessed of the supreme

XL. Whether it be lawful for Kings and States to make War upon such as violate the Laws of Nature, they themselves or their Subjects; this is explained, and the Opinion that would have justif- dication natu- rally requisite towards Pun- ishing re-

5. Quodque bellum parareci autemus Populum Romanum, &c. Livy, Lib.XIII. Cap. XXX. Num. 11.


8. Ex eadem ratione, in Regard to false Witness, xix. 19, which he has cited above, § 32. Num. 2.

9. Extra judicium. Our Author means here the Law of Deuteronomy. As he is not included in the Section of this Purport, upon Rom. iii. 13. and upon Chap. viii. Num. 11.

Grotius.
Power, and that properly, not as they have an Authority over others, but as they are in Subjection to none. For, as for others, their Subjection has taken from them this Right. Nay, it is so much more honourable, to revenge other Peoples Injuries rather than their own, by as much as it is more to be feared, left 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 of Anteous, Buthiris, Dianodes, and such like Tyrants, Whole Countries, says Seneca of him, be 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 Lytias thought, the Author of great Good to Mankind, by punishing the Unjust. Diodorus Siculus speaks thus of him, He made States happy, by purging out of them unjust Men, and infolent Princes. In another Place he says, He travelled over the World to punish the Wickedness of Men. Of the same Perfon is that of Dion Prausenius, He punished bad Men, and either destroyed the Dominions of proud Tyrants, or transferred them upon others. And for the General Care he took of all Mankind, Aristides, in his Panatheneac Oration, says, he deserted to be taken into the Number of the Gods. In like Manner is Thetis commended for having destroyed the Robbers Sciron, Simon, and Procris, and is therefore introduced by Euripides, speaking thus of himself, In his Supplicants;

My Acts of old have spread my Fame thro’ Greece,
Where I, The Scourge of Villainies, am stiled.

Valerius Maximus says of him, Every Thing that was monstrous or wicked, be subdued by the Bravery of his Mind, or the Strength of his Body.

3. For the fame Reason we make no Doubt, but War may be justly undertaken against those who are inhuman to their Parents, as were the Sogdians, before Alexander perfuted them to renounce their Brutality; against those, who eat human Flesh, from which Cynemon Hercules compelled the antient Gaurs to defist,

XL. (1) And the Seas too, Philo, De legat. hæc æquæ circuli vicis, &c. Hercules cleared both Sea and Land, undertaking Enterprises necessary and advantageous to all the World, Enterprises designed purely for the Destruction of every Thing that was hurtful and pernicious amongst Men and Beasts. GROTIUS.

2 Oret. XXXX. see Funch. Cap. V.
3 Lib. IV. Cap. XVII. p. 147.
4 See Plutarch, in his Life. Tom. I. p. 45.
5 (Ver. 339, 340.) When the Herald says there,
    'Il paeon in d' iporum ægyniæ sanctis
    Did you from your Father this very gain,
Was't he who made you thus a Match for all?

Tobias replies,
    *Oeni y' òbati y' òbatos d' xalados.
For all who are injurious. But we ne'er Melft the Good.

Plutarch, in his Life, 'apoptes τὴν ἐλλάδα δαον τευκρόν, He delivered Greece from fame terrible Tyrants. And again, d' ev eòs, &c. Without being any ways injur'd himself, to vindicate others, and, for their Security, he employed his Arms against the Wicked. GROTIUS.

6 Plutarch, De fortuna Alexandr. Tom. II. p. 328.
7 The same may be said of those who kill Strangers that come to dwell amongst them. This Example, which is in the first Edition, is rectified by Mr. Barbevraz, having been left out in all the other Impressions. The Omition he thinks was occasioned by the Authorities added after each Example, which either cau'd the Author inadvertently to Strike out the Words Hypocrit avent, or the Printer to slip over them through Mistake. Our Author, without Doubt, had in View what is related of the Sogdians, who sacrificed Strangers, and eat them, making Cups afterwards of their Skulls. SICULUS. GROTIUS.

8 Alexander the Great is noted for the respect he paid his Countrymen, and for his Cares of their Peace. As Plutarch, De fortuna Alexandr. p. 328. C. In regard to this Thing indeed, see what I have said on Pufpen Dorf. Laws of Nature and Nations, B. VIII. Chap. VI. § 5. Note 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. Plu.

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as Diodorus relates; and against those who practice Piracy. If a Man, says Sene-
ca, does not inflit my Country, but is only vexatious to his own; the he is at a Dis-
tance from my Nation, yet if he disturb his own; so great a Depressity of Mind has cut him off from human Society, and makes him to me, and all the World, a Foe. And
St. Augustin, 3 Such abominable Crimes do they allow of in their publick Decrees, that if any City upon Earth should injure, or bad injoinde, the like, it ought to have been, by the general Voice of Mankind, laid in Ruins. For of such Barbarians, and ra-
ther Beasts than Men, may be fitly said what 14 Aristoteles spoke out of Prejudice concerning the Perfanis, who were indeed nothing worse than the Greeks; that War against such is natural; and as Isocrates said in his Panathenaeis, 15 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 thofe 16 who offend against Nature; which is contrary to the Opinion of Victorius, Vespues, Azorius, Medina, 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 Perfon against whom the War is made. For they affirm, that the Power of Punithing is properly an Effect of
Civil Jurisdiction; whereas our Opinion is, that it proceeds from the Law of Na-
ture, concerning which Point we said something in the Beginning of the first
Book. 16 And certainly, if the Opinion of thofe from whom we differ be admit-
ted, the Consequence is, that one Enemy shall have no Right to punish another, even 17 after the War is begun, upon the Account of any Caufe that has no Rela-
tion

be sufficiently express'd, says he, how much is owing to the Romans, for destroying thofe Masfiers, who imagined it an Act of great Donation 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 find in this Chapter, Sect. LXXVII. Num. 9. So Jufninius commanded the Princes of the Araf-
i, not to crafter their Subjects Children. Plio-
copus mentions this Affair, Gothic. IV. and Zo-
maras, in his Life of Lu. Ignatius. And the
Inchis, Kings of Persa, 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 ob-
tained an Empire, of all we read of, excepting their Retire of them.
Our Author, in the Text, gives us what he fays of Hercules, upon the Authority of Diodorus
Siculus, in whom we find nothing of it. He
means Dionysius Haliacarmenensis, as ap-
pears by this Note, which he added afterwards, without breaking the full Citation in the Text. But this other Historian is not more to the Purpose alluded, for he fays directly of the contrary of what he is called to attest. He tells us, that the Cultum of
offering up human Victims to Saturn, fulfilled E-
ven in his Time, among the Gauls, and other
XXXVIII. p. 30. Edit. Osann. Our Author there-
fore has confounded the Gauls with the ancient In-
habitants of Italy, of whom it is faid immediately after, that Hercules pretended (not compiled) them to offer to Saturn, instead of human Victims, the Images of Men, which they were to throw into the Tiber. He might have remembered, that Ju-
lius Cesar, in his Description of the Customs and
Manners of the Gauls of his Time, expressly fays, that when they were afflicted with any griev-
ous Malady, or other Danger, they either offered up
human Victims, or made Vows to do fo, to
their fale Deities. Accepit etiam curam, qui just
affidui praefcripta morti, &c. Bell. Gall. Lib. VI.
Cap. XVI. Cicero is also express upon that

Head, in his Oration pro Fonteis, Cap. X. See
Hottomman and Cicconius upon the Paffage
of Cesar.

10 Aristotle does not directly fay the Perfaniis,
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 Pa-
ticks, where he fays, that War, which he confiders as
a Species of Hunting, is naturally just against thofe
People who are naturally formed for obeying, or,
that he termis it, naturally Slaves. Lib. I. Chap.
fore, after the Poets, that Slave and Barbarian
were the fame. Cap. II. p. 297, C.

11 Τοι δι' αυτων καθως ουδαμον, &c. That
is, "The most necessary and juft War, in the
Opinion of our Ancitlors, is 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 Slaves for our Ruin." Orat. Panathen.
p. 460. We fee from this, that our Author does
not give us exactly the Sense of the Paftage.

12 See Jofephus Acosta, De procuranda Indi
orum falubrit, Lib. XI. Cap. IV. Grotius.

13 Etiam per focepetum bellum ex caufa non pas
mitae. So it is in all the Editions before mine, in
which I have thus retouched the Text. Pof't jurte
focepetum bellum. The Reafoning required the Ad-
dition of that Adverb, which had been manifeftly
omitted through the Fault of the Printers. The
Author reason's upon the Suppofition of the Op-
inion's being true that opposes his own; fo that,
on this Suppofition, no War is to be undertaken on
Purpofe to punish him againft whom we take Arms;
and yet this is what the Expreffion of the Text,
as it stands, oppofites. Besides, there is more Rea-
fon to doubt the Right of Punithing, in a War un-
dertaken for some Caufe that has no Relation to
Purpofe to punish him againft whom we take Arms;
and yet the Word our Author ufeis here, plainly oppof-
ites the contrary. In that Caffe he had been nece-
sary to fay, fellem, at leaft, and not etiam, even.
tion to Punishment, which yet is a Right that most allow of, and the Practice of all Nations confirms, and that not only after the Enemy is disabled, 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.

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, ¹ They distinguish their Ambition and Covetousness, under a Pretence of civilizing barbarous Nations.

XLI. 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 Chal, perhaps, may be ranked ² the Sin of single Fornication, some of the Familiarities that are called Incest, and likewise Usury.

XLIII. 1. The third is, that we carefully distinguish between general Principles, such as this, That we ought to live benevolently, 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 what belongs to another: And between the Inferences drawn from them, of which some are obvious enough, as, that ³ Admitting Matrimony, Adultery ought not to be allowed; others again are more difficult to be discovered, as, that That Revenge is criminal which has nothing in View but another's Sufferings. It is here almost as it is in Mathematics, where some Things are first Notions, or next to first Notions; some are Demonstrations, which both immediately underlie and are attendant to, some again are true, but not evident to all.

2. As therefore, with Respect to the Civil Laws, the Ignorance of them, or their true Meaning ⁴ excites a Fact, so, with Respect to the Laws of Nature, it is reasonable ⁵ 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

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 Refemblance of the initial Letters of the following Word Josephon. The Moment justo is added, there is no longer the least Difficulty, and the Force of the Reasoning is preserved. For, if the War be suppofed to be unjustly undertaken, the Injustice of the Case would make it less surprising, that it should give no Right of punishing. For the Rest, we need not wonder that our Author did not observe this Ommifion in the new Editions he revised: We have seen before, Chap. XII. of this Book, § 10 an undoubted Ommifion, 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 justo.

XLI. (1) It is where, confufing the unbounded Ambition of Caesar and Pompey, he says, that if they had defired Trophies and Triumphs, they might have fattiated themselves with them, by making War upon the Parthians and Germans, without mentioning the Sybaris and Ithacians, 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. Pompeii, Vol. I. p. 646. D. Edit. Book.

XLII. (1) Asterius, Bishop of Amagia, or αἰπηρης το βίον, &c. Those who regard only the Legis-

lators of this Life leave the Liberty of Whoredom without a Punishment. Add to this a Passage of St. Jerome to Ursinus, cited by us at Chap. V. Sect. 19. Grotius.

XLIII. 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 confifled, as we have observed before, in Chap. XII. of this Book, § 20.


Negligence,
Negligence, it lessens the Fault. And therefore those Barbarians who offend in these Matters, by Reason of their bad Education, Aristotle compares to such as have their Appetites vitiated by some Dilemper. Plutarch says, There are some Dilemper of the Mind that put a Man out of his natural Situation.

3. Lastly, this must be added, which I shall now mention once for all, that those Wars which are undertaken for the exacting of Punishment, are suspected to be unjust, unless the Crimes be very heinous and manifest, or there be, at the same Time, a Concurrence of some other Cause. Perhaps it was not without Truth, that Mithridates laid of the Romans, * It was not the Crimes of Princes, but their Minds 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 Ciceronis has treated of at large. But he, following others, thinks there is no Power to punish, where there is not a Jurisdiction, properly so called; which Opinion we rejected before. Whence it follows, that, as in Ecclesiastical Affairs, Bishops are said, in some Measure, to have power, 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, that, GOD alone is sufficient to revenge the Crimes committed against himself, whence the Sayings, * The Injuries of the Gods are left to the Care of the Gods; and ** Perjury has GOD for its Re- venger.

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 inquit 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 Injustice, Befiality, 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 * Plate, The Bulwark of Power, and The Bond of Laws and good Manners. ** Plutarch, in like Manner, calls it The Cement of all Society, and the Foundation of the legislative Power. And, according to Pliny, * The Worship of one GOD is the most effectual Charm, and indiffoluble Tie of Kindreds.

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. Quaip non detita Regum illis, &c. Justin, Lib. XXXVIII. Cap. VI. Num. 1. XLIV. (1) This Passage is in the Conscripti accrobed to St. Clement. We find in St. Cybrian, 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. Epit. XXX. Ed. Pampl. (XXXVI. Fell.) That Father remarks elsewhere, that is but one Epifcopacy, of which each Bishop holds his own respective Part entire, Episcopatus usus est, vsus a finguil in ficioj parti tenetur. De unitat. Eccle. (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. Ed. Fell.) See also St. Chrysostom, in laudibus S. Bazilatii. 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, Jurijurandae contentae religii, fatti Devem uterum habeat. Code, Lib. IV. Tit. I. De rebus eruditis, &c. Leg. II.

4. This is very conformable to the Doctrine of that Philosopher, and to the Maxims he lays down in several Places. But I find no where the very Words attributed to him by our Author, and which he gives us only in Latin, both here, and in his Treatise De imperio summorum Pontificum circa fa- crum, Cap. I. § 13. The learned Böcker quotes them exactly in the same Manner, in his Differtation initia, Ruma fòt fepem regibus, Vol. II. p. 485. But neither does he direct us to any Pas- sage; which thers that he copied them here without any other Examination, as is often done by him and others.


6 [De Monarchia, Lib. I. p. 818. B.] He observes elsewhere, that the Belief of one GOD is the most efficacious Caufe of Concord, and the most indiffoluble Tie of Love and Unity amongst a People. De Paritä. (p. 741. D. L.) Josephus says, that the beft Means to unite Man, is...
War and Peace.

Kindness and Friendship. Irreligion is attended with all the contrary Effects.

—'Twas Ignorance of GOD

That first plunged wretched Men in Wickedness.

Every Error, says Plutarch, in Matters of Religion, is pernicious, and if accompanied with Paffion, it is so in the highest Degree. In Jamblichus we find this Sentence of Pythagoras, The Knowledge of GOD is Virtue, and Wisdom, and perfect Happiness. Hence Chrysippus called 9 Law the Queen over all Affairs divine and human; and, according to Aristotle, among publick Care, 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 Plato makes the whole Business of kingly Government to consist, In 11 taking Care of private, public, 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, faith 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 Conclave, 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, fo neither would he have it continue longer than it made for the common Benefit; and thought, that the only Reafon that ought to restrain Men from injuring others, should be the Fear of Punishment. His very Words to this Purpose, which are very remarkable, are extant in 16 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 least fear ill Treatment from a Prince whom they believe to be religious. And Galen, (in his ninth Book, De placitis Hippocrati & 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 Ufe towards the Practice both of private and publick Virtues. The same was likewise observed by Homer, who

to bring them into one and the same Opinion, concerning the Divinity, without differing in their Way of Life and Manners. Contra Apion, Lib. II. (p. 1572. E.) Grotius.

The ill Paffage is not so 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 Paffage, and the Sequel of the Discourse. Our Author quotes a little lower in the Text, a Paffage of a Pagan Philosopher, which is more applicable to the Subject, viz. what Jamblichus says, after the Pythagorean, that the Knowledge of the Gods, or Religion in general, is the highest Degree of Virtue, Wisdom, and Happiness. Prosopisc. Cap. III. p. 7. Edit. Asse. 7 Silius Italicus, De bello Punic. (Lib. IV. ver. 794, 795.) Josephus, enquiring into the Reasons why many ancient 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. 1578. E.) See there some excellent Thoughts that follow immediately after.

9 The Paffage of this Philosopher, taken from his Book upon Law, is cited in the Digest, Lib. I. Tit. III. De legis. &c. Leg. II. 10 Jurisprudentia est dominantium acque humanarum Passuum notitia, justitiaeque institutio. Digest. Lib. I. Tit. I. De jüf. & jure. Leg. X. § 2. 11 De creat. 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 Covarvius, Red. in Cap. Peccatum, Part. II. § 10. Grotius.

12 De civi Institution. Lib. VIII. Cap. I. § 9. Edit. Owen. 13 De Natur. Dier. Lib. I. Cap. II. 14 De finibus. &c. &c. Lib. IV. Cap. V. 15 Philo the Jew, says, that Piety and Humanity, or Justice, proceeds from the same Quality of Mind. De Aorabam. Grotius. 16 He affirmed, 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. De divers. cum Epicuro, &c. Epist. XXVII. Grotius.

16 Lib. X. § 150, 151. 17 Politic. Lib. V. Cap. XI. p. 429. E.
in the sixth and ninth Book of his Odyssey, to savage and unjust Men, opposes those who have Sentiments of Religion. So 'justifi' from Trogus Pompeius commends the Justice of the antient 'Yew', as being mixt with Religion; as does also Strabo, saying, They were People who were really just and religious. If it is Fiety, says LaCantius, 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 be know 'justice, who is ignorant of the Source from whence it is derived? And the same Author elsewhere, 'justice properly belongs to Religion.

6. Now the Usefulness of Religion is even greater in that great Society of Mankind in general, than in any particular Civil Society; for in a Civil State it is partly supplied by the Laws, and the easy Execution of the Laws; whereas, on the contrary, in the universal Society of Mankind, the Execution of Right is very difficult, as being to be performed no other Way than by Force of Arms, and the Laws are very few, which themselves, moreover, derive their Force chiefly from the Fear of a Duty; from whence those who offend against the Law of Nations, are everywhere violent to the Law of GOD. It was not amiss therefore, that the Emperors asserted, that 'The Corruption of Religion was an Injury to all the World.'

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 that one GOD only. The second, that GOD is not only 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 'Assiaphenes 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 'Philos, It is a profane Thing to represent the Image of him that is invisible, by any Picture or Statue. Diodorus Siculus, speaking of Mofes, says, 'He made no Image of the Divinity, because he did not believe GOD to be of human Shape. The Jews, says Tacitus, 'conceive GOD in their Minds only, and him as but one; observing them profane who frame Images of Gods, out of perishable Matter, after the Likeness of Men. And Plutarch alludes 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 paffes in our Hearts, and at the same Time subm it to his Vengeance; whereby we likewise acknowledge his Justice and Power. In the

18 Quaest. in Religionem divinam, &c. Cod. Lib. I. Tit. V. De Harrestic, &c. Leg. IV. But the bare Inscripture of this Title shews, that Arcadius and Honorius extended their Maxim much farther than our Author designed to admit it; for what they called A Crime against Religion, consisted in not receiving all the Opinions of the Ecclesiastics, who had got Politition of the Minds of these Princes.

XLV. 1. The Philosopher Aniaphenes [and not Assiaphenes, as our Author calls him in his Exposition of the Decalogue] said, as Clement Alexanderinus 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. (Prooem. Cap. VI. p. 61. Edit. Oxon.) Which Thought Seneca seems to have borrowed, Hoc, qui ei tradatur, qui candidatur, &c. Natur. Quod. Lib. VII. Cap. XXX. Plutarch says, that it was injurious to the Divinity, to represent 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. Wch.) See also Dionysius Halicarnassensis, upon Numa's Conduct, in Regard to the corporal Representation 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. Spalatin. On the contrary, Dionysius Halicarnassensis endeavours to show, 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 Comum, p. 1032, E.) Grotius.
fourth is delivered the Origin of the whole World, from GOD its Author; 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, 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. And again, that in different Places different Notions, as to what is Virtue and Honesty, prevail, but in this of honouring GOD the Agreement is universal: Now the Truth of these speculative Notions, as we called them, may, no Doubt, be demonstrated by Arguments drawn from Nature, amongst which this is one of the strongest, That it is evident to Sense that some Things are made, or have a Beginning; now the Things that are made are 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: Which general Consent, in so great a Variety, both of Laws and Opinions about other Matters, sufficiently shows 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 Phaenecis, when he says, that The Perfection of a GOD is partly

vanitate, (Cap. V. Num. 9. Edit. Cellar.) Gro-

tius.

All these Passages, we fay, 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 expects himself thus: Quae confidunt — fari eft perfuadat, aut locum adquamat animis infaustis, quae vi minuunt animorum fervit, aut traditionem a primis hominibus, &c. quisque utrum-
vit ad folum fudendum fatis eft. However, in his Tractate 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 Reve-
lution 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 drop from the Pagans themselves, O Deus, f. deitatis, &c. See the Oeconomius Minucius Felix, Cap. XVIII. a. 90. Edit. Doz. with the Note of that judicious English Commentator. Besides, the Passage is ill applied here. For St. Cyprian's Design is to prove the Unity of the Godhead; whereas the present Question relates only to the Existence of a Divinity in general; at least, the Proof deduced from the Consent of Man-
kind, can be alleged no otherwise; for Mankind are far from being agreed in acknowledging one only Divinity.

born
Of the Rights of 

Book II.

born with us, as being gained by Arguments of our own Reason; and partly acquired by Tradition. 4 Plutarch calls the same, An ancient Opinion, which, for its Certainty, is equal to any Argument that can be brought or imagined, it being the common Foundation of Piety. And 5 Aristotle says, All Men are persuaded that there are Gods. 6 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 discounting 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 Efficiency 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 Redeemer of them that diligently seek him. Heb. xi. 6.

2. Thus 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 Epicurus, consists in having right Conceptions of the Gods, as of self-existant Beings, that superintend and dispose of all Things with Wisdom and Justice. 3 Ariosto 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 a happy, but also an affectionate, a careful, and a beneficent Being. Nor, as Laelius, 5 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.

3. Wherefore even out of mere Necessity, as it were, that these two Notions have for so many Ages been preserved 6 among all the People of the known World. And from hence Pomponius 7 ascribes Religion to the Law of Nations. And Socrates, in Xenophon, says, that To worship the Gods is a Law and Maxim that

7 Ἐνθισμένος θεολογός. Our Author does not say in what Discourse of that ancient 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 Amorist. p. 756. B. Vol. II. Edit. Wach. 9 De Caes. Lib. I. Cap. III. p. 434. E. Vol. I. Edit. Paris. 10 Lib. X. p. 857. Edit. Steph. XLVI. (x) Sunt enim philosophi, &c. De Nat. Deum. Lib. I. Cap. II. (Embrici. 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. Prius omnium cultus, &c. Epit. XCV. Grotius. 3 Var. Hist. Lib. II. Cap. XXXI. 4 De communis. mutat. adv. Stat. (p. 1075. E. Vol. II. Edit. Wach.) Seneca, Espít. CXVII. That there are Gods; amongst other Arguments that might be urged to prove it, we have 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 conformed to so much MADNESS, as to address Deities, who can neither hear their Prayers, nor give them any Assistance. Add to this, Plato, Protagore, and Lib. X. De Legis, and some fine Passages in Jamblicus, about the Beginning of his Tractate, concerning the Mysteries of the Egyptians, where he says, It is as natural for Man to know there is a GOD, as it is for a Horse to neigh. Gros. 6 Velati [Ius Gentium ait] erga Deum religio, &c. Diges. Lib. I. Dei Jus. & 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, Memarab. Sacrat. (Lib. IV. Cap. IV. § 19. Edit. Own.)
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every where prevails. Which Cicero, both in his first Book Of the Nature of the Gods, and in his second Of Invention, does also affect. And Dion of Prusia, 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 further he filies it, A powerful and eternal Perisophos, which at all Times, and in all Places, was begun, and is continued. Xenophon, in his Poets, says that both Greeks and Barbarians think and allow, that all Things, whether present or future, are known to the Gods.

4. It is my Judgment therefore, that those who first attempt to destroy these Notions, ought, on the Account of human Society in general, which they thus, without any just Grounds, injure, to be refrained, as in all well-governed Communities has been usual: It is what we read was practisfied towards Diagoras of Melos, and towards the 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, Do you punish me then for my Opinion No; but for your Inpiety: You may propose your Sentiments, but you must not be impious.

XLVII. 1. Other general Notions, as that There is but one GOD, that No Object of our Sight is GOD, not the World, not the Heavens, not the Sun, nor the Air; that The World is not eternal, nor its matter Compounded, 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 Reminisce 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 incontested Authority, was infallibly afood of the Truth of these Notions, tho' it utterly defected the Adoration of false Gods, did not sentence to Death every Offender in that Cafe, but such only whose Crime was attended with some particular Circumstance; as, for Instance, one who was the Ringleader and Chief in seducing others, Deut. xiii. 1, &c. 6, &c. or a City that began to serve Gods unknown before, Deut. xiii. 12, &c. or him who paid divine Honour to any of the Holt of Heaven, hereby cancelling the whole Law, and entirely relinquishing the Worship.

8 Our Author here cites Cicero's first Book, De Natur. Deor. and his second, De inventione. The first Passage is, Quam sit extranea, aut quid genus luminis, quod non habet fine deliria antiquitatis, quum Domum? 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, § 2. Note 5. See also the Tullian Quotations, Lib. I. Cap. XII.

9 Therefore those only who dogmatize can be lawfully punished. See what I have said upon Puffendorf's Law of Nature and Nations, B. III. Chap. IV. § 4. Note 1. To dslide the Lydian, having taken the City of Garamus by Siege, drowned all the Inhabitants, Obis absis. As Athiels, because they neither acknowledged nor worshipped any GOD. Nicolaus Damascenus, in Excerpt. Peirs. Grorbius.

If a People, tho' Athiels, lived morally well, their Athiels would be no Reason for exterminating them, whilt they did not endeavour to infect others with the bad Principles wherewith they are imbued. See above, Note 9.

11 The Athenians expelled them their City; or, as others say, that Philosopher having fled for Fear of being punished, they fet a Price upon his Head. See Aristophanes's Comedy of the Birds, with the Note of the Greek Scholar, and Valerius Maximus, Lib. I. Cap. 1. Num. 7. extern.

12 See Athen. Var. Hist. IX. 12. and the Commentators upon that Place.

13 Himerius, Atiq. de Epicur. Our Author has taken this Passage from the Bibliotheca of Photius. Cod. CCLXIII. p. 1083. Edit. Reithom. 1653.

XLVII. (1) The Passage of Deuteronomy does not speak of the Introduction of an idolatrous Worship, profaned by all the Inhabitants, but of the Toleration of that Worship, profaned by some particular Persons, who confected others with Impunity. See Mr. Le Clerc upon that Place.

Philos., upon the Dialogus, speaking of such Persons, cie & i. 2, aequores barbaros, &c. But there are some whose Impiety goes further still, who do not so much as make an Equality between GOD and his Works, but give all the Honour to those alone; so far from letting him have a Share of it, that they do not worship that Universal Being a bare Memorial, the Writings are unworthy of him whom alone they ought to remember, industriously entitling a voluntary Forgetfulness. So Maimonides expounds the Passage in Deuteronomy, Direct. III. 41. Grorbius.

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 εν, with an Accusative, when a Companion is made;
Of the Rights of the true GOD, 

Deut. xvii. 2. (which by St. Paul is interpreted to be, Worshipping the Creature, and not the Creator: For as, 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 Elyas; 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, 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 immovably prejudiced in Favour of some Tenets, before they are in a Capacity of distinguishing betwixt Truth and Falshood.

4. As then they are excusable, and certainly do not deserve human Punishment, who having received no revealed Law, worship the Powers and Qualities of the Stars, or other natural Beings, or Spirits, either in Images, Animals, or any other Objects, or even the departed Souls of Men eminent for their Virtues, and useful in their Generations, or other spiritual Substances, especially if they were not themselves the Inventors of this Worship, and therefore do not forfake the Service of the true GOD: So, on the other Hand, these are not to be looked upon as People pardenably ignorant and mistaken, but as impious and pervertly wicked, who pay divineHonours to evil Spirits under the Notion of such, to the Names of Vices, or to Men infamous for flagitious Lives.

5. Of the fame Stamp are they likewise, who honour their false Deities with human Sacrifices; to a Difuse of this detestable Rite the Carthaginians werecompelled by Darius the Perfan King, and Gelo, King of Syracufe, which Action of theirs gained them much Credit and Applause. We have an Account in Plutarch, that the Romans thought to have punished some barbarous People for...
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making Victims of Men, but when, to extenuate their Guilt, they urged the Antiquity of this Custom, they were exempted from Punishment, but briefly 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 fland 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 this Doctrine cannot so easily gain Belief, and procure Mens Assent upon the first Promulgation of it, without the inward Affiance 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 denieth 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, which forbids the Use of compellent Means, in gaining Converts to Christianity, for On whom he will have Mercy he will have Mercy; and whom he will be will be hardeneth. It being the Practice of the inspired Writers to ascribe those Effects, whereas of Human Reason cannot discover the Cause, to the Divine Will.

2. The second Thing to be considered is, that it was not the Intention of the Author of Christianity, that any should be 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 Senic Tertullian is doublet in the Right, when he says, that The Christian Religion avenges not it self by the Help of the Sword. In an old Book, entitled The Constitutions of Clement, 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 final Examination in the World to come. To the same Purpose St. Ambrose says, That our LORD, using no Force, but allowing every Man to be his own Master,

XLVIII. (1) Besides the Prejudices of Education, and the Attachment of All People to the Principles of Religion they have once imbibed.

2. Diق dicitur principalis jucunda symphonia nee minima discrimini et necessario sineret. Cui enim vult Deus, minuerer, & quern vult, indurat. In your Canon. Diffinit. 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 Tertullian Historian says this, upon the Occasion of his Countrymen, who were for compelling some great Lords, Subjects of the King of Tagrioth, to be circumcised. Vit. Joseph. p. 1007, C.

3 Servius the Grammarian has observed, that whenever the Reason of an Event does not appear, and no Judgment can be formed of it, it has been customary to say, It pleased the Gods. [Vulgar Superstition] Ur ipse est Nostissinum, Jannem, nostam, &c. Quotquisque autem ratio, vel juidicum non adharet, sic visum, interpositum: Ur Hora, iest omium Feneri, &c. In Ennius III. 2. Donatus makes the same Remark, Quod si quid graecus Volebat DEUS, Horumque re- pentinis impulsi Statu nata mirate prescribunt, DEO adhuc soleat. Ur, Defendo, ac ducente DEO, flammam enter & hostes Expedition. Et: Hinc me digressum velris DEUS adpelo oris. E* Sallustius: Ut tanta repente manifesta non fine DEO videreetur. In Eunuch. Terent. Att. V. Scen. ii. (v. 16.) The Rabbi Abaranangel says the Word SHI is taken alo in the same Sense. Grotius.

4. This Subject is treated by Gregory Nazianzen, in his Orations, entitled, Canon affectus est de Patre: And by Bede, Lib. xxvii. Isidore, speaking of King Silifatius, Whom, 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 transmitted this Passa in his Histor. II. 13. The later Kings of Spain, are, on this Account blamed, by Goeorus and Mariana. See the latter, XXVI. 14. XXVII. 5. Gro- tius.

5. Leo New non sit vindicat altere gloriae. I have already observed in a Note upon Vol. iii. of Tholotson's Sermons, p. 13. that our Author, citing to Memory, had in View the following Words, Nam verus Leo ullois gloria j e vindicabit, & sequam pro odio erubescere, & viliumdom injuriae retri- buere nobis. Nova autem est, ejusdem insigne dignitatem. Adver. Judaeos, Cap. iii.*

6. C. J."E. An- 

every one the Liberties 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 bis Apologies. 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. Procipius, in his secret History, informs us, that 11 the Proceedings of Justinian were by wise Men censured, because in profelyting the Samaritans to Christianity, he made use of external Force and Menaces. And adds, that from thence several Inconveniences arose, the Particulars of which may be seen in his Narrative.

XLIX. War may justly be made against them who profess Christianity, only for their being 12.

8 St. Cyprian, Epif. IV. Turning to his Apologies, he saith, Will ye also go away? Observe the Method of the Latter, which leaving every Man to his own Liberty, and at his own Discretion, gives him the Choice of Life and Death, and fo makes himself the Author of his own Fate. Grotius.

9 'Eiwm alw- Me ei omvai; 'Eldai evpaqpar, &c. Al. III.

10 To St. Cyprian, De idolorum vanitate, with an Eye to this Passage, saith, But the Displeases, by the Advice and Order of their Lord and Master, directing 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 bend the Blind and Ignorant to the Knowledge of the Truth. But left this should be too flight a Proof of their Fidelity, and too nice and tender a Conception of CHRIST, Torments, Crosses, and a thousand other Punishments, tempers and try their Strength and Constancy, Cap. VII. Num. 66. Edit. Celler. Grotius.


XLIX. (1.) Some sacraments now in such esteem, &c. Lib. X. Epif. XVII. Num. 7. Edit. Celler.

2 He says this in Regard to George, Bishop of Alexandria, a turbulent Man, and a great Accuser, Prosfhimte gouo oibwv, que nihil mihi jutum fuerit & bene, ad delata sua civitatem profecto defecisset. (Lib. XXII. Cap. XI. p. 355. Edit. Valsh. Gr.) The fame Historian adds Christianity, a plain and sincere Religion. Christianam Religionem absolvens & simplicem, nulli superflius cordis fondendis (Con-
War and Peace.

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gaius, of the Jewish Synagogues, is more truly and properly applicable to the Christian Congregations, That they were not Meetings for Revellings, or leisured Cabals, but pure Seminaries of Virtue.

2. They, therefore, who pervert Christians, as such, do make themselves justly obnoxious to Punishment. This is the Opinion of Thomas Aquinas. (Summ. Theol. ii. 2. Quæst. 103.) It was for this Reason that Grotius commenced a War against Licinius, and other Emperors, against the Persecutors; which Wars however relate rather to an innocent self Defence, of which we shall treat hereafter, than to a Punishment properly so called.

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 primitive Christians, they are undoubtedly very unjust; which is evident, both from what has been already said, and from the standing Practice of the Jews, who, tho' their Law had for its Barrier temporal Punishments, did not inflict any upon the Sadducees, for denying the Resurrection of the Dead, because (tho' infallibly true) it was not directly and explicitly asserted in their Law; but obiously, 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 Galen, more incurable than a Leprozy. Very much to this Purposa says Origën, ἡμάρτησαν γὰς ἐσυναγόμενοι, &c. That a Man with more Ease can remove any Habit, than his holy Laws, or abandon Thoughts 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. Augustine's Definition, An Heretick is one who, out of a Desire of any temporal Interests, chiefly of Glory, and of being reputed the Head of a Sect, is the Author, or Follower, of new and false Opinions. Saloian's Judgment of the Arians is thus expressed, They are Hereticks, but not unwittingly: With Respect to us they are Hereticks, but not with Respect to themselves; for so unquestionably do

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 Conflantine, Vol. III. init.) St. Augustine says, that if Maximian, Bishop of Vigen 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; Absit inimica politis jure, &c. Ad Bonilic. Epif. L. These Words are inserted in the Canon Law, Cauf. XXIII. Quid. III. Cap. ii. Grotius.

L. (1) Many Books of different Authors compiled together towards the Close of the Fift, and in the present Age, are to be seen upon Toleration; in which Persecutions are entirely overthrown, as well by direct Proofs of the greatest Evidence, as by indirect Arguments. All the World know these Works, which were published in several Languages, especially French and English. To these may be added the Observations of Matthias Beyer, published at Strafburg in 1669. Obs. XV.

2 Dr. Natura. Facult. Lib. i.

3 St. Chrysostom also says, that there is nothing so difficult as to resolve to change, in Point of Religion. In lib. ad Corinth. Hom. ii. Grotius.

4 Quaquiesum harmonicius est, ut maxis fort opinis, &c. Cap. i. These Words are inserted in the

Cannon Law, Cauf. XXIV. Quid. III. (Cap. XXVIII.) He afterwards distinguishes between a Heretick, and a Perfon that suffers himself to be misled by the Arguments of a Heretick. Ille autem, qui hujusmodi hominis credit, hunc ejus imaginis quadam certavit ut pisatis illius. See the same Father's Letter, CLXX. cited in the following Canonos. In Justinius's Code Hereby is called A mad Obligancy. Nihil Harretici sunt, nulla ad eodem animi obstinatis, dum se sequestrare, &c. Lib. i. Tit. i. De nemina Triumatis, &c. Leg. ii. prince. Grotius.

But this Obligancy is what Men can form no certain Judgment of, and those who are themselves in an Error, may look upon the Paradoxes of Truth as obfinate Perjons; as the Authors I have mentioned in Note i. of this Paragraph observe, and prove at large.

5 The Author of the Answers to the Orthodox, Quid. IV. says, &c. It is evident, that either the Ambition or jealously of the Bracthers gave Birth to all the Heresies in the World, St. Chrysostom, upon Gal. v. 'F, &c. For Ambition is the Mother of Heresy. Grotius.

they think themselves Orthodox, that they load us with the infamous Imputations of being Hereticks: What therefore they are to us, that we do seem to them: We are well assured, that their Conceptions of the Divine Generation are too mean; insomuch as they asser that the Son to be subjected 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, 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, is a Secret to all but the Judge himself; but for the present, it is my Opinion that GOD does patiently bear with them, because he sees, that the Tenets they falsify, yet do they proceed from a pious Zeal.

4. As to the Manichean’s let us hear St. Austin, who himself was for a considerable Time tainted with their Heresy. 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 Circumpection Errors are avoided. Let them exert their Rage against you, who know not how rare and difficult it is to discern the Phantoms of a gross Imagination, by the Calm of a pious Judgment. Let them exert their Rage, who are not capable 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 freed 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 Mindly maintained, and madly perfidied in these very Errors my self.

5. St. Athanasius, in his Epistle to the Hermits, sharply exclaims against the Arians, because they were the first who introduced the Use of the secular Power against the

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7 Agathias, in the first Book of his Histories, relating the ridiculous Superstitions of the Almaines, subjoins Exeversum cap., &c. But indeed whatever they are who offend against the Truth, they deserve rather more than our Hatred, and are the more entitled to our Pardon: For they do not willingly deceive and flumine; but only when their Judgments are deceived in their Pursuit of GOD, whatever they have once received, they are obstinately bent to retain. (Cap. V.) Grothius.

8 This St. Chrysostom observes also. Can any one tell, says he, how the Perfon 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 if the Judgments of GOD are unsearchable and his Ways past finding out, Homil. contra Anomaumizantium. Grothius.

9 Contra Epift. Manichei, Quatt vocant fundamenti, Cap. II. & III. p. 78, 79. Pat. VI. Edit. Bofhi. Fine Sayings, if this Father had not believed 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 let us horrid an Example. See the account in Epist. Dr. Vit. Conphant, Lib. I. Cap. V. - XXXVIII. Socrates, Hift. Ecclef. Lib. IV. Cap. XXIX. Procopius, Varolotic. Lib. I. where he speaks of Honorius (or Honorius, Cap. VIII.) and Godius. Lib. I. (Cap. XIII.) concerning Amandus; as also in Victor, Vicent. St. Epiphanius accuses the Demi-Arians of persecuting those who professed and teach the Truth; and of endeavouring to convert them, not by Persuasion, but by Emmony, Violence, and the Sword; that is, add he, they have not ruined one City or Country, but many. Gregory, Bishop of Rome, says to the Bishop of Conphant, 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. None in manibus sua praecocita, que usurbaris exigit. Hec. Grothius.

The Arians were, without Doubt, highly in the Wrong to persect; but as we ought to do Justice to all the World, our Author should not have reproached them, as having been the first who desecrated Christianity by a Conclaud to oppose 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 Arians, Notes A. G. that The Orthodox had been the Agressors; for they had improved the secular Arm of Conphantine against Arianism, before the Arians had proceeded to any violent Measires. See what follows. And Eusebius, in the Life of Conphant, Lib. III. Cap. LXIV. &c. Socrates, Hift. Ecclef. Lib. I. Cap. IX. in Conphant’s Letter to the Bishops and People. Our Author quotes this Life improperly, that has nothing in it of the Persecuations used by the Arians, against those of the Opposite Party. He had probably in his Thoughts what Sosomen
againt Dillenets, 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, means that this Heresy is neither pious nor religious. Spoken, very probably, in Allusion to that of St. Paul, 2 Gal. iv. 29. As then he that was born of the Flesh, perfected 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 Constantinians. And we have an Account of 12 some Bishops in the antient Gent., who incurred the Censure of the Church for procuring the Execution of the Præsiliæans; and in the East a Council was centred, for confenting to the Burning of Bогоniius. It was a wise Saying of Plato, that 13 14 The only Punishment of one 15 under an Error, is to be better informed.

Sopomen relates, Hift. Ecclef. Lib. II. Cap. XXXV. 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 Interrogation of the Arians, against the Defenders of the Consstitutionality of the Word. For the Reft, our Author, in his Notes upon the Gospels, (in Matthew, xxiii. 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 Constanter, 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 Convulsing the World every Day with their Controversies. No quod impurgi in consuetudine arbitrariorum, sicut quod Epicopii laubrem quotidiana dispensationis libenter fecerunt, &c. 

11 He adds, that it is the Property of Priest to use the Methods of Persecution, not of Compulsion. Episcopal Laws, Vol. I. p. 183. A Nose 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 Halfe; to 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 Heretics, were not to be punished in any Manner whatsoever. But having many Contests afterwards to maintain against the Donatists, a pretty obstinate Sect, he changed his Sentiments, and approved of such Punishments as left the Criminal Time to repent; perfectly otherwise to condemn capital Punishment, which he often says in Regard to those People. See the Treatise of Mark Antonius de Domini, De Repub. Ecclesi. Lib. VII. Cap. VIII. in which he has collected several other Passages of the Fathers upon this Subject.
Of the Rights of

Book II.

LI. 1. But to punish thofe, whole Deportion to the Objects which they esteem as Gods, is ireverent and irreligious, is more reaonable and juft; and this, in Conjunction with others, was alligned a Caufe of the Peloponnesian War between the Athenians and Lacedemonians, and of Philip King of Macedon's War with the Ptolemies, whose Sacrilege Jufh in repreffes to be fuch, that To have it expiated, the whole World fhould have united their Forces. St. Jerom, upon Daniel, Chap. v. fays, 3 As long as the Veffels were kept in the Idol Temple at Babylon the LORD was not wrath, (for thofe Veffels they looked upon as dedicated to GOD, and applied them accordingly to Ufs, in their miftaken Judgment, the left and moft facred) but immediately upon their polluting them with ordinary Ufes, their Sacrilege was attended with a fevere Punifhment. And St. Auftin thinks that GOD gave the Romans fuch great Dominions, 4 becaufe they had a Zeal for their Religion, tho' a falle one, and becaufe (as Laftanius fays) 5 they applied themfelves to the principal Duty of Man, if not by a true Practice, at leaft with a good Intention.

2. We have already taken Notice, 6 that whatever GOD we invoke in our Oaths, the Violation of them will be punished by the only true GOD, 7 Becaufe, as Seneca fays, we believe that we affront GOD, which Opinion of ours makes us juftly liable to Punifhment. In this Sence I take too that other Paffage of Seneca, 8 The Violators of Religion are in different Places differently punished, but no fubje& are fuffered to go unpunifhed. And it is thus alfo that I understand Plato, 9 when he fays for inflicting Death upon all who defpire Religion.

3. (See fome fine Paffages upon this Subje& in B. V. and VI. of St. Cyrh, againft the Emperor Julian. The Amphiioxus, at the Perfonage of Salam, made War upon the Cithareus, for having entered by Force into the Temple of Delphi, as Plutarch informs us in the Life of Salam, (p. 83. Vol. I. Edit. Web.) So thofe who fet themfelves up for Prophets, and are not fuch, may be juftly punished. See Agathanias, Lib. V. (where he fpeaks of fuch People that rofe up at Eph- anxian, Cap. III.)

4. Lib. VIII. Cap. II. Num. 6.


6. Our Author does not fay from whence he took this; and perhaps it is no where to be found, tho' a learned German, Chriftopher Adam Rupert, advances the fame Thing in his Observation upon Valerius Maximi, Lib. I. Cap. I. p. 19. without Doubt upon our Author's Author- ity. I very much fuppofe, that he has miftaken the Name of the Father, or if that Father has faid any Thing like it, he is not here entirely confident in his Principals: For in his Treatise De Civitate Divi, 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 Ac- tachment to their Religion, tho' falle, but becaufe of their civil Virtues. See alfo Lib. IV. Cap. XII. I find in the Notes of Temar, a Paffage of Litt. V. to Mercurialis, wherein that Compiler discovers the Thought abfcribed by our Author to St. Augustin; but it is juft the reverse, and I fhall give the Paffage, in order to prove at the fame Time the Truth of my Observation, and the Want of Judgment which Temar throws in this Place, as he does every where elfe. Ut quandum

inde peregimus, feramus eos, corrigere non vale- mus, qui, vitiss impunitis, volunt fane Repu- publish, quam primi Romani confituentur, aequali- que virtutibus: & fi non habueris veram pietatem urae DEUM verum, qua illis uti in externam civitatem poffis falarii religionem eductiones tarnen quandam sui generis prorbatem, quae poffis. TERRAE CITATIT constituentes, AUGENDE, CONSERVANDAQUE foffere. DE- US enim fe fencinat in opulentissimis & proceris Imperio Romanorum, QUANTUM VALERENT CIVILES, ETIAM SINE VERA RELIGIONE VIR- TUTES, &c. This agrees very well with what the antient Doctor fays in the Places of his other Work, which I have quoted.


6. Injuiriam sacrifciui DEO, &c. De benefic. Lib. VII. Cap. VII. The Philofopher does not fpeak of thofe who affront fable Divinities; but his Menning is, as appears by the whole Series of the Difcourfe, that tho' by committing a Sacrilege, one does no Injury in Reality to the Divinity, whom he affo- pies a true GOD, becaufe he is out of the Reach of all Harm; yet he who commits it de- ferves to be punished, becaufe he believes he injures the Divinity, and others consider his Action on that Foot. Our Author, however, has twice al- leged this Paffage, thus misapplied, in his Notes upon The Wisdom of Solomon, ver. 31. where, upon the Word Opiunis, he fays, addc, aut pro- fijfe.

7. Et homicidii, veneficii, &c. Ibid. Lib. III. Cap. VI.

CHAP.
Chap. XXI.

Of the Communication of Punishments.

I. 1. Our Enquiry concerning the Communication of Punishments, relates either to those who are Accomplices in the Crime, or to others who are not. Accomplices in a Crime are not liable to properly to be punished for other Mens Faults, as their own. Who they are then, is easily learnt from what has been already 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 content it to it, when their Consent is necessary for committing it; who afford their Assistance; who shelter the Author of the Action, or are in any other Respect accessory to it, either in advising, commending, or encouraging the Fact; they prevent it not, when


2. Tertullian, De Superstitione Carnis, Chap. XVI. For they will say that their Benefactors and Companions are at their Liberty, either of helping and assisting with them or not, that it is as their own Choice, and in their own Power, either to be or the other, being no less than other People endued with Freedom of Will, and that therefore, since they voluntarily concurred with them, as are criminal as the Authors themselves. Grotius.

3. At the Death of St. Stephen, the Soul kept only the Clouds of those who floned that holy Man, he floned him by their Hands; as St. Austin observes. Salmus manubus annuum ladebolat. Serm. V. De Santeis. Cap. IV. See something like this, Serm. I. in idem Argument. Cap. III. and Serm. XIV. Grotius.

The Confect of Soul was not necessary; they would have floned St. Stephen without him. So that this Example relates to another Class, or to the Cafe of those, who, converting little or nothing to the actual Production of a Crime, are united in Will with those who commit it, and incline to aiffist in it very much, it necessary.

4. As when a Man makes Money out of one's Pockets, that another may bezeal it; or flops 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; Inter- dum Pariti tenetur, qui ipse furtum suum fecit. Lib. IV. Tit. I. De obligationibus, qua ex delites non furtur. § 11. See the Editt of Theodoric, Cap. CXX. Grotius.

5. Hieronym. super panoplias, Cap. XXIX. Vol. VII. p. 53. C. Edit. Probon. 1537. Not only the Thief, but the Peron who, being privy to the Thief, conceals it from the Party robbed, is guilty. Chrysostom. De Statutis, Orat. XIV. 5 § 5 of Steeven- kock, &c. Not only those who forswear themselves, but those who are acquainted with the Perjury, and conceal it, are criminal. Grotius.


What is here quoted from Aristotle, that Philosopher cites as from the Orator Lædonamus, 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 Poethical, Cap. XVIII. and it is necessary to remark further, that in the Pagis of the Institutes to which he refers, the bare Advice is not considered as a Thing that renders a Person an Accomplice in a Crime; 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 nullum open ad furtum factendum adhibeas, fed tantum consequi delict, argu horstatur, & ad furtum factendum, non teneant fastui. This is clear, and I shall not enter into the Diffuse of Interpreters upon the Scene of this Form, Ores conjugis, or Ope aut consefort. A Diffuse which arises from the Ambiguity of the Word Confide, and the different Opinions of the Sects of ancient Civilians upon this Subject.

7. According to St. Chrysostom, he who praiseth a bad Action, is worse than him who com- mits it: In Cap. I. Ad Roman. circa fin. By the Laws of the ancient Romans, he, who being praiseth, encourages a Person in doing ill, is destined to commit the Crime himself, Lib. I. Tit. IX. § 25. See the Paffages cited hereafter from Philo and Josephus in the Note upon § 17. Grotius.


8. Chrysostom I. Adversus Judæos, Orat. I. 5 Z
when under a strict Obligation of so doing, or who do not aid the Sufferer, when invested with a proper Power and Authority thereunto; who did dissemble not, when in Duty they stand bound to do it; and who they then disdole 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. Augustin very aptly distinguishes between the peculiar Faults of Individuals, and publick Faults committed by the Concurrence of a Multitude. Hence that Condition to frequent in Treaties 1 If the Violation was a publick Ad. The Locrini in Livy 2 tell the Roman Senate that the Publick was not any ways concerned in their Revolt. And the same Author 3 reports that Zeno in his J ustification of the Magnesians did with Tears beseech T. Quintius, and the other Embassadors, not to ascribe to a whole City the Follies of one particular Person, but that every Man should at his own Expense pay for his Refiduez Extravagance. And the Rhodians 4 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 Governors the Accomplices in a Crime, there are two of very frequent Use, and which require to be particularly considered, viz. Tolerance and Protection. As to the first we thus determine, that a Man who is privy to a Fraud 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. Cicero in his Oration against Piso says, that it is much the same Thing, especially in a Conspire, whether by destructive Laws and siditious Species he disturbs the publick Peace himself, or connives at such a Practice in others. Thus 5 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 Fraud ourselves, or not to hinder others to be so (says Agapetus to Tustinius) are equally criminal. And Arnobius, 6 The Sufferance of an Offence makes the Offender more forward and audacious. Thus Sabatini; 7 He who prevents not an ill Action, when it is in his Power, injures the doing of it; and Saint Augustin, Not to obstruct and oppose a Thing, is an Argument of our assisting to it.

3. So by the Roman Laws, 8 he who kept not his Slave from being prostituted, when he might, was taken for the Profitutor himself. And if a Slave with his Master's Knowledge commits Murder, 9 the Master is wholly accountable for it, be-
caused 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 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 affent 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 flight and disregard their Master's Authority, 10 are not imputable to their Masters, because in that Case they could not prevent what was done by their Slaves; nor those of Children 11 to their Parents; if not under their Direction and Government, because Knowledge without Authority will not amount to Guilt; so, on the other Hand, are they not chargeable with any Crimes, tho' they have it in their Power, and could otherwise have hindered them, 12 if they are not privy to them. For to make a Man accountable for another's Fault, there ought to be a Concurrence of Knowledge and Permission. All which will with respect to Princes and their Subjects hold equally good, because it is founded upon natural Equity.

5. And therefore Proculus thinks that of Heofid not unreaonable.

13 

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 reft, were dependent on the general Affembly, it was no Hardship that

15 The People suffer, when the Prince offends.

Creech.
Of the Rights of the Kings

Because it was their Business to have compelled him to restore the Priest his Daughter. So their Navy is afterwards fail to be burnt by Pallas, 

17 For the Fault of one offending Foe. 

Dryden.

Which Affair Ovid, Metam. XIV. expresseth thus:

The Maid be stole, yet what himself alone Denov'd to bear was felt by all the Rest;

Because they did not hinder the Rape of the Virgin Priest's. And we have an Account in 15 Livy, that some Lauretine Embassadors being been ill used by Persons nearly related to King Tattus, demanded of him Satisfaction for this Infringement of the Law of Nations, but by the Interest his Relations had in him, together with their Intricacies, he was byassed in their Favour, for which he brought upon himself the Punishment that was due to them. To this what Salavian says of Kings is very properly applicable, that 19 the Supreme Power, which is able to prevent the Commisions of the greatest Villanies, does by Toleration manifest its Approbation of them. And in Thucyldides we read that ơ δανάμας, &c. He who can prevent a Crime, and does not, is more in Fault than the Actor. In Livy we find that the 21 Veientes and Latins excused themselves, by urging that it was without their Privity, that the Romans Enemies had received Affiliation from their Subjects. But the Excuse of 1 Testa the Ilyrian Queen would not serve, when she endeavoured to vindicate herself by afferting, that not by her, but her Subjects the Piracy was committed; because tho' acquainted with their Practice, she did not prohibit them. And the 2 Scyrians were long since condemned by the AmphiCyones, for permitting some of their People to play the Pyrates.

6. Now

16 According to St. Cyprian in his fifth Book

Adversus Julianum. Grotius.

The Place which our Author means is in p. 175. Ebd. Spansibem. But I do not find, that that Father gives such an Explanation. He makes use of this Example only to resort upon Julianus, the Apostle, the Reproch he had cast upon the true GOD, of being subject to great Wrath.

17 — Pellefisus corurred clamor

Argogia, atque ipso patuit falmerere penta

Unius s se navam, & furias aequis Oetii. 


Narcolichus heros, a virgine, virginis rapide,

Quin moritit fulus, pandam dignatur in annos. 

Ovid. Metam. Lib. XIV. (Ver. 468.)

Euripides in his Tragedy, introduces Neptune speaking thus, Ver. 69. & seq. 

Od' 6. Αἰας ἔδωκε εὐαρξίαν θεῷ,

I know it, when Ayes for'd Caiandria.

And Minerva replying,

Κ' νῦν ᾿Αἰας ἔδωκε εὐαρξίαν θεῷ,

I know it, when Ayes for'd Caiandria.

The Greeks Respectles from his Crime

Nor made him suffer for it.

And upon the same Principle St. Chrysostom involves all the People of Athens in the Guilt of the Sedition, wherein the Statues of the Emperor and the Imperial Family were thrown down, in his first Oration De Statuâ : οἶδα τὸ σάξισμα, &c. Few were directly concerned in the Crime, but the Charge is common and universal. We are all upon their Accounts under fit Approbations, and expect ourselves every Moment to be punished for what they have dared to do: Whereas, had we expel'd 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' ἄνδρας, &c. For this very Reason, says he, had ye spared, had ye severely punished, because ye were not there, because ye did not hinder them, because ye did not restrain those furious Wrathes, we hazard ourselves 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 reproved. Grotius.

18 Περὶ αἰτίαν αἰνεῖν, &c. Lib. I. Cap. XIV. 

Num. I. 1. 2. 

19 Patfias quisque magna & potentissima, &c. De Gubernat. Dei, Lib. VII. p. 226. And Philo in Placum, εἰς τὸ ἐπιχαίρον. &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, τὸσι κυρανων, &c. All that a private Person has to do, is to find 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 Syed of Pylaci, inferred among the Capucilaries of Charles the Bald, we have the following Sentence, Who neglects, to reform what he might reform, does at the same Time, give his Consent to the Fact; and therefore, or Doubt of it, makes himself an Acomplice in the Crime. See Niger Chonizae, Lib. II. De Andronicus. Grotius.

20 Where he speaks of those who suffer their Allies to be enlavi'd by some other State, tho' in their Power to prevent it, Lib. I. Cap. LIX. 

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 Pylaci against the Romans; Rejunction

frequent;
War and Peace.

6. Now it is rational to conclude, that one must of Necessity know Things that are publickly and frequently transacted: for as Dion Phraenesis says, the Practice of considerable Numbers no Man can plead Ignorance of. Polybius smartly reprehends the Ἀφτιανοι, 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.

But in the Ventu IV. A in the States is brought by the Lacedemonians to make War upon the Ἐφίξιον, because they did not deliver up a Person who had slain several Lacedemonians; and at another Time, for protecting from Punishment those who had defouled some Virgins sent to Sacrifice. And Catō was for having ἔφασσεν furrended to the Germans for the unjust War he had frequent; e.e. Cap. X. Num. 7. But I find not- thing of this Kind that relates to the Vexistes 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, th'o' his having read Alberic Gentilis hastily, from whom he has taken these Examples and some others, alluded by him in this Chapter; as appears also from the Manner in which he quotes the Palilage of Law: For that Civilian in Chap. XXI. § 1. of his Tretise, De Jure Belli, puts also in the Margin, Liv. Lib. I. VI. In the Paillage of the first Book Livy says, that the Ἀρμέαν 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 Vexistes 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 Reasons I have mentioned: Publilia usitatius, &c. Cap. XXX. Num. 7. See the Note of Mr. Le Clerc, and the Animadvertents Historicas of the late Mr. Perizonius, upon the Truce there spoken of, Cap. IV. p. 170, & seq. 22 Orat. Rhodœ. 23 Lib. IV. Cap. XXVII.

III. And if they be of the Kingdom of Hostility, they are if they allow them to be of Hu-

III. 1. Having thus discoursed this Question, proceed we now, to shew how Punishment is contracted by Protection from Punishment: By the Law of Nature, as we observed before, every particular Perfon, if himself not chargeable with any such Crime, has the Privilege of inflicting Punishment; but since the Establishment of States and Communities, it is judged reasonable to transfer this Right to the respective States or their Sovereigns, according to whose Discretion all Faults, as do properly concern them, are to be punished or remitted.

2. But the Right of punishing Offences against human Society is not to exclusively theirs, but that other publick Bodies, or their Governors have a Right to procure the Punishment of them in the same Manner as the Laws of a particular State allow 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 Governor of the State, where the Delinquent is, ought to bring no Obstacle to the Right which belongs to the other Power.

IV. 1. But since for one State to admit within its Territories another foreign Power upon the Score of exacting Punishment is never practised, nor indeed convenient, it seems reasonable, that at State the convicted Offender lives or has taken Shelter, should, upon Application being made to it, either punish the demand Perfon according to his Demerits, or else deliver him up to be treated at the Discretion of the injured Party. This is that delivering up fo commonly to be met with in History.

2. Thus did the Ἰσραηλῖται demand of the Benjamites the Delivery of those flagitious Wretches mentioned in the twentieth of Judges; and the Philisii of the Hebrews that Ἀσσύριος should be given them up, Judges xv. So did the Lacedemonians make War upon the Ἐφίξιον, because they did not deliver up a Person who had slain several Lacedemonians; and at another Time, for protecting from Punishment those who had defouled some Virgins sent to Sacrifice. And Catō was for having ἔφασσεν furrended to the Germans for the unjust War he had expressed in the twenty-fourth Book of Livy.
brought upon them. The Gauls likewise insulted upon having the Fabii delivered to them, because they had invaded them. Thus did the Romans demand of the Hermicians some who had laid waste their Fields; and of the Carthaginians' Amilcar, not the famous General, but one who moved the Gauls to Rebellion, and afterwards Hannibal; and of Bocchus they required jugurtha in these Words, according to Sallust, That if you may save 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 Embassadors, and them likewise who had used the Embassadors of Apollonia in the same Manner. The Achaeans demanded, that the Lacedemonians should deliver to them those who had laid Siege to Lawrence, adding that their Refusal would be by them construed a Violation of their Treaty. The Athenians issued out a Proclamation importing, that whoever had confin'd against Philip, and betok'd himself to Athens for a Sanctuary, should be immediately delivered up; and thus did the Boecians demand of the Hippodentes the 1 Murderers of Phocis.

3. But we are to understand here, that a Prince or People is not absolutely and strictly obliged to deliver up an Offender, but only, as we said before, must either punish him or deliver him up. Thus we read, that the Eleans made War on the Lacedemonians, because they would take no Notice of those who had injured them, that is, would neither inflict conuding Punishment nor deliver them up. For the Obligation is either to one or the other.

4. Sometimes indeed the Perfons demanding are indulged the 6 Choice in Order to give them a more ample Satisfaction. We find in Livy, that the Carvites signify to the Romans, That the Tarquinius, tho' they had asked no more than the Liberty of pillage, had yet entered their Country in Spite of them with a Body of Troops, and had taken by Force some of their Peasants to aff light them in the Pillage, which was laid to their Charge; but that they were ready, if they pleased, either to deliver them up, or to punish them themselves.

5. In a Clause of the second Treaty betwixt the Romans and the Carthaginians, which we find in Polybius, there is a Passage very ill pointed, and misunderstood by those who published that Historian: If that (what that is, by reason of a Gap in the preceding Words, we cannot tell) be not effected, then let every Man by his own private Authority pursue his Right, which if he then cannot obtain (that is, if Justice be not done him) the State shall be reputed guilty of the Crime. 6 Aefchines in his Defence to the Accusation of Mifconduct in his Embassy preferred against him by

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1 Of the Rights of Men.

2 Phutarch in
Camillus, p. 136. 137.
Appian
6. History
Legant, 9. Lib. 5. 36.
2 Liv. xxxi.

3 Liv. xxxviii.
4 V identifier.
5 vi. 6. Num. 5.
7 Num. 2.
8 Plutarch.

9 See the Treaties between England and Denmark, in if.

10 P. Portier de Mari.

11 De domibus.
Chap. XXI. War and Peace.

Demosthenes afferts, 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 Declaration says, that in his Judgment they who afford Shelter and Sanctuary to Defectors and Rebels, are also made criminal as the Defectors 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 whoe have been injurious to one State, may fly too and find Refuge in another.

7. This Discourse of Persons up supposeth to us another Question. Whether they who have been delivered up by one State, and not received by the other, do still continue Subjects of the former. Publius Mutilus Seculola was for the Negative, because such a Surrender is in some Manner a Maniment, just as if they had been solemnly interdicted the use of Fire and Water: But Brutus, and after him Cicero held the contrary; whom I think in the right, tho' not properly for the Reason ascribed by Cicero; 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 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 Perfon 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 Curfions) to be, at the Discretion of his own State, either punished or not punished by them, as there are severall 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 whole they were before. But if the Perfon, whose Delivery was accepted of, and who was actually fized on, shall chance afterwards to return, he is not then to be deemed a natural Subject, unless by an after-Act this Privilege be conferred upon him; in which Sense 16 Modestinus's Decision about a Perfon given up is certainly very true.

8. What

10 Bardas, sumamed the Cruel, having taken Refuge with Chares, King of Perfar, the Emperor Julian Porphyrogennitus sent to desire Chares, not to protect a Rebel, who had attempted to de-throne his lawful Sovereign; and to consider, that in doing so, he would set an Example, which might prove of ill Consequence to himself: Zonar. IV. 4. in Beloph. Porphyrogemnii. See what Lanius Chales, a Duke the fays of some Curfions, to whom the Island of Lesbos had given Refuge. H. P. T. A. Col. Lib. X. init. Grotius.


13 Quæ in genere diemam Mancini, &c. The Opinion of Brutis, which the Orator here embraces, was not followed in the Affair of Hulfius Mancinus; as it seems to be deduced from the last Law of the Title De Legationibus, which will be cited in Note 16. See what I shall say there, and in B. III. Cap. IX. § 8.

14 This is true generally speaking. But it may also happen, that the Giver upon this occasion has not the Perfon 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 fays, the Carfians, to whom he had been given up for having concluded a dishonourable Peace with them, would not receive; for he was executed in Pirith at Rome: Marcus Clodius Sannius Capitius, &c. Valerius Maximus, Lib. VI. Cap. III. Num. 7.

16 An qui habi66 duobus, &c. Diget. Lib. XLI. Tit. XV. De Captioitis &c. Poffitn. Leg. IV. This Law is not without its Difficulties. As the Question in the particular Case, of which the Civilians Modestinus speaks here, was to know, whether Hulfius Mancinus retained the Rights of a Roman Citizen by the Refulf of the Numantians to whom he had been delivered up: It seems at first, that instead of the Words nee a nobis receptus thefe had should be read nee ob ille 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. See Francis Baudoquin in his Jurisprudencia Musciana, p. 43. Anthony Faure, Jurisprudent. Polich. Tit. XI. Principe. VIII. Itar. I. p. 612. And Julius Pagi in the Margin
V. The Privilege of Suppliants or Refugees belonging not to Offenders but to the unfortunate, with an Exception.

V. 1. The so much revered Rights of Suppliants or Refugees, and the many Precedents of Asylums, affect not our last Conclusions; for they are intended only for the Benefit of them who suffer undeservedly, and not for such whose malicious Practices have been injurious to any particular Men, or to human Society in general. Glycippus the Lacedemonian, in \* Diiodorus Siculus, speaking of the Privilege of Refugees has these Words: It was the Design of the first Inhabitants of their Rights, that the Unfortunate should find Compassion, but that such who by their Villanies made Punishment their due, should not expect an Exception 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 who are free from GuiU, tho' not from Injustice; but the flagitious Lives of these have deflected them of any Claim to Compassion or Protection. Between these two Cales of Misfortune and Crime Menander puts this nice Distinction, that

Misfortune and Injustice this Difference has.
The one from Chance results, the other's Choice.

Not very foreign to this is that of \* Demobemas, \* Xenus, &c. translated to this Effect by Cicero, in his second Book of Invention: It is our Duty to have Compassion on such whose Misery is owing not to their Crimes but Misfortune. And that of Anti-planes: \* A Fault unwillingly committed must be ascribed to Fortune, but if with Design to ourselves. And that of Lyfas, Misfortune is no Body's Choice. Accordingly by the left and widest of Laws, who by an accidental slip of a Weapon chanced to kill a Man, might safely betake himself to the \* Cities of Refuge; and 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 force good Manuscripts. For these Words, \* nec a nobis recepta, may very well be understood as if the Lawyer, at the same Time that he denies that the Person in Quelion becomes a Citizen again by the Right of Potiliminy, infinates, that he might become fit to be reformed, 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 Legatis-nibus, cited before: De qua \[ Hostilio Mancino \] &c. It appears from thence, that Sculpius's Opinion took Place in the Dispute under Consideration; \* as Baudoin obseruir, (ubi supra, p. 47.) Mr. Thomais, who pretends, that the Law in favour of Mancinus imported only a single Deception of the covered Cae, does not allude sufficient Reasons for his Opinion. The very Office of Praetor, which Mancinus flood for a second Time, after having been Conful, supposes a Rehabilitation. See the Note of Andreas Schottus, upon Aurelius Victor, De Fr. illis. Cap. 139. Num. 4. So that our Author's Application of Modesti- nus's Words is not just.

V. (1) In quo benevisn \* minis, &c. as Polibius and Malchus call them in the Excerpta Legationum, that is to say, the Laws generally received in Relation to Suppliants. Grotpius.


\* ἠναγόμενον ἢ ἀναδίσκομεν ἵνα;

`Τὸ γὰρ διὰ τὰς γρήγορα τὸ δ’ αἰτεῖν.

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 Communion of their Crimes fly thither.


\* δυνατίον ἢ ἀναδίσκομεν ἵνα;

Misfortune and Injustice this Difference has.
The one from Chance results, the other's Choice.

Not very foreign to this is that of \* Demobemas, \* Xenus, &c. translated to this Effect by Cicero, in his second Book of Invention: It is our Duty to have Compassion on such whose Misery is owing not to their Crimes but Misfortune. And that of Anti-planes: \* A Fault unwillingly committed must be ascribed to Fortune, but if with Design to ourselves. And that of Lyfas, Misfortune is no Body's Choice. Accordingly by the left and widest of Laws, who by an accidental slip of a Weapon chanced to kill a Man, might safely betake himself to the \* Cities of Refuge; and the

\* Dejudice

This Oracle is in \* ELLIAN. Var. Hist., Lib. III. Cap. XLIV.


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 Indice (p. 732. A.) The Emperor MARCUS ANTONIUS had for having the Disposition of Mini examined, to know whether Men ad\* from Ignorance or Defign; and for considering these Things that have a Connection with them. (Lib. IX. 52. Ed. Gartner. TOULIAS distinguishes between what is done thro' Ignorance or Forget-
Chap. XXI.

WAR and PEACE.

and the fame Protection was allowed to Slaves; but the very Altar of GOD was no Sanctuary to him, who was a premeditated Murderer, or a Disturber of the publick Peace. Philo in his Explanation of this Law says, That no consecrated Place can afford Shelter to such vile Wretches. The fame was the Practice of the antient Greeks. The Calcidians are laid to have denied the Deliveriy of Nauplius to the Grecians; the Reason assigned was, because he had proved himself innocent of the Crimes laid to his Charge.

2. Cicero, Pauflansis, Servius and Theoephilus mention an Altar of Mercy among the Athenians, of which we have an ample Description in Status. For whom was this designed? Let the Poet inform you, who tells you that

The Diffused 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 vestigated seek a foreign Aid.

Arfides makes it the peculiar Commendation of the Athenians, that they always administered Succour and Relief to those, who thro' Misfortune became Objects of Pity. And again he says, that the Diffused of all Parts of the World had this Felicity in common, that in the good City of Athens they were sure to find a Retreat of Security. In Xenophon, we have Peterclus Philias furn an Oration of his spoken at Athens, commending that City; because that they who were any ways oppressed, or in Danger of being fo, were sure to meet with a kind Reception, and a generous Assistance there. Demophilus in a Letter of his in Favour of Lycurgus's Children speaks to the fame Efficac. And Oedipus, in a Tragedy of that Name, is introduced by Sopheles, upon his Retreat to Colonos, representing his Cafe in the following Manner:


This Antipodes, 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 afcribes to him. But I happen sometimes to have thought of this Orator very like that in the preceding Note. Où απόστασις αντίποδος αλλ' ον ανων, αυτος τινος incertum. Conr. Ancicd. Orat. V. in fine.

The last Words of this Paflage of Marcus Antoninus are misunderstood by our Author, & falsly is confidered, qua his soberment; for they signify that as ought to be confidered that other Man as our Relation; that is to say, by Nature, as Gataker, and after him Montfier and Damad Dacier translate it. The latter, by the Way, have committed a Fault in faying out eno muna. Hic ego per reflexionem, to know whether he was alledged by Reafon, instead of s'il est, s'il pêche per ignorance, or voluntarly; if he acted or offended thro' ignorance or voluntarily.

7 Plutarch. Quam. Graec. XXXII. (p. 283, D. Edit. Wech. Vol. II.) K. Pepis received such as flayed from the Tyranny in Neuftria, and would not give them up. Frederic. In rebus Pipinis, Ad Ann. 638. The Emperor Lewis le Debonnaire gave Refuge 420 to them 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 Bold acted in the fame Manner with regard to thofe, who came over to him from his Brother Lewis. Alymondus, Lib. V. Cap. XXXIV. Conflate Antimachus refused to deliver up Cegena Patavinon to Tyrchus a Turkish Governor. See Zonaras, Vol. III. in the Life of that Emperor. Nor would the Governor Ingumio deliver up Ofman to Edshur, as Leunclavius tells us, Hist. Turc. Lib. II. The Portuguese made the fame Refuflal in regard to the Duke of Albuquerque according to Mariana XVI. 18. Grotius.

8 Lib. I. Cap. XVI. Servius upon the eighth Book of the Enid. (Vir. 342.) Theophrus in his Great Paraphraxe upon the Institutes, Lib. I. Tit. II. § 51. Grotius.

Our Author has apparently quoted Cicero in this Place upon the Authority of the Scholaff on Status, who fays: Homo atrae Cicero, ibid Tucidinarum, Mclericzorum nominem, &c. in theo. XII. 381. For I do not find, that Nizolius himself Points out any Passage of the Roman Orator, that mentions this Altar. And the Scholaf, quoting by Memory, might have given, as from the Tucidian Questions, a Paflage, which he had read in some Work not now in Being.

9 Urbe fuit media nulli conceps potentum Ara Deae: Mitis phifit Clementia fedin, Et miseri ftcrte foramin.

Hz viti belli. &c.-

STAT. Theb. XII. 481. & seqq. 207, & seqq.

12. The Cypriote declared that they would all pe- rish, rather than give up Ilippigal to the Romans or the Lombards, Procop. Goth. Lib. IV. (See Hift. Mclfier. Cap. XXVII.) Grotius.

6 B

The
The Words I bear, are numerous and great.
But I only bear them: GOD is my Witness.
That none of these Falls was ever once my Choice.

To whom Theseus replies:

You're Welcome, Oedipus, such Guest I value,
Depend on my Affiance and Protection,
I know my self I'm Man, and therefore subject
No less to you than to human Casualties.

So Demophon 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 Diſpiffed a Refuge; to those diſpiff'd
Who justly claim a Right of being secure.
Ten thousand Dangers has its Friendfip cost it
Of an impending ill.

And this is the very Thing that Calliſthenes cried up the Athenian for; 13 because that in the Defence of Hercules's Children, says he, they engaged in a War against Eurythæus, who then tyrannifed over Greece.

3. But on the contrary, it is of Malefactors and profligate wicked People in the fame Tragedy thus pronounced:

13 The Lewefel guilty Wretch who dares approach
The sacred Altars of the Gods and there
For Pardon fakes,
To tear him from the Hopes of Sanctuary
And drag him down to Justice, for my Part
I cannot think a Breach of Piety.
For 'tis but Reafm that he who does what's ill
Should fuffer for it.

12 The Words of Calliſthenes are not taken, as might be conceived, from any of the Histories compiled by that Philofopher, who was the Counf and Disciple of Aristotle: But I find them in Arrian's History of Alexander the Great. They are an anfwer, which he is there told to have given Philoſophy, and which was probably made use of to colour the Accufation, laid againft him, of being concerned in a Conspiration to kill Alexander. He fabd therefore to Philoſophy, that the Perfons whose Memory was most honoured by the Athenians were Harmodius and Aristogiton, becaufe they had killed a Tyrant, and subverted the Tyranny: Upon which Philoſophes asked him where it would be proper for him, who fhould kill a Tyrant, to take Refuge, to which Calliſthenes replied, at Athens or no where, and gave for his Reafon, what our Author reports of the Aid and Protection granted by that City to the Heraclidæ. De Expediſt. Alexand. Lib. IV. Cap. X.

The following Verfes ought to be translated either from Sophocles of Euripides; but from the Manner in which our Author expreffes himself, it does not appear at firft, which of those two Poets he means:

Hanc qui faciendum conficiat, nunc legitur
Facilis, ad aras volatilis jupplices Dexam,
Trobare ad Tribunal, nulla religit mula:
Malum fuperum argus fero, qui fequitur.

Before this he only says: De maideci loc habes in cadem Tragediam. Now he had quoted Sophocles

first, Oedip. Colon. Ver. 512. & seqq. and afterwards Euripides in his Heraclidæ, Ver. 330. & seqq. but without naming either the Poet or Tragedy, and as if he fill quoted the fame; attributing befides to Demophon the Words of the Chorus. I find the Original in Stobæus, where however the Edition even of our Author only refers us to Euripides without mentioning the Tragedy. He believed it to be the Heraclidæ, because Stobæus cites it julf before; and from hence it was that he omitted the Verfes in Quifition, in his Excerpta ex Frig. & Comed. Graec. But these Verfes 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 Verfes, which our Author translates in the fame Manner in his Stobæus hereafter; except that he has not suffered an Erratum of the Prefs in the firft Latin Verfe to creep in, which all the Editions of my Original, not excepting the firft, have retained: Nunc legitur, for nec legitur, &c.
And in his _Ieon_ he adds:

**No barbarian hand must ever 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, that a certain Person named _Callistatus_, who was guilty of a capital Offence, having consulted the Oracle, had this Answer returned him, that if he would go to _Athens_, he should there _find justice_; that upon Hopes of Impunity he fled to _Athens_, to the Altar repeated 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 to the Oracle's Prediction was accomplished. _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 endeavoured themselves to their Gods. And in another Place he says, that _Princes are the Representatives of the Gods_, but that neither by the Gods are the Petitions of any but the just regarded.

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 _Cymæns_, as _Herodotus_ tells the Story, when to give up _Pasæs_ the _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 _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, 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 inflicted 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, 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, to far as regards their Punishment; because to bring them off from this pernicious Courfe of Life by

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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 _Saintes_ in, a Trefifie of that great Man _Paul_, the _Venetian_, a Service. _Grotius._

15. He was not a _Persian_, but a _Lybian_, as _Herodotus_ calls him in more than one Place. The Palfage wherein I find what our Author says, is: _Oι βαλανοί [21 Κυνάν] δέ εν ταύτη επελεύς, δε πώς οι ἑαν ἐκείνας πολιορκήθησαν, ἵνα μοι δοκιμάζοντο ἐπιτησιμα;_ Lib. I. Cap. CLX.

16. _Livy_, Lib. XLI. Cap. XLI. Nat. 8. _Apollos_ too has this Relation, Excerpt. legal. 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 _Lacedæmoniens_. _Athean_ King of the _Molossi_ would not deliver up his _Retorts_, but advised him to provide for his Safety, and for this Purpoze ordered him to be conducted under a sufficient Guard to _Pydna_. So also the _Gepidæ_ in _Procopius_, _Goth. III_. _diffinitis Ildigis_ the _Limbardi_. Add to this _Thucydides_ Letter to King _Thrapeciward_ about the receiving of _Giffel_., _Ver. 43_, _44_, and what is in the Life of _King_ _Louis_; to the _Emperor_ _Radolphus_ the Second removed from him _Christophor_ _Stromangelius_, as is testified by _Thuanus_, Lib. LXXXIII. Anno 1585. Queen _Elizabeth_ answered the _Scotts_, that the would either deliver them up _Batheloum_, or banish him England. _Camben_ has this Affair about the Year 1599. See _Mariana_ xix. 6. of _Alphonfus_ Earl of _Giegniai_, who was condemned by the French King, and denied Admission into _Spain_. _Grotius._

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18. As in the _Scotæni_ League with the People of _Milan_, _Simonius_ relates this Matter. By the Treaties of the _English_ with the _French_, it was provided, that Rebels and Defectors should be delivered up; and by others of theirs with the _Burgundian_, that they should be expelled. _Camben_ at the Year 1605. _Grotius._

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**Assurances**
Of the Rights of

Book II.

Assurances of Pardon, when '9 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 Cause is depending, entitled to Protection. Thus Demophoon to the Embassador of Euripides:

If you've any Crime to charge these Strangers with
We'll hear your Allegations, but you mustn't
Expect to take 'em hence by Force.

And Theseus to Creon.

You have offer'd, Sir, a base unworthy Thing,
Unworthy your self, your Ancestors and Thebes:
You're in a State where Laws and Justice reign,
And yet you think to do 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 mere a Cypher?
Great Amphon's Government 'e'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 Heaven break thro' no less than ours,
By tearing from us the unhappy Wretches
Who in our Kindness truffling sue Reliefs,
Were I' the Thebes, and the my Claim were just,
Yet would I not by Violence attempt
To vindicate my own Pretensions,
Without the So' reign's Leave, I can't forget
A Stranger's Duty in a foreign Land.
But you your Country shame, fix Scandal on't,
It don't deserve: And one can plainly see
That Age has robbed 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 shown by Aegyptus in his Supplices, where the King of Argos is introduced thus addressing himself to the Daughters of Danaus coming from Egypt:

If Aegyptus' Race should any Claim pretend
Over you, by any Law or Rule of theirs,
Because they say they're your nearest Kin'smen,
Who could withstand the Plea, or argue't false?
Why, you must prove by your own Native Laws
That they have no such Power.

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

2 In one of Sophocles' Tragedies. Oed. Coln. Ver. 904. & seq.
out a Crime, but to treat of this will be more proper hereafter. 1 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) 2 Where there is a Community there must be Particulars, because a Community is composed of Particulars, and Particulars collected and united, make up together what we call a Community.

2. But yet the Faults of this Body are, in Propriety of Speech, theirs only who consented to the Communion of them, and not theirs who were obliged to submit to the others, and the Punishment 3 likewise of the whole Community, and that of particular Persons are distinct. As the Punishment of Particulars is sometimes Death, so 4 the Death of a State, is the Ruin of it, and this happens when there is an entire Disolution of the Body Politick, of which we have already 5 treated, whereupon that State does, as 6 Modestinus says very well, as utterly lose its infructuous 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 7 Alexander the Great, exclusive of those who opposed piling the Act for breaking off the Alliance with the Macedonians. So likewise a whole Nation is sometimes brought to a 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, Theatre and public Lands.

3. But to punish particular Men with the Loss of their Properties, for the Faults of the Publick, to which they did not content, is a Piece of Injustice, as it is clearly evinced by Libanius in his Oration concerning the Sedition at Antioch. And he mightly approves the Proceedings of 8 Theodosius, who had punished the publick Crime with the Forfeiture of their Theatres, their Baths, and the Title of Metropolitian.

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 9 proved. But on the other Hand we must observe, that many Things are essential to a Community, as it is a Community, such as the having of a Treaty, Laws, &c. other Things are applied to it only as derived 10 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, tho' whole Means the Publick contracted the Guilt, the Guilt also must cease too, and by Consequence the Obligation of Punishment; which (as we before observed) can never subsist without some Demerit. Libanius in the above-mentioned Oration, says, That in his judgment, when none of the actual Offenders are yet in Being, no further Satisfaction should be sought after.

2. We must therefore conclude Arrianus in the right, when he condemned

7. (1) In Levetic. Quanti. XXVI.
8. In the Original it is Diffusit evan iunt partes, &c. But I believe the Author intended etiam, instead of eam, which is perhaps a Fault of the Pref that he overlooked. This however includes no Reason for what precedes it.
10. Si injustitias, &c. Digest. Lib. VII. Tit. IV. Libanius modi injustitiae velius, &c. Leg. XXI.
12. 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.) Scissus also destroyed the City of Byzantium, and deprived it of its Theatre, Baths, all its Honours and Ornaments. He even reduced it into a Village, and gave it to the Peripamnians; as Herodian informs us, (Lib. III. Cap. VI. Num. 19. Edit. Boeckh.) See also Zonaras, and what we have said above (Chap. V. § 12.) Grotius.
13. In the preceding Chapter.
Alexander for punishing the Perians, when not one of them who had injured the Greeks was then surviving. The Opinion of Curtius concerning the Extermination of the Branchide by Alexander is, that bad these Severities been contrived and executed upon the Authors of the Treason, it would have looked like Jujtice, and not Cruelty. But now their Punishment (who never few Mileus, and confeguently could not betray it to Xerxes) smart for their Predecessors Crimes. The fame is Arrian's Sentiment of the burning of Persepolis by way of Revenge, for what the Perians had formerly done to the Athenians: &c. &c. In my Opinion, (says he) Alexander did not deal differently in this Affair, nor do I think it any Punishment of those Perians who were long since dead.

3. The Answer given by Agathodice 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 in his Book against Herodotus says, it is very unlikely that the Corinthians should be for revenge upon the Samians an Injury received three Generations before. Nor is the Defence of this

2 This is the Reason that Conqueror employed, when Parmenio would have distradhim from burning the Temple of Perses. I have translated the passage, and changed the word Transgress, &c. &c. After which follows the Historian's Reflection: the &c. De Expedition. 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, as placed after the Passage of Quintus Curtius. But his Memory has improperly mutilated one and the same Reflection upon one and the same Occasion; for which Reason Mr. Barber thought, he might fuppose 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 Auxiliaries entered Macedonia, and the rest of Greece, and did great Damages, without our having given them any Cause for such Injuries. But I, on the contrary, tho', having been elected General of the Greeks, it was my Inflation and Duty, to revenge the Wrongs they have received from the Perians, have not entered Asia, till you had first commenced Hostilities. Iterat, De Expedition. 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 Perians; whereas the other relates only to a particular Act of Hostility.

3 And therefore the Emperor Julian abridges to a different Motive the War undertaken by Alexander against the Perians: All the World knows, that no War, reputed just, was ever undertaken upon such an Occasion; not that of the Greeks against Troy, or of the Macedonians against Periscus. For they did not enter into it to inflict Punishments for Injuries of a very ancient Date, nor even upon the Grandchildren or Children of the Authors of them, but attacked those, who had inflicted and dispossessed the little of the most Higbly Libraries of their Crowns: Kai de apo toux, kai eis apostolh, (for it should be read instead of apostolh) apostolh. Orat. II. De rebus gestis Contiuiti (p. 55. 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, in that 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 filled himself of the Empire. Julian would prove the Justice of that War, and for that Purpose could not have entered the War, and inflicted those Wrongs with it thence, which paffed for the most just, as of the Greeks against Troy, and of the Macedonians against the Perians; of which the first was undertaken to revenge the carrying away of a Woman, as he said afterwards, and the other, our Author intimates here, had for its Motive the desire of revengeing the Injuries Greeks had formerly suffered from the Perians. Whereas Confiuntus took up Arms solely to bring to Reafon an Ufurer, who had deprived him of the Empire he had a Right to inherit, as the Son of Confiuntus the Great; to which the Word inconsideration relates, and which our Author judiciously substitutes instead of abasement. Therefore what he acribes to the Greeks and Macedonians must relate to Confiuntus; and the whole Passage be thus translated: Every one knows, that no War was ever undertaken upon so just a Foundation, not even that of the Greeks against Troy, nor of the Macedonians against the Perians, which paffed however for just Wars. For our Emperor had not in Fierio the revenging of some ancient Injury, nor has he invaded the Sons or Descendants of those, from whom he had received it; but he has attacked a Man who ravished the Empire from the Perians, and lawful Successors of Periscus, menaced for their Merit. It isplain from his using the Plural, that he alludes to the Ufarption of the Empire in Prejudice of Confiuntus, and the Affiliation of Confiuntus 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 Perians, than that of revengeing the ancient Injuries they had done the Greeks; serves, on the contrary, to confirm the Reality of that Motive. But I must not forget to observe on the other Hand, to our Author's Praise, that he has very happily corrected a manifest Corruption at the End of the Passage, in the Word abasement. The Latin Translator, the learned Father Petavius, 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 and
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 by and by. Nor does the § 14. 
7 Justice of conferring Honours and Rewards upon Children for their Father's Mer-
rists, infer the Equity of punishing them for their Faults: For a Benefit of such a 
Nature, that it may without Injustice be conferred on any Man, but it is not so 
with Punishment.

IX. Having thus traced the ways by which a Participation of the Crimes draws IX. Whether 
aft free from the Punish. the Party may be appre-

tended, and there be no Confusion of Things really different by Reason of a Like-

ness in the Terms, it will be proper to premise some Directions.

X. 1. First that a Distinction should be made between an intended and direct 
Damage, and what is only consequentially such. Depriving a Man of what he has 
an indispensible 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 Re-

toval 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 between doing an Injury, and depriving a Man of 
some Advantages which be 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.

2. The Sufferings that redound to Children from the Confinement of their Fa-
ther's Goods, are not properly a Punishment inflicted on them, for they could not 
lay any Claim to those Effects, unless they had been posseed by their Father at the 
Time of his Decafce. And this Alphenus very justly oberves, 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 
dispossessed of. Cicero writes, that the Children of Themistocles were reduced to Want, 
and 5 that if Lepida's Children had the same Fate, he thought it no Injustice. This he aferts to be antiently practised by all Nations, from the Rigour 6 of which the more modern Roman Laws nowsomwhat abated. Thus too when the major Part of a Community (which, as we elsewhere said; reprefents the Whole) are guilty of a 
Fault, the Whole being, as we told you, obliged to bear the Blame of it in the 
LoS of their Civil Liberty, their Walls, and other Advantages, the innocent Part 
are equally Sufferers, but are fo in those Things only which they held as Members of the Community.

XI. 1. Again it is to be observed, that one Man's Crime may be the Occa-
iof 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, fuffers upon the account of the other's Debt, 1 according 
to the old Proverb, Ἰρὶν ἑπίτρως ἐτούσατο ἁθανάτων, &c. Digeft. Lib. XXXIX. Tit. II. De deannae infinde, &c. 
Leg. XXVII. § 12.

2. Multumque interjicit, &c. ibid. Leg. XXVI.

3 Eft autem præpositus, &c. Lib. XXXV.

Tit. II. Ad Leg. Falcid. Leg. LXIII. Princ.

4 Enam, qui cautéron autemter, &c. Digeft. 
Lib. XLVIII. Tit. XXII. De iurisdictioni & Re-

ligatis, &c. Leg. III.

5 In qua [suntimicr] &c. Epiff. Ad Bratum XV. See alio Epiff. XII.

6 See the Interpreters upon the Digeft, Lib. 
XLVIII. Tit. XX. De boni Damnatorum. Leg. 
VII.

XI. (1) This is a very antient Saying, since it is 
acribed to Thales, one of the Seven wife Men, as 
appears from Stobæus, Florileg. Tit. III. See 
Erasm. Aug.

2. From
2. From whence it follows, agreeably to the Opposition which we look upon to be the truer, that no Body ought to be put to Death upon the Score of any such Engagement, because no Man’s Life is so entirely at his own Disposal, as that he may take it away himself, or authorize another so to do; tho’ the Greeks and Romans held the contrary, * thinking that Sponsors were accountable even to Lofs of Life; as is evident from a Verfe of \( ^3 \) Aufonius, and the known Story of Damoc and \( ^4 \) Pythius, and from their inflicting capital Punishment on Hostages, as we shall elsewhere have Occasion to obferve. The Conclusion we make with refpect to a Man’s Power over his Life holds good likewise with refpect to that he has over any of his Members; for the Amputation of one of them is not allowable, unlefs it tends to the Prevefervation of the Body.

3. But if Punishment, or a Fine, be the Terms of the Delinquent, and he becomes obnoxious to them, the Bail must stand to it; but in strictnefs of Speech, not as a Punishment of his own. Much the fame is the Cafe of one who enjoys any Right, the Ufe of which depends on the good Will of another, fuch as a \( ^5 \) precarious Right for Innance, with refpect to the Owner of the Thing fo 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 fuch Privilege, cannot be called the Infliction of a Punishment, but the Execution of an antecedent Right, which the Perfou who takes it away was before entitled to. Thus the flaying of a Beast, one for Innance which a Man has been criminally concerned with, (as is enjoined \( ^6 \) by the Law of Mofes) is not really a Punifhment, becaufe Befts are not properly chargeable with any Crime, but it is the Exercife of that Dominion Man has over them.

XII. Having laid down these Difficulties, we affert that no Man, if entirely innocent, can be punifhed for another’s Crime. Of which the true Reafon is, that not that affigned \( ^7 \) to Perfulus the Civilian, that all Punishment is designed for Mens Reformation, for one may make an Example without the Perfou of the Criminal, provided it be in the Perfou of one who nearly touches him, as we fhall thee the \( ^8 \) fubtly; but becaufe all Obligation to Punishment is grounded upon Guilt. Now

\( ^1 \) Lev. xviii. 25. and xx. 15. 16. See Jaffus, Diet. Dubitant. iii. 40.

\( ^2 \) In no Man properly speaking can be justly punifhed for another’s Sin, and the Reafou why.

\( ^3 \) In the following Para- graphs. N. 1.

\( ^4 \) Lib. 3. c. 4. § 14.

\( ^5 \) In Propofals and Rewards.

\( ^6 \) 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 Dio- dorus Sulinis, wherein that Pythagorean Philofopher is fo called.


\( ^8 \) XII. (1) Si paene atque irregatur, St. Digel, Lib. XLVIII. Tir. XIX. Do. Panic, 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 Sentence, in the preceding Chapter, at the beginning of § 7. But indeed it is difficult enough to explain the Meaning of \( ^7 \) as connexion, to which Paulus refers the Subdivision of the Maxim in Quotation. The Reader may con- fider that He furpradus Papinianus of Anthony Pauper, Tir. I. Princip. ii. Hat. Marc. Lycklama, Membran. Lib. i. Edix. IX. and the new Explanation of Mr. Wachttler, in the Alia Eruditorum of Leipsic, Ann. 1714. P. 555.
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Guilt must of Necessity be personal, because it refults from our Will, than which nothing can be said to be more strictly ours, and it is therefore styled ἀνθρώπων, something entirely at our Disposal.

XIII. 1. St. Jerome says, that neither the Virtues, nor the Vices of Parents are ascribed to the Children. And St. Augustine, that it would be Injustice in GOD himself to condemn any innocent Perfon, Dion Chrysostom, in his Preface, having alluded, 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 Poifority of Offenders, but every one's Misfortunes are owing to himself : Agreeable to which is that common Maxim, Νοςα κατὰ φήμιτι, The Crime goes along with the Perfom. We ordain, fay the Chriftian Emperors, that where the Guilt is found, there the Punishment is laid. And again, Let every Man be answerable for his own Sins; and where Punishment is not due, let it not be dreaded.

2. Philo fays, it is juft that Offenders should themfelves alone be punifhed, condemning that barbarous Practice of some Nations, who put to Death the innocent Iliue of Traytors and Tyrants. So likewise does Dionysius of Heliocarnaffus, and thence the Unjustice of the pretended Reafon for it, because it is fuppol'd they will imitate their Parents, fince there is no more than bare Supposition and Uncertainty, and an uncertain Fear is not sufficient to put any Man to Death. Arca-dius, the Chriftian Emperor, at the Infigation of fome Body, I do not know who, ventured to fay, in one of his Confifutions, That the Children of Criminals, who are likely to follow their Examples, ought to be punifhed as their Fathers were. And Ammi-anus' reports, that young Children were executed, left after they grew up they fould take after their Parents. Nor is the Apprehenfion of Revenge a more juf- tifiable Reafon, a Reafon that gave Birth to the Greek Proverb,

XIII. (1) Nec virates, nec viatis parentum libe-

ris impuniter. Epiff. III. Ad Heliodoru. De mora


2. De humanis infanibus, ficut damnorar

immanifestum. Epiff. CV. So our Author relates and quotes the Paflage. I do not find it in the Letter he refers to: But there is the fame Thought, expref Ted in other Terms, in that which follows: Quamquam vero immortali & nulli omnibus peco-

nis Deum damnare crediderunt, alienus ab iniquitate

non creditur. Epiff. CVI.

3. This Maxim is taken from what is faid in the Diogift, in Relation to Slaves: Servi quorum noxa caput fequuntur, ubi defendi fentient, ubi debiliter aperuerunt. Lib. IX. Tit. IV. De mulchen. Albin. Leg. XXIII. But the Roman Lawyers mean only by this, as appears from Paragraph V. of the fame Title of the Inftitutes, and other Places, that the Action againft the Mafter, for Damage done by a Slave, ought to be brought againft him, who is in actual Poffeflion of the Slave at the Commencement of the Suit; or againft the Slave himfelf, if he was afterwards free; and not againft him who owned the Slave at the Time the Offence was committed. So that this is not directly to the Purpofe. See what is already faid above, Chap. V. B. II. p. 32. Note 7.

4. Sanctus ilni off panem, ubi & nona gl. Pre-

porating, familiare, propugnaculum fami

norum—Nec ulterius progressor metus, quam re-

pugnotat diffidium. Cod. Lib. IX. Tit. XLI.

De Parent. Leg. XXII.

5. He maintains, that in that Occafion, that Jufti-

cence requires only the Punishment of the Guilty, as is expressly ordered by the Law of Moiffis, (Deut.

er. xiv. 16. De special Leg. Lib. II. p. 68.) The fame Author observes elsewhere, that there is no Etablifhment more pereci-

ous to a State than not to punifh a wicked Perfon, because defended of honest Parents, and not to reward a Man of Worth, because the Son of a bad Father. The Laws, adds he, ought to reward or punish every one according to their personal Merit. (De Nobilitate, in fin. p. 910. A.) Josephus fays, in regard to Alexander, King of the Jews, who followed inque fons Maxim, and caufed the Thraets of the Wife and Children of thofe he put to Death to be cut, as criminal againft him; that fuch Punifh-

ment exceeded all Bounds of Humanity. (Antiqu. Jud. Lib. XII. Cap. XXII. Ovid infinuates, that Hybriden Amnon was unjust in ordering Abraham's Son to be flaughtered at a Rock, and punifhed in that manner for the Fault of Caleb, her Mother, in boafting that she was more beautiful than the Nerids:

Illic immorali damnarum pandere lingue

Andromadan panem infulus juftarat Ammon. (Metam. IV. 688, 689. Gratiius.)

I cannot help taking Notice in this Place to the Reader of a halte Citation, which I have corrected. Our Author gives us the second Paflage of Philo, as from his Treatife upon Peace, (Libro de pace.) Now it is well known there is no Work of that Name which bears fuch a Title. The Miftake arose from the Refemblance between two Greek Words. Instead of Πηγας ἐτοιμασα, our Author read, without thinking of it, Πηγας ἐτοιμασαι.

6 I have observed, in my Notes upon Puffen-

borg, that this is not exactly related. 'The Hiftor-

ian, from refusing the Reafon in Queftion, does not fufficiently juft or not, and leaves it to be determined by the Reader, whether his Idea of Equity was not sufficiently juft, or that he did not care to offend the Country. (Antiq. Rom. Lib. VIII. Chap. LXXX. p. 525. Edit. Oxon. (p. 547. Sylburg.)

7 Cod. Lib. IX. Tit. VIII. Ad Leg. Jog. Ma-

jusdiri, Leg. V. § 4. See the whole Diftribution of James Godefrey, upon this Law in his Opiniones, printed 1654.

8 Sylb.
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*Who kills the Father and sows the Seed's a Fool.

But Seneca says, that * nothing is more unjust, than to make any one inherit the Hated one bare his Father.

3. Paulanius the Grecian General did no manner of Harm to the Children of Attagimus, who was the Author of the Theban's Defertion to the Medes, judging them entirely Guiltless, B 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, 

* And therefore you shall pardon the Children, Wife, and Son-in-Law of Avidius Caflius, (who had confined against him) but why do I say pardon, when they have done nothing that has Occasion for it?

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 ailing any Reason and at any Time he may deprive us of. And therefore if by an unexpected and violent Death he seizes away the Children of Agban, Saul, Jerobam, and Abib, * 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 Culp principally intended in the Law of GOD, whose Menaces on that account are not extended beyond * the Great-Grand-Children or fourth Generation, Exodus. xx. 5. because that is a Sight which human Age may possibly arrive at) such a Spectacle must undoubtedly be a Punishment more afflicting to them than any Thing they suffer themselves, as is well observed by * St. Chryfiplon, to whom Plutarcb 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. * Tertullian says, that the Hardships of Peoples Heart forced GOD upon this severe Expedient, that * 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: * Thse Crimes that were thought to affect the Person's Posterity, by them called θον, horrible Impieties, were all of this Nature; upon which Head Plutarcb reasons excellently in his Book De fera numinis vindicta. In Aelian there is extant the following Delphick Oracle:

* Or soon or late Jutlice is sure to seize
The Authors of a Crime, nor can they 'scape
Inexorable Vengeance. Tho' from Jove
Defended, they and theirs shall one Time feel
The Weight of Heav'n's Anger: From Generation
To Generation shall dire Confusion run
And shall thro' all the Family.

8 ARIOTOT. Rhetic. Lib. I. Cap. XV. See Adag. ERASM. at the Proverb, Stultus, qui parere
caito, liberis puerior.
9 De Ira. Lib. II. Cap. XXXIV.
10 See alic Vulciatus in his Life of Avidius.

Julian commends the like Humanity in Conflantius, and hevvs ill Parents have often good Children, as Rocks produce Bees, a bitter Wood Figs, and Thorns the Pomegranate. He says also, αδμέν ἡ τοῦ παῖδος, &c. But you took Care not to let the In-
furst of the Deceafed be involved in his Father's Punishment: This Proceeding of yours is full of
Lenity and good Nature, is a evident Sign of perfect Virtue. (Orat. I. in fin.) GROTIUS.

XIV. (1) Hist. XXX. In Cap. IX. Genef. Plutarch had the fame the name before him: η μὲ
δὲ τοῦ παῖδος, &c. (De fera numinis vindicta, p. 561. A. Vol II.) GROTIUS.

2 Duritia Popula ad tale remedio compulerat, ut. (Adverf. Marc. Lib. II. Cap. XV. In QUIN-
US CURTUS Alexander the Great says to fame Confrimators, who being condemned to die, defrid
him to spare their Relations; they did not defire to know their Fate, that they might die with
the more Regret; but by an Effect of his Godhead, he affures them, that their Relations should suffer
nothing either in their Honour or Fortunes; be-
cause he had long abolifhed the Cufom, which had
prevailed amongst the Macedonians, of putting the
Innocent to Death with the Guilt.

3 See Plutarcb in his Pericles, and what was
faid above in this Book, Chap. XIII. § 1. GRO-
TIUS.

4 Var. Hist. Lib. III. Cap. XLIII. LIBANIUS
fays the fame Thing speaking also of Sacrilege. There
is nothing of the like Kind in a Discourse of that
Orator published by GODEFROY. GROTIUS.
He was treating there of Sacrilege; and this is farther ratified by the Story of the 
Gold of Thoth, as it is related by Strabo and Gellius. We gave you above sev-
eral such Sayings in Relation to Perjury. It is likewise observable, that those Se-
vere 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 
some Eatures produced by Plutarch in the above-mentioned Place.

3. And therefore in the Gospel, there is where a more express Declaration than 
formerly of the Punishments that after this Life await the impious, 'there is no
threatening advanced beyond the Sinner's Perdition; and it is to this that Ezekiel in
the aforesaid 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, unleas for some enormous and personal Crime.

4. And therefore that very Divine Law does strictly prohibit both the putting
Death to the Children for their Fathers Faults, and the Fathers for the Childrens:
Which Law was observed by some religious Kings, such as Achab, even with respect
able Practices. This Law is highly commended by Josephus and Philo, as one
like it among the Egyptians is by 6 liberates, and one among the Romans by
7 Dionysius Halicornaeonfis. Califfratus 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 attendant the Son, and affigns this Reason, 9 because every Man is answer-
able 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 a Woman with Child was prohibited by the

11 Egyptian, 12 Grecian, and 13 Roman Laws 14

5. Tertullian, De Mamm. The four
Grape that the Father eats, no longer sets the Chi-
ldren Tooth on Edge, for every one must die in his
own Iniquity. Cap. VII. GROTIUS.

6. That Orator, in his Praef. of Rufes, 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 Reli-
stance of the Egyptians, he facts, that they gave no
Regard to an Oath, than any other People ; and
believe, that, the Divine Vengeance will punish every
Crime immediately, without deferring the Punish-
ment of the Guilty, or transferring it to their Off-
springs. p. 591. I confess however, it is very prob-
able, that the Egyptians, in whole Law there was so
much Equity, (as may be seen in Bocler's Collec-
tion of them, Vol. II. Difjer. 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 intimize. At least I do not
see how such a Custom can be reconciled with the
Law of the Egyptians, which our Author relates a
little lower, concerning the Delay of punishing
Women with Child. There would be more Cru-
elty without doubt in putting Creatures into the
World to Death, especially after having been
long in it, than to let the Infant in the Womb pe-
rish with its Mother. And I cannot comprehend
how such wise Legislators would have been guilty of
so gross a Contadiction.

7. He does not commend it, as I have faid al-
ready in Note 7. upon Paragraph XIII. He only
says that thoes who were for introducing a contrary
Practise, in regard to the Children of the Perpkins
proscribed by Sipia, were looked upon by the Ro-
man as doing a Thing highly odious, not only in
the fight of Men, but of the Divinity, who to

14 Dio and Plutarch add, as a Law, the German
Story that the Son of a Roman Citizen
shall receive the Love of his Father, and
be treated as a Son, if he
shall do anything for the
Father, or be a good Citizen.

15 Another History says, that the Egyptians had a
Law, that if a Father kill his Son, and his Son
kill another, the Father is not to be punish-
ed, unless the Son says he done it.


18 See also Lex Territor. &c. De Leg. p. 1. c. 8.

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Book II

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 takes away the Lives of all who are any ways related, that is (as Curtius says) whoever had offended against the Majesty of the King might fall with more solemn Sadness and more poignant Sorrows. This Law Amianus Marcellinus reports to be without a Parallel in former Ages.

XVI. 1. But it must be considered, that if the Children of Traitors 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 Virtue of the Power they have to dispose of such Things, provided that the Exercice of this Power turns to the Offender's Punishment: Upon this Ground (as Plutarch relates) the Defendants of Antiphanes, as a Traitor, were for ever disqualify'd for Honours; and at Rome the Children of the proscribed, by Sulla. And so what is decreed in the aforesaid Law of Arcadius against the Children of such is what may pretty well be borne with, Let, they never be advanced to any Places of Honour or Truftr, either Civil or Military. But as to Slavery, how and how far it may justly affect Children, we have elsewhere shewed.

XVII. 1. What we have said with respect to making the Children Sufferers for the Parent's Crime, is applicable to the Case of a People who are really and strictly Subjects. For, as we told you, a 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 Whether they gave their Consent or concurred in any Action of their own Defence; but we are now talking of the Communication of Punishment which results from the Nature of that Body whereof the King is Head and the rest Members. GOD for the Sin of David sent a Pestilence

XV. (1) Philo says, it was usual with Tyrants to put to Death, with the Perjury condemned, five Families of their next Relations. See Hermodian, Lib. III. and an Insurrection at Milan upon the Death of Galatius. In Pet. Bizar. Hist. Gen. Lib. XIV. Grotius.

The Punishment of Philo, which our Author has in View, is in his second Book De Legis special. Decree, but he has very much changed the Scene 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. Ed. Paris. There is also great Room to believe, that our Author, his Copist, or Printers have put Hermodian in this Place for Herodotus. At least I can find nothing in B. III. of the other Historians, condemned to die by Darius, according to the Cuditt of the Persians, with his Children and all his Family, Cap. CXIX.

2. See the Paginage cited above Note 2. upon Paragraph XIV.


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 Antiphon is put instead of Antiphanes. For the rest, the Word συνέχεια seems here to imply something more than a bare Exclusion from Honours, because it is a Law 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.


XVII. (1) Philo, De Abraham, p. 365. &c. speaking of the Egyptian King's Subjects in Abraham's Days, πατρών. &c. His wife Parnys as well as he, had their Share in the Punishment, because not one of them blamed his Injustice, but were all, as it were, Accessories with him, by applauding what he did. And Josephus, where he relates the Prophecy denounced against Jeroboam, μη πᾶν εὖ ναε τοὺς πτωχοὺς, &c. The People too are to bear their Part in the Punishment, and are therefore to lose their Land, and to be dispersed beyond Europolis, because they followed the Impieties of their Prince. (Antiq. Lib. VIII. Cap. IV. p. 386. E.) Grotius.

2 De ex Contactu qui ex natura ortus ejus corporis, &c. It must be read so according to the first Edition, and that of 1672, as I have observed in my Latin Edition, in which the Printers however have not followed my Correction in the Text, and have left contrarious. The Fault was even in the Edition of 1672, 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 contagis, as we find it also in some Authors, for Infection in Seneca and Tacitus. The learned Gronovius had thus read the Paflage, as appears by his Note, tho' he takes notice of it. But Zonaras, without suspecting that the Text was faulty, as it must have perceived, if he had attentively considered the Connexion of the Discourse, accredits our Author of giving an Explanation more obscure than the Quotation itself; and after having racked his Wits to discover the Rational Sense of the Passage, he at last confesses, there is none. From whence it appears, how necessary it was to confult the ancient Editions carefully, before he undertook it, I do not say, to criticize, but to read a Work like this, in order to understand it.
on the People, (who in David's judgment were entirely innocent) but it was GOD who did it, and who had an absolute Right over their Lives.

2. And besides this was properly David's Punishment, and not the People's; for as a Chriftian Author obferves: 3 The severest Punishment that wicked Princes can undergo is that which is laid on their Subjects. For this, says the Sage Author, is juft as if you fould lafc a Man upon his Bock for an ill Thing his Hand had done: And Phædreb 4 on the like Subject, compares it to the Phyficians applying a Caftick to the Thumb in order to cure the Thigh. But why it is un lawful for Men to take this Liberty is already declared.

XVIII. The fame we likewise pronounce of not punifhing particular Perfons with the Loss of what is properly and peculiarly their owne for the Fault of the Publicke, if they have not confeited to it.

XIX. Why the Heir is bound to other Debts and Obligations 1 and yet not subjeft to the Punifhment of the Deceafed, 2 according to that of Paulus the Cifian, it is provided by the Rules of a feligitious Right that the Punifhment due to any one should not be transferred upon his Heirs. 3 the true Reafon is, that the Heir does not reprefent the Deceafed in his Deferts or Demerits, which are Qualities merely perfonal, 4 but only in his Effects; and in thofe, upon this Principle that at one and the fame Time that Property was introduced, it was made an effablifhed Law that the Debts which arise 5 from the Inequality of Things fhould be attached to them. Thus Dion Phyfcius in his Rhodiaca 6 apud nos copiosus, &c. what was due from Predeceffors is not left due from their Poffeffors. For you cannot fay, that we have renounced our Succeffion.

XX. 1. From whence it follows, that if, besides the Crime, there be fome new Caufe of Obligation, the Heir may be bound to fland to the Penalty urged not properly as a Punifhment. Thus in fome 7 Places after Sentence is pronounced, and in others after the Commencement of Suit, which are Circumftances that give the force of a 8 Contraft, the 9 Heir fhall be liable to the Fine; the Cafe is the fame, if the Deceafed in treating about any Thing, submitted himfelf to a pecuniary Forfeit; for then, there was a new Caufe of Obligation, difting from the Punifhment.

3 Digest ad Oradorum CXXXVIII. Grotius.

4 In a Treatife, which has been already cied feveral Times, wherein he endeavours to justify the Punifhments inflicted upon the Poffeffors of Criminals, De fora numinis condendis, p. 559, E. Vol. II. XIX. (3) MAISONDES, Tit. 777-72. Cap. VII. § 6. GENARA, Baco Cato, Cap. IX. § 2. Grotius.

5 This Law has been cied above, § 12. Note 1. See the Ccncill of Toleda VIII. in Recollectioneh. and what is above in this Book, Chap. XIV. § 10. There is no Perfon fo proper to reprefent the Deceafed as his Heir, fays Cicero, De legibus, Lib. II. (Cap. XIX.) Grotius.

6 That is from one Man's having more and another left than he ought to have. See above Chap. XII. § 8.

XX. (1) We fnd this for Inflance, in the Law of Suits in Germany, according to which a penal Actio cannot lie againft an Heir, till after Sentence, in the cafes of Thief, Gaming or Ufury; and for other Offences, the Fact must at leat be proved jurifdictionally before the Death of the Difknten. See a Diification of Mr. Thomasius, De iudicium Puelliae et Juris Romanis in foris Germania, Cap. II. § 16. where he cites the express Words of Speulchus Survivor, Art. CCLXVII. of which the following may be a condud of it. 2 Puft litum constitutum, tis the Dicreation of the Roman Law; and the Cultuml in Countries which follow it: Omne parum ad iudicium puftatem inueniunt, & ad Heredes transfert. Digest. Lib. XLIV. Tit. VII. De Oblig. & Acedeb. Leg. XXVI. See allo 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 Cafes. As soon as Sentence is given, the Perfon, in whole Favour is pacfled, or his Heir, has his Action againft the Heir of the other Party: Judicati actio perpetua est, & rei perpetu aeconiti continuabitur. Item heredes & in heredem competit, Digest. Lib. XII. Tit. I. De re judicata, & de effectibus testamentorum. Gr. Leg. XVI. § 11. From the Moment a Suit is commenced, the two Parties are prefumed to engage thereby to pay whatsoever fault become due in Virtue of the Sentence: Nam festa capellionis contrahitur, cum plus, & minus judicis contra, &c. Peculiaren, non peculiaren, non nominantur, id est, in iudicium velut obligationem. Digest. Lib. XV. Tit. I. De Peculio, Leg. III. § 11. So that there being an Obligation of the Deceafed founded on this Prefumption, which the Laws authorize, it is transferred to his Heirs, in the fame Manner, as that of express Confraft and Engagements, which is, as it were, attached to the Defunet's Eftate.

5 Ut & ea quae in conventione declarata ait. But this is only a Penalty Leg. VI. § 5. To called in Strictnefs, 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 fold fome Materials, and taken the Money for them, under a certain Penalty if the whole Quantity were not delivered in a Time fixed. This Perfom 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 againft the Heir, for the Penalty or Reparation, to which the Deceafed had made himfelf liable by the Contract of Sale: Lucius Titius, accepta pecunia, &c. Digest. Lib. XIX. Tit. I. De adiuvibus et eadem, &c. Leg. XLVII.
Of the unjust Causes of War.

I. 1. IN beginning to treat of the Causes of War, we divided them into justifying Reasons and Motives. Polybius, the first Author of the Distinction, calls the one μαθηματα, as being usually such as are openly annexed for the War, (Livy sometimes terms them the Title of the War) to the other he gives the general Name of αιτία, Causes.

2. Thus in the War of Alexander against Darius, to take Vengeance of the Peripateticon, for the Injuries they had formerly done the Greeks, was the justifying Reason, while the Motive was a strong Desire of Glory, Empire, and Riches, in Conjunction with confident Hopes of Success, conceived from the fortunate Expeditions of Xenophon and 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 takes Notice) their being animated and fluffed by the Sueceses which had of late attended their Arms in Spain. So 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, Potiadians, and some other Things, were the Pretences made use of for justifying the War; tho' in this Place he seems to confound the Terms μαθηματα, and αιτία. The fame Distinction do we find in the Speech of the Campanians to the Romans, where they profess that it was in probably, in View, at least there is nothing else where that has any Resemblance to the present Subject, in the two Books of the War against the Peripateticon, is, at the Clofe of the Speech made by the Embassadors of the Lacedemonians, to the Peripateticon King of Peripateticon, to intreat him to receive their Nation into his Alliance and Protection against the Romans. After having fet forth all the Reasons that were capable of showing the Juflice of their Demand, they represent the Advantages that Chofreus himself would have in complying with it; and conclude, that it is no more than prudent to accept offers, which [Juflice 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. XXII. See also Cap. LVI. and LXVIII. In his fifth Book, where he treats of the War between the Greeks and the Libyans, he calls Alius, what he had a little before called βιος. In the fame Manner (as we have observed in the first Chapter of this Book) the Greek Word άνίκησεν, and the Latin Word Prin- cipia, and such others as are made Use of to express the Origin of a War, are equivocal. The Writers of the Contemporary History often use the Word πάντα, to signify what others call άνίκησεν, and that in Allusion to the History of the Greeks. When Odorico took Olibon from the Death of Petronius to refine his Arms, which he had before renounced. Grotius.


4. Order
Chap. XXII.  
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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 Antiochus made War upon the Romans, for the Murder of Brachyllas, and under some other Pretex, but the real Incitement was, some extraordinary Hopes he had conceived from the Remiscfeds of the Roman Discipline. Philectus remarks, that Cicero's Charge against Antony, as being the Caufe of the Civil War, was not true; for Antony only furnished Cæsar, who was already determined for the War, with a plausible Pretence for it.

II. But there are some who engage themselves in War, having neither of these Causes, Coveting (as Tacitus represents them) Dangers for Danger's Sake. This Vice so far paves the Bounds of Humanity, that by Arijotle it is said Brutishness. Seneca speaking of such Wretches, says To take Pleasure in Murders is not properly Cruelty at Perity and Slaughter: One might call it Destruction, for there are several Sorts of this, but none of them more impiously, than that which carries People to the Murders and Butcheries of their own Kind. Conformant to this is that of Arijotle, sénas yco, &c. For he is superstitiously barbarous, who for nothing but the Sake of Fighting, and Spilling human Blood, converts his Friends into Enemies. And Dion Phryephanc says, that To be engaged without any Reason in Wars and Broils is perfect Madness, seeking one's own Destruction. And Seneca in his fourteenth Epistle, The Effuion of human Blood for its own Sake, and no other Reason, is to use scarce any Man can be guilty of.

III. But the Generality of those who engage in Wars, are induced thereto by Motives, either in Conjunction with justifying Reasons, or without them. Some there are who do not care whether they have any justifiable Reasons at all, of whom we may pronounce, as the Roman Lawyers do, that such are Robbers, who being called to Account how they came by such and such Things, can shew no Right they have to them, but only that they are in their Possession: And

7 Our Author by not attending to the Construction of the Terms, attributes to King Antiochus, what the Latin Historian fays of the Byzantins: In Boeotiam [Antiochus] —— babentum —— re- tiro per muita jam facia publicis praeintus la- bante egregiis quamdam disciplina gentis, & menderum ex flatus, qui diurnorum effe montium re- rum non paffit. Lib. XXXVI. Cap. VI. Num. 1. 2. Boecull has exactly copied this Errors, in a Differention, intitled De Clarissimis & Maximos, Vol. II. p. 1312. where he expreffes 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, Grönovius seems to doubt whether it be really his. But I shall give the Passages, from which it will appear also, that that learned Man was mistaken, in imagining our Author spoke of Ofidius, or Augustus Caesar, whereas the Passages relates to Julius Caesar. Div. II. C. CoaRes & Cris, or tobthornw, &c. In Fis. Merc. Anton. p. 932. C. D. Vol. I. Edit. Wech. The Passage in the Philippique, of which Plutarch speaks, and wherein it is said, that Antony was the Cause of the Civil, as Helen had been of the Tro- jans, War, is in the II. Philippique. Cap. XXII.

Our Author cites here, in a Note, some Passages of Livy, wherein that Poet says on the same Subject, that the ill Treatment of the Tribunes of the People, C. Caftus and Mark Antony, finally deter- mined Cæsar, who was before irresolute, for furnishing himself thereby with Pretex to justify the War wherein he engaged himself. Ecce facies beli, dubieque in praelia menti Urgentes addunt stimulis, consetaque padoris Rumput fata moros: juftus Fortuna laborat Effi duci notus, & caufa intenit armis. Pharril. Lib. I. ver. 252, & seq.


4 Possimus dicere, non effe hunc crudelitatem, sed feriatum cui, subspati jussita J, &c. De Clemencia, Lib. II. Cap. IV. He says elsewhere, speaking of Apollodorus and Ptolomeus, two most in- fluential 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 voxem suavis, & fangeum humanae gaudient, &c. De Ira, Lib. II. Cap. V. Grotius.

III. (1) Sed enim & benarum poffifer, &c. Di- gell.
Of the Rights of Book II.

 Aristote laying the common Infightors to War, that 2 They seldom consider the Injustice of enforcing their inoffensive Neighbours, and such as no Ways injure them.

2. Of this Stamp was 3 Brennus, who affected, that The strongest have always the best Title. So Hannibal, whose Motto, according to Silius, 5 was

Justice and Leagues to me my Sword points out.

And so Atilla, 4 and all others who tell you, that

5 The Reason of the War they never inquire, It's Conclusion all they care for.

And,

6 To be overcome is Argument of Guilt.

And,

7 Successful Arms are always in the Right.

Applicable to this is that of St. Austin, 8 To make War on our Neighbours, from thence to push our Violence farther on, and so to oppress inoffensive People, out of a Thrill after Empire, what Title does it deserve, but that of a notorious Robbery? Of these Wars Velutius says, that 4 They are not entered into on Account of any just Preexcitement, 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 Rbdius, who for some great Interest of their own, take where they ought not to take, are called wicked, impious, and unjust, such as Tyrants, and those who despise People.

IV. There are those who allege some Sort of justifying Reasons, but such as, being weighed in the Balance of right Reason, are found to be unjust. And in

geut. Lib. V. Tit. III. De beraudatas positiones, Leg. XI. in fin. & XII. XIII. ivit. Such was the War of the Heruls against the Lombards, undertaken without Pretext.  

2. Romania queruntur, & quid in Etruria vel Galli offer? Quam illi in armis jux tere, & omnibus foris vixerum esse, facierit dicerent, &c.  

Livy, Lib. V. Cap. XXXVI. Num. 5.

3. Dauroresque forum, cui nunc pro saevo, quaest juriidit sit, Est,  

De bello Panic. II. Lib. XI. ver. 183, 184.

4. Our Author had, probably, in View what the Emperor Valentianus says in a Letter to Theodoric,  


5. It is a Passage in one of Seneca's Tragedies,  

5. Quisorum bellis exitus,  

Non causa,  


6. This is the Sent of our Author gives to a Verse of Lucan which he  

uses here, without saying whose it is. But Cicero, whom the Poet introduces speaking in this Manner to his Soldiers, means, that the Gods would have whose Cause was good, by making the Victory turn to that Side; so that the Application is not very just. The Original is

Hac, fata quoque tute probat, quis jusstis amas

Sumnus, haec quia virtutem fatum nostrum effet.  


In the same Manner a Roman Herald, declaring War against the Sammites, said, that the Gods who preide in War, would judge which of the two Nations had broken the Treaties. Dionysius Halicarnassen. Excerpt. Legal. p. 795. Edit. Oxon.

7. These are Tacitus's Words, and are cited before, in the Preliminary Discourse, § 3. Note 2.  


9. Sed saevo aliis, &c. De Offic. Lib. I. (Cap. XIX.) Aeneas treats those as inoffolent and abandoned, who, from the Love of Gain, or unreasonable Enmity, pollute themselves of other People's Land, without any just Subject of Complaint against them, Lib. II. (Cap. I.) Menander, Pretorius, gives us a remarkable Instance of this, in the Peron of Bacch, Chagan (or Prince) of the Avars, who broke the Treaties he had made with the Romans, without so much as seeking any fault Pretext to colour the Rapture. (Cap. XXI. Of the Embassies of Tustatin, Tustin, and Tile-  

rian.) Grotius.

10. (Paraph. Ethic. Nicem. Lib. IV. Cap. II. p. 202.) Philo the Jew, speaking also of Tyrants and ambitious Perions, excellently observes, that when they have the Power in their own Hands, and can allure themselves of Impunity, they plunder whole Cities, and commit the greatest Robberies, under the specious Name of Government. In  

Dezec. (p. 763. C. D.) This agrees perfectly well with the Passages of Seneca, Quintus Curtius, Justin, and S. Austin, cited above, Chap. L § 4. of the Book. Grotius.
Chap. XXII. War and Peace.

this text, (to use Lives' Expression) The Dispute is not who is in the Right, but who is the most powerful. The Generality of Princes, says Plutarch, employ the two Terms of War and Peace, as they do their Money, not for what is just and benefit, but for what will serve their Turn. 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 fruitone. However, to make the Matter as plain as we can, we will inlist a little upon the principal of them.

V. 1. First therefore, the Dread (as we before observed) of our Neighbour's encroaching 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 Neceffity for 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 attended 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 of such within our own Dominions, and look out for other Remedies, rather than immediately have Recourse to War. From whence it is deducible, that the War of the Romans against Philip King of Macedon, and of Lynacicus 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 Cauci, They are a People of the greatest Repute and Figure in all the World, and chief to maintain their Grandeur by their Justice, living quiet, and keeping at Home; as free from Ambition as from Evry. They give no Occasion for Wars, committing neither Outrage nor Robbery; and what is a great Proof of their Valour, and their Strength, they prefer 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 Horfes, and in the midst of Peace are equally reflected and feared.

VI. Nor does the Advantage from a War give us as good a Right as a Necessity for one.

VII. Nor is the Refusal of supplying us with Wives, tho' there be great Plenty of Women, a just Provocation to War, which was what moved Hercules against Zonar, to which the Author in VII. 1, abund. de bell. Maced. I.}

IV. (1) The Historian says this of Hannibal, who fought Pretexts to quarrel with the Neighbours of Saguntum, Lybians, quam adnset ideo, qui hitis erat fatur, nee ceteris juris, sed vnum quari, adverterit. Ut, Lib. XXII. Cap. VI. Nunc 30.


3 See Puffendorf, Leto of Nature and Nations, B. VIII. Chap. VI. § 35.

V. (1) Pausanias, cited in the Margin by our Author, says, that Lynacicus was for preventing Demetrius, whom he knew to be as ambitious as his Father, Lib. I. Cap. X. p. 90. Edit. Graec. Web. But we find immediately after, that Lynacicus took his Pretext from the Perjury of Demetrius to Alexander, the Son of Caffander, whom he affiliated, that he might reign in his Stead in Macedonia. The Romans also alleged other Reasons in Justification of their War against Philip; which, however, were not much better. See the Spenus Jurisprudent, Hist. of Mr. Bunte's, § 101. The Conjecture of Gronovius 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 destroy a Prince from building a Fortres upon the Frontiers, that was fad only by Way of Intime of what gives Umbrae; 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 Gronovius supposes.

2 Popul. [Caecil] inter Germanos nobilissimam, Ut, German. Cap. XXXV. Num. 49, § 5, 6.

VI. (1) The commissional 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 alleged by the late Mr. Vitriarius, Inl. Jur. Nat. & Gent. Lib. II. Cap. XXII. § 3.

VII. (1) See above, Chap. II. of this Book, § 20.

2 If we follow Apollodorus, this Example is ill applied. For, according to him, Eurytus, King of Oealbulia, had promised his Daughter Iole in Marriage to him who could outshoot him and his Sons. Hercules performed himself, and having won the Prize propounded, 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. Bihith. 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. XXXII.
Eurytus, and so Darius against the Sicythians.

VIII. Nor is the Defire 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 Caufe of most of the Wars amongst the antient

Germans.

IX. Nor is it left unjust 2 to go to War, and lay Claim to a Place upon the
Score of making the first Discovery of it, if already inhabited, the People should be a wicked Man, or have false Notions of GOD, or be of a stupid Mind; because by the Right of Discovery we can pretend to those Places only which are not appropriated.

X. 1 Nor is the being endowed with Virtues, moral or divine, or an extraordinary Capacity, a Qualification absolutely requisite for Property, unless if there be a People entirely delimited of the Use of Reason, that then disposing them may seem defensible, as having no Right of Property; and all that Charity would in that Cafe oblige one to, is to allow them Necessaries sufficient for Life. What has been already 3 delivered with Respect to the Provisions made by the Law of Nations, for preferring 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 
their Enemies, because they were different in their Manners, and of more slavish
Abode (in their Opinions) than themselves. But how far upon the
Account of enormous Crimes, Crimes against Nature, or prejudicial to human So-
ciety, it is lawful to dispose of People, is a different Query, and already 4 discussed in our Discourse about The Right of Punishments.

XI. 1. Nor is the taking up Arms upon the Account of Liberty, justifiable in
particular Persons, or a whole Community; 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 fald to be 5 by Nature in a State of Freedom, by Nature is to be under-
stood the Right of Nature, as it is antecedent to all human Acts to the contrary;
and the Freedom there meant, is an Exemption from Slavery, and not an absolute
Incompatibility with Slavery, that is, no Man naturally is a Slave, but no Man
has a Right never to become such, for in this Sense no Body living is free. And
this is what Albinus 6 intends, when he says, that No Man is born either a Freed-
mun or Slave, but these Names Fortune gives them afterwards. Thus Aristotles, 

Nam te m id eis invenis, iniq. ut dixit, Tote loctio ut est, quod one is in a
free, another in a servile Condition. And therefore it is every Man's proper
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.

3 Our Author has, no Doubt, taken this from Justin. That Epicmiater says, that Januaries (a Name very differently express'd by Authors) 1 say, that Januaries, Idiastres, or Industrianti, having refused to give his Daughter in Marriage to Du-
rians, the latter declared War against him upon that
Account. How Darius Rew Punifhed — quanm
fibilia eius unipotens non obviniatur, bullum intulit, Lib. II. Cap. V. Num. 9. I perceive however, that
Albe BACKS GENTILIS, whose Whole our Author had before him, when he computed his own; re-
lates this Example on the Authority of Jornan-
des, Hift. Gotch. (Cap X.) and of Paulus O-
rosius, Lib. II. Cap. VIII. See the Treatise of
that Civilian often cited, De jurie Bello, Lib. I.
Cap. xx. p. 158.

4 And Antinous Caracalla, against Ariabantes, 
King of the Parniian. See XIPHIHUS. (Epi-
Din. p. 356. Edis. H. Steph.) GROTONI.
VIII. (i) Eadem famer cana Germania, et
Hift. Lib. IV. Cap. LXXIII. Num. 6.

X. (1) Φιον πολέμων. See PLATO, De Re-
publica, (Lib. V. p. 470. C. Vol. II. Edit. Steph.)
ARISTOTLE, Politic. (Lib. I. Cap. II.) EURIPID.
ides, in Hecub. [or rather Iphig. in Aulis, ver.
1400, 1401. J Litv. Lib. XXXI. (Cap. XXIX.
Num. 15.)] ISOCRATES, Orat. Panathen. (p. 67. 
Edit. H. Steph.) GROTONI.
See above, Chap. XX. § 40. Note 19, and 11.
XI. (1) See the Fourth Council of Toledo, and
what we have said above in Chap. IV. § 14. of
this Book. GROTONI.

2 See PAPPENBURG, B. III. Chap. II. § 8. Law
of Nature and Nations.

3 ALBIUS, On philosbatus βίβες, dixit. UT.
SNECFA, Controvers. Lib. III. Cont. XXI.

4 He does not lay this of his own Head, but
relates it to the Opinion of others, who believed
that all Slavery is contrary to Nature, and conse-
quently unjust. Politic. Lib. I. Cap. III.

XII. It
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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 file 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 Sense, and their Reason, is not to be left to themselves, unless some other Person has gained any Right over them. But that of Infants 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 with which some have dignified the Roman Emperor, as if the Right of governing the most distant, and even undiscovered Parts of the World, was his, had not Bartolus (who for a long Time passed for the most celebrated Civilian) presumed to declare that Man an Heretic, who should dare to deny it; because, forsooth, the Emperor does sometimes title himself Lord of the Universe; and because that the Empire (to which modern Historians have given the Name of Roman) is in Holy Writ called by the Name of universal, of the World; which is no more than such Strains and Flights as

* The whole World to Rome's victorious Arms Subjection already paid,

and many such other Expressions, by Way of Hyperbole or Eminence; especificaly if we consider, that in the same Sacred Pages, Judaism 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 in the Middle of the Earth, that is, of the Land of Judaism: So Delsbos being in the Centre of Greece, is called the Novel of the World. Nor are the Arguments used by Dante for the universal Jurisdiction of the Emperor, drawn from its Tendency to the Interests of Mankind, at all convincing; for the Advantages he proposes are counterpoised by the Inconveniences that attend them. For as a Ship may be built to so valet a Bulk, as to be uncivilized, and not manageable, so an Empire may be extended over to great a Number of Men and Places so widely distant from each other, that the Government of it becomes a Talk, to which no one Sovereign can be equal.

2. But however, allowing what he contends for, the Expediency of such an universal Monarchy, yet the Right of Empire cannot be hence 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 obtained by Contrac& others by

XII. And the Defence of taking others against their Will, under Pretense of their being Interest to be governed by them.

1. * Fr. Vitt. de Ind. n. 29. 2. * Fr. de Ind. 3. * Fr. de Ind. 4. * Fr. de Ind. 5. * Fr. de Ind. 6. * Fr. de Ind. 7. * Fr. de Ind. 8. * Fr. de Ind.


XIII. (1) Mr. BARBEYRAC adds, And Idists, (De Infensis) because, says he, it is highly probable, that the Printers stiup over & amonium, from the Refermance of the Word infensh which preceded. In § 10. Our Author joins together Infants and Madmen.

XIII. (1) Digl. Lib. XIV. Tit. II. Ad Leg. Rhod. de jajtix. Leg. IX. Our Author might have spared himself the Trouble of refuting seriously the Opinion of Bartolus, if he had considered that the Roman Empire has been long extinct, as I have thrown in the Notes upon the ninth Chapter of this Book, § 11. See Mr. Bynkerhock's Diflerration upon the Law of Rhodes, Cap. VI. p. 52. & seq. 2. * See Athanathus does also, in his Letters Ad Solitarios, and that was scarce the earth Part of the then known World. ARISTOT.


XIII. (2) Mr. BARBEYRAC adds, And Idists, (De Infensis) because, says he, it is highly probable, that the Printers stiup over & amonium, from the Refermance of the Word infensh which preceded. In § 10. Our Author joins together Infants and Madmen.


Abdication, 9 which are become subject to other Potentates and Nations. And some States that once were entirely subject, are since become so only in Part, or made a Sort of Confederates on unequal Conditions. For all these Methods of losing, or changing a Right, hold equally good against the Roman Emperor as against any other Potentate.

XIV. 1. But some there are, 9 who would confer on the Church a Power over the Inhabitants of even the undiscovered Parts of the World; 9 whereas St. Paul openly declares, that he had no judicatory Power where Christianity was not embraced. For What (says he) have I to do to judge them that are without? 1 Cor. v. 12. And this Power of the Apostle, tho', after its Manner, it belonged to earthly Things, yet was it of a celestial (if I may so say) not of a terrestrial Nature, I mean, not to be exerted by Arms and Blows; but by the Word of GOD, delivered both in general, and applied to particular Circumstances; by administering or refining the Sacraments, which are the Seals of the divine Grace, as it was proper and most expedient; and lastly, by a Vengeance not natural, but above the Power of Nature, and therefore derived from GOD, as is manifest in the Punishment of Ananias, Elymas, Hymenæus, and others.

2. CHRIST himself, from whom all Ecclesiastical Power is derived, who was a Pattern for the Church to walk by, declared that 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, 7 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 Infrument, but only the Symbol of GOD's Wrath; as at another Time the Spittle and the Oil was not the Salve, but 7 the Token of the Cure. St. Autilus, upon the forementioned Paffage of St. John, breaks forth into these passionate Expressions: 9 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. Diffurb not yourfelves 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 fo many Infants to be destroyed, in Hopes that JESUS might be among them. (This 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.

3. St. Paul, among his other Charges, gives this for one, that A Bishop be no Striker, 1 Tim. iii. 3. And St. Chrysifolus 4 says, that it is for Kings, and not Bishops, and the Nefeter, to rule imperiously, or by human Force and Compaf lion. 5 And in

9 Spain, for Infrance: Upon which see Go- 

mex, in § Fuerus, Num. 5. De Actionibus. Pa- 

norritan, in Cap. Tertio div. 9. De 

Elittonis. JASON, in Log. I. Col. De Summa 


Cardinal Tuschus, Prædict. Concil. CCCXLV. 5 


V. Condend. XXVIII. AEATUS, Inflitut. Mo-

ral. Lib. II. Cap. V. p. 2. GROTIUS.

XIV. (1) Compare with this the Trench of our 

Author, De Imperio Summarum Potestatum circa 

Sacer. Cap. IV. 

2. Audite ergo Judæi, & Gentes, &c. In JOANN. 

XVIII. 36. (Tractat. CVT.) St. HILARIUS 

Castra linguis, for CHRIST did not come to in-

vade another's Glory, but to heave his own: Not to 

seize on an earthly, but to confer on heavenly, King-

dom. Non enim ad hoc venit CHRISTUS ut 

alius invaderet gloriæ, sed ut fiam domi, 

non ut regnum terrestris preriperet, sed ut coeleste 

conferret. GROTIUS.

3. His Words are in his second Book, De Saecu-

dibus, Mähäum un in de tie genesei, &c. It is by no Means allowable for Christians to reform Of-

fenders by Force and Violence. The secular Judges 

indeed, when they get Mulattoes under their Ju-

ridition, 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 reftrain Criminals; nor, if 

they did, could we put it in Execution, because 

GOD does not crown those who by Necessity obtain 

from their Vices, but who do it out of Choice. And 

therefore, there is a great Deal of Art and Industri 

by us, that we who labour under such Difficulties may voluntarily apply themselves to the 

Glory for a Cure. And presently after, s. 36. 

Nov. &c. For we must not drag him by Force, nor 

necessitate him by Fear. And upon Ephel. iv. 

17. doxarchias, &c. Our Judges is to teach, as 

infruit; not to command and govern, but to per-

suade.
in another Place, 

We have no Power given us to refrain Men from joining 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 any human Right. And he says, that a Bishop discharges the Duty of his Function, not by Constraint but by Persuasion. Now from what has been said, it is evident that Bishops, as such, can exercise no human Dominion. 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 Chapter concerning Punishments.

XV. I will here give another Caution, and it will be somewhat necessary too, because, by comparing Things present with Things past, I foresee a great Mischief like to ensue, if not guarded against. The Caution is this, that the Hope we conceive from the Explication of some Divine Prophecies, can be no just Cause for our declaring War. For besides that, there can no certain Interpretation be made of fuch Prophecies as are not yet accomplished, without Inspiration, the Times of

Ecclesiast regit ille foam, divinitus jurae, Tempore: imperium nisi falsitatem relinquat.

Gunter, Ligurius. When William, Bishop of Roschild, refused Suero, King of Denmark, who was excommunicated, entrance into his Church, by opposing his Clergy 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.


We may add here what the celebrated Mr. Schulting says upon the Receipt Sentence of Paulus the Civilian, Lib. V. Tit. XXI. § 1. Jurisp. Anto. Hystor. p.502.

2. For the Book of the Prophets are closed up and sealed till the Time of the End, so that they cannot be understood, Dan. xii. 4, § 9. St. Jerome upon Daniel. If the Prophet spake and did not understand, what shall they do who pretend to declare what is contained in that sealed Book? Book expounded in several Mss. till the Time of its Conjunction? Procopius, Grot. Lib. II. Cap. i. § 20. 2050. I think it impossible for any Man to find out the Meaning of the Sibylla Oracles before the Event. And presently, 2050. I admit, it is impossible for any Man living to understand the Sibylline Oracle before their Accomplishment. For it is Time alone, which upon the Arrival of the Affairs itself, and the Conclusion of what is predicted, can exactly tell what the Prophet intended. Gregorius, Lib. V. 2050. 2025. But as other Predictions are very difficulty gaffled at and consolidated, because they have a hundred Introductions and various Explications till their actual Execution, fo this Oracle to received many, and even the Emperor Andronicus himself to till his Decease, as it shall be related and by. When we was dead and gone, the Oracle interred left. Have a Care then you who are Divine, that you be not too bold this Way: And do who you are Politicians a Care, that you be not imposed on by such presumptuous Theologians.

There is a Pallade very worth your viewing in Thucydus, Lib. LXXIX. in the Year 1583, about one Jacobus Drocardus. Grotius.

6 G
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. 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, Compasion, 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 and human Laws do sometimes give us to those Things which are due by other Virtues; and when that is so, there arises a new Obligation which belongs to Justice. But when this is wanting, the War on that Account is unjust, as was that of the Romans against the King of Cyprus, for his Ingratitude. For he who has done a Kindness, has no Right to demand a return of his Favour: For if so, it would be a Bargain and not a Kindness.

XVII. The Distinction between a War whoso Caufe is unjust, and that which is falsely in some other Rejpects, and the different Effects of both.


Epist. Mihr. ed. Defcrum, Prog. Libr. 4. § 3.

Hist. Lib. 4. Cap. 74. n. 7.

Stoic. Hipp. V. § 490, 541.

Contr. Pass. l. 21, c. 74.

Cicero in C. pecemans, Part 2. § 9. n. 2. Claud. 2. 2


Whereunto we may refer that of St. Austin: a A Pleasure in doing Mischief, or in Revenge, a reflexive and imputable 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 for Damages sustained by such a War.


XVII. (1) Which Vice infinuates itself the most, under the Appearance of Virtue. But as St. Austin well observs, it is much better to suffer as the greatest Coward, than to acquire Glory by such an use of Arms: Satius est cogis et vitam vivere, quam illas armas gloriamque uenire. De Civit. Del. 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.
Chap. XXIII.  W a r a n d  P e a c e.

G H A P. XXIII.

Of the dubious Causes of War.

I. W H A T  A r i s t o t l e  says, holds very true, that we cannot expect the same Degrees of Evidence, in Moral, as in Mathematical Sciences, because Mathematicians consider Forms abstractly from Matter, and Forms themselves are generally such as will not admit of any Mean, as between strict 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 have commonly some Mean coming between them, and of such an Extent, that they sometimes draw nearer to this, and sometimes to that Extremity. So between what we ought, and what we ought not to do, there is a Medium, via, that is permitted, but it appears sometimes nearer to one, sometimes to the other Extremity; whence we are often at a stand to know, which of the Extremities it has the nearer Alliance to, as in a Twilight, or Lukewarm Water, and this is what Aristotle says, ceteris paribus, &c. It is often difficult to judge which Side to take. Aristotelian Rhetoric explains it thus, ut navis adversa, &c. It is hard to distinguish what is really just, from what appears to be so.

II. 1. But this we are at first to take notice of, that the Action be in itself lawful, yet if upon weighing all its Circumstances, he performs it of Opinion that it is unlawful, that Action is vicious and bad; and this is what St. Paul means in affirming, Rom. xiv. 23, that whatsoever is not of Faith is Sin; 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 esteem its Suggestions, our Minds degenerate and become brutish.

2. But it often comes to pass, that the hangs in Supposition and Doubt, which if, be satisfied in, Cicero's Direction will not be, be is in doubt whether we shall do well or ill. The Hebrew Rabbins give

I. (1) See the Passage related at large in Pufendorp, Laws of Nature and Nations, B. I. Chap. II. § 1, and what I have said in the Notes upon that Paragraph.

2 Pufendorp has examined this in the last cited Chapter, § 9. All that our Authors say, 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 Pufendorp, § 3. Num. 3.

3 In this Sort of Forms, the Change is made ex diuinis, from one Extremity to the other: Whereas in Moral Things, it is ut majus, more, by a Medium. 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. Ephesinum, II. Morali. I imagined the Printers had slipped the Word Arifes, and then put II. for I. For I found in the Chapter of the Book which I have referred to, something agreeable enough to the Subject; the Philosopher therefore thowing, 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 Aries, the Scholarman, whom Aristotle mentions Morali, cited elsewhere by our Author, are exact. But I have not the Book, to see whether that Conjecture be better founded than the other, to which I shall therefore keep. The Thing is indeed of little Importance.


II. (2) To the same Purpose are the following Expressions in the same Chapter of that Epistle of St. Paul, ἀλλὰ ἐν τῇ ἀποκαλυφθέντι πάσαν διάκονον. Let every Man be fully perfused in his own Mind. And shall we be counselled thus, or not? Happy is he that commendeth not himself in that Thing which he alloweth. St. Ambrose. Whatsoever is done contrary to the Approbation of the Judge- ment, is Sin. St. Austin is of the same Mind; they are both quoted by Grattan after Chap. XIV. Conf. XXVIII. Quaest. I. Not very foreign to this is that of Plutarch in his Timoleon, διὰ τὴν σέβας. &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 if we may do it out of Principle and Conscience. Grotius.

To this may be added, what our Author says in his Vomum pro pace Ecclesiastic, Ad Aqu. XXI. p. 71. & seq. Edit. 1642.


3 And Pliny the younger: Ad St tetius petat, illud causiforius eunajque praeceptum: Quod dum quidem, ad Euerinit, id ipsum referis, Lib. I. Epit. XVIII.
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; in that for Café he is to chufe the faffer Side, that which he thinks to be leat unjuft; and for at all Times when we are under a Neceffity of choosing, then the leifer Evil puts on the Form of Good; of two Evils we must take the leaf, says Aristote; 5 and Cicero 6 advises the fame; and Quintilian 7 tells us, if we compare Evils together, the inamale holds the Place of Good.

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 Hefiac takes Place, It is best to fee with one's own Eyes, and to be guided by one's felf, 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 Caufes, the Eflécts, and other Circumftances.

IV. 1. But for our right Understanding of these Things, some Ingenuity and Experience are neceffary, and tho' who want these Qualifications 3 must listen to the Directions of wiser Men in order to regulate their Judgment in Pràctice. For according to 4 Aristote Things are probable, when all the World agree to them, or the Generality of the World, or at leat the Men of Understanding; and again, when either all thefe Men of Understanding, or the Majority of them, or however the moft Eminent agree to them. And this way of judging is what Princes chiefly make ufe of; 5 who can hardly afford Time enough to learn and examine by themselves the moft subtle Points of Arts and Sciences.

Princes are from their Conversation wise.

5 Aristides in his Harangue to the Rodians upon Concord tells them, that, as when

5 This requires to be rectified. See the Place in Puffendorff which I have cited in the fecond Note of this Paragraph.


(3) 1. Autumns fays, Lib. III. De Offic. When the Officarion of an Affair perplexes us, there are two Ways for us to go, either to follow our own Reason, or some other's Author. This is explained by GABRIEL-VASQUEZ. Difput. LXII. Chap. III. Num. 10. See also Medina I. 2. Quafl. XIV.

Grotius.

1. Exs xvi. 22. &c., &c. (Opor. & Dier. Ver. 293. & seq. Edit. Cleric.) This Thought has been copied by Livy, who puts it into the Mouth of Marius talking to his Soldiers: Sapere egaandi, Militae, cum, primam effe vina, qui ius confidet qualis in rem fit; feendum eum, qui hominum ostendit, qui nec ius effe confedere, nec alteri parere cant, qui exteriori enim effe dedit. Lib. XXII. (Cap. XXIX. Num. 8.) CICERO has also borrowed it: All the World allows him to be the wisfif Man, who can himself judge what is moft expedient and necessary, and that he is next to him who conforms to the good Counsel of another. Supercifimam effe dictum eum, et, quod opus sit, voluit in mercem: proximi accidere illiun, qui alterius bene inventi

2 Orat. pro Client. (Cap. XXXI.) Grotius.

IV. (1) Trog. Lib. I. Cap. I.

2 Quibus artium momenta effeificere aut expendere non videtur. Our Author has here imitated what Cicero fays in regard to Cato Major, Et primus M. Caroni vitam ad certam rationem normam dirigendi, & diligentissimi perpendentis Momenta Officiorum, amicum, de officio refundetur. Orat. pro Marcus Cæci I. 2. He cites here the Greek Verse in the Text without saying from whence he took it.

Ecce tugendo &c., &c. (That is: The Conversation of wise Men makes Princes wise. This is an ancient proverbial Sentence, as AUGUSTUS GELLIUS tells us, Notit. Attic. Lib. XIII. Cap. XVIII. upon which the Commentators may be confulted, who however have not observed, that STOBÆUS, Serm. XLVIII. cites it as from EURIPIDES; and others, as from SOPHOCLES, as appears from the Excerpta ex Trag. & Comic. Græcis of our Author, p. 122. As to the Thing itself, it is but too true, that the Great in general, and especially Princes, fee little with their own Eyes, and rely upon thofe of others. But this proceeds not from the Want of Time or Means of being inquired after 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 Purpofe, as they devote to Pleasures and frivolous Occupations; they would have all the Leifure necessary to enable them to judge for themselves, in acquiring fufficient Knowledge: And they generally have all the neceffary Means in their own Hands, if they would vouchsafe to ufe them.

3 Vol. II. p. 378. B. C.
a Fact is in dispute, that which has the greatest Number of, and those the most credible Witnesses to assert it, is held for Truth, 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 Roman first advised with the College of certain Priests (Fessi) established for that Purpose before they declared War against any Nation, and the Christian Emperors seldom or never undertook one without consulting their 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 incon- siderable and of indifferent Concern, either Side may be adhered to, and the Judgment be blameless. But if the Matter in Hand be of great Moment, such as the putting a Man to Death, then on account of the vast Difference between the Things to be chosen, the safest Side is preferable, according to the usual Saying,

"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 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, καὶ γαρ, &c. For when a Man is in a doubt, be is to choose that Side where there is the least Fault. Parallel to this is the Saying of Antiphon, αicisme, &c. 3. If we must do amiss, it is better to pardon the unjustly, than to condemn with certainty; for by the former we are only guilty of a Mistake, by the latter of a horrid Crime.

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 SiliusItalicus, who gives the following Character of him:

"With Caution be proceeded and wisely weighs
Each future Hazard; thus be nor eager
Nor forward is for flight uncertain Wrongs
To rouze up bloody Mars."

Now there are three Ways whereby Mifunderstandings among Princes may be accom- modated without a War.

VII. 1. The first is by a Conference: "There being two Sorts of disputing in the World, says Cicero, the one by Reason, the other by Force, that agreesable to the Nature of Man, and this to Brutes, we ought never to have recourse to the latter."

4. See the Differention of Mr. JENSIUS, De Fessi, in his Periculum Literarium, printed 1717. 5. But were thofe Bishops to know better than the Emperors, what related to so important a Part of the Power and Duty of Sovereigns? Have Ecclesiastics, 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 Tempor that many amongst them have been of in all Ages, there is more Reason to fear that they would engage a Prince in unjust and rash Wars. The History of such of them as have been Ministers of State sufficiently proves this.

V. (1) Forum in iisam portum potius pecos tamen, [TERTEN. Adhib. Act II. Sce. I. Ver. 20.] AMMANNUS MARCELLINUS, [in faber CICERO, Epig. ad Quint. Prat. I. 1. cited by that Historian] says, that a Facility to be angry and to be appealed is better than implacable Wrath, and that therefore the former Vice is preferable to the latter, as the leat of


2. "Et si in isto inum malum in loculis tuis adhuc in imperio (it should be read fo instead of mi adhuc) adhuc in imperio hic non (in the mi (it is here the mi should be added, which is wrong placed in the preceding Line) adhuc in imperio (it should be read as in imperio, &c. Sect. XXIX. Num. 13.


but when we cannot redress our Grievances by the former. A Man of Prudence and Discretion, says Terence, would try every Method rather than that of Compulsion; how do you know but that he may do it without any Force at all. Apollomius Rhediae speaks to the same Effect,  

and Euphris,  

Apepioi μᾶς νωρίς ἢ μην βία δοῦς:  

I'll do it by Words; if not, by Force of Arms.

And in his Suppliants he blames the States that neglected this Means of Accommodation.  

What Words alone might easily decide  

You to the Sword’s Determination leave. Ver. 748, 749.

And Achilles in his Tragedy of Iphigenia at Aulis:  

If he submits to Justice you’ve no need  

Of my Assistance, you are then secure,  

And I the Favor of my Friend prefer:  

Nor can the Army blame me if I gain  

My Point by Reason rather than by Force. Ver. 1017, &c.

The very fame we read in Euripides’ Phoenissae.

Πάντα γάρ εὐδοκέω λίγο  

‘Ο χίλιονος πολίμων δεξίων ἄτι.  

For all the hostile Sword can do,  

By Conference is done as well. Ver. 518, &c.

Pheneas in Livy makes this Improvement of it,  

Men for presenting of War do allow of several Things which by force of Arms they could not be compelled to. And Mardonius in Herodotus’s Polyxenia taxes the Greeks upon this Score:  

τὰς φρονίμους, &c.  

Whose Duty it was, since they were of the same Language, to have endeavoured to compose their Differences by the Mediation of Herodotes and Emassadors, rather than by the Point of their Swords.

2. Carolumus in Dionysius Halicarnassensis, says τοι μη, &c. If any Body without desiring what is another’s Property, only jues 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 Titalus in the same Author maintains, that what cannot be accommodated by fair Means must be decided by foul ones. I must profess, says Velogoeis in Tacitus, I had rather keep the Conquest my Ancestors have left me, by Justice than by the Effusion of Blood, by a Conference than by Force of Arms. And King Theodore takes Notice that it is then only our interest to run to Arms, when we cannot otherwise have justice done us by our Enemies.

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 to put the Matter to Arbitration:

2 Oceanus, in his History of the Days of the World, after the Deluge, says Τῆς θεώς  

Εὐρυχλή σεῖς ἐσεῖς,  

Αἰενεῖς, &c.  

What the Gods say I always found was Truth.  

For none but Gods and Madman e’er would seek

Or Rest or Virtue from the bloody Points Of Sword and Spear: For if human Miseries By force should be determined, War and Contention Would every City, every State infest. Grotius.

3 (Lib. XXXV. Cap. XLV. Num. 4.) Dionysius ad Eunuchen: For it is an Observation almost to a Proverb, That what a Man will stand up for, and maintain with all his Might and Main when you would force it from him, he will generously part with, when you quit your Pretensions. Grotius.

VIII. (1) A Method indeed generally lighted by the more potent. See CONNEXUS about the Union of the two Crowns of England and Scotland: but this is a Way that ought to be taken by those who have any regard to Justice and Peace. Several
Arbitration: see by Grotius. But Spartiam, and Hift. Edit. Thus are to his Controversy the which willing which Juft Omnesque Si But Polybius, Reference. any Several You Our nothing For...
2. Thus did the Ardealces 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 Sammites in their Variance with the Romans appeal to their common Friends. Cyrus 6 refers the Point between him and the King of Abyrria to the Indian King. The Carthaginians for avoiding War about the Controversies with 7 Mefenis, appeal to Judgment. And the Romans themselves, as to their Differences with the Sammites, (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 Arbitrators to the Partibians and Armenians, when they 9 demanded it, for regulating their Bounds and Limits. Plutarch tells us, 9 That it was the principal Busines 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 lays 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, 6 that the Priests in Spain did ufe to do the fame.

3. But much more are Christian Kings 11 and States obliged 10 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 fame 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, fince he is not fo much as allowed to commence a Law Suit; which Expressions, as it was observed in another Place, are to be taken in a qualified Sense.

4. And for this, as well as several other Reasons, it would be not only convenient, but somewhat necessary that Congresses of Christian States were held, where, by them who are no ways interested on one Side or other, the Differences of contending Parties might be made up; and 8 that some Means were thought upon 15 to oblige the Parties at Variance to accept of a Peace upon fair and reasonable Terms: And that this very Business was 14 the Druids Employment 15 formerly among the Gauls what Didacus 1 and Strabo 16 inform us. And we read too that the Kings of France referred the Division of their Kingdom to their 16 Nobles.

5 Our Author cited Nobody here in all the Editions before mine, except Livy, Lib. VIII. which could agree only with the Intimation of the Sammites related in the following Period. This proceeded from his underhanding rightly, up to the marginal Citation of ALBREICH. GENTLE, DE FURE, BELL. Lib. I. Cap. III. p. 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 fame Fact which our Author relates a little lower, by changing the Parties. For LIVY says of the Embassador, sent from the Romans to the Sammites: Quaum Romanus Legatus ad disputedandum esse Sammitae ad communes faciat urbis amicis societatem, &c. LIV. Lib. VIII. Cap. XXIII. Num. 8. I know no other Place, where this is said of the Sammites 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 amicis, and in the other societatem; it is, I say, very probable, that having at first quoted by Memory, or rather on the Credit of the same Author 1 mentioned in the preceding Note, who commits the fame Fault, p. 23, and uses also the Word amici, 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 Sammites for the Romans in the first Citation.

7 See Livy, Lib. XL. Cap. XVII.

8 See Note 6 here.


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 fo much Zeal upon one another, when they might accommodate their Differences with great Ease, and unite their Arms against the impious. NICHOPH. GREGORIAS, Lib. X. GROTIUS. 12 I find this Passage in the Treatise De Core, Milti. where that Father speaks thus: Et praefertim operatio filius patris, qui nec litigiosi consuetudine? Cap. XI.

13 See a Precedent in CASIODORE, Lib. III. 1, 2, 3, 4, and GAIL. DE Pace publica, Lib. II. Cap. XVIII. Num. 12. GROTIUS. 14 They discharged this Office becaufe 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 Author had here in View, and that which agrees with that of DIOECENTIUS CICERON. 15 The Drudes 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 RODERICK OF TELOS, Lib. VII. Cap. 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 knew 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. Cap. III. § 13.
Chap. XXIII. W A R  and P E A C E .

IX. The third Way to prevent War is to determine Differences \footnote{489} by calling Lots: \footnote{IX. Or by cafes of Lots.} Which Method \emph{Dios Chrysostom} highly approves of in his second Oration in \footnote{X. Whether Dueling may be allowed for procuring \emph{Peace}.} Ptolemais, and before his Time \footnote{Solomon, Prov. xviii. 18.} Solomon.

X. Something like this is \footnote{1} Dueling, a Custom which is not altogether to be rejected, if two Antagonists, \footnote{2} whose Disputes would otherwise involve whole Nations in Misy and Ruin, are willing to decide the Matter themselves by the Sword, as \emph{Hylus} \footnote{3} and \emph{Ecbemon} formerly did about \emph{Peleponnesus}; \emph{Hypercucus} \footnote{4} and \emph{Phenius} about a Province near \emph{Iaucbus}; \emph{Pyrcemba}, the \emph{Etolian}, and \emph{Deogemos} the \emph{Epeian} about \emph{Elis}; \emph{Cerbis} and \emph{Orfia} about \emph{Iba}. \footnote{5} For the People may accept of this Way of Determination (if it be not justifiable in the Champions themselves) as being the lesser Evil. \emph{Mercur in Lycur} thus addresses himself to \emph{Tullus}. \footnote{6} Let us make use of some compenations Way of deciding which of us shall sway the Scepter, with as little Bloodshed as possible. \footnote{7} Strabo \footnote{8} records this as an ancient Custom of the \emph{Greeks} and \emph{Etrusc} in \emph{Virgil} pronounced it justifiable, that the Matter depending between him and \emph{Turnus} should be so determined.

2. \emph{Agathias} in his first Book, where he describes the Manners of the ancient \emph{Gauls}, does in particular extremely commend this Custom; \footnote{10} his Words, as being very remarkable, I shall let down at large; \footnote{11} If any Difference happen between their Princes, to Arms they immediately go, as they were resolved to have the Matter determined by the Sword; \footnote{13} and when the Armies advance near one another, laying aside all Animosity, they enter into Sentiments of Peace, and tell their Kings either to make up the Difference, or to fight it out in single Combat, and so end the Dispute at the Hazard of their own Lives: \footnote{14} It being neither agreeable to \emph{Reynor} nor the Ufage of their Country, that their Kings, on Account of their private Piques and Quarrels, should embroil, \footnote{15} 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 \emph{Justice} and such an Affection for their Country had those Subjects, \footnote{17} so tender and confeding was the Temper of their Kings.

XI. But tho' in a doubtful Cause both Sides are obliged to endeavour after Terms of Peace, to avoid the Mitchiefs consequent upon War, yet does this concern him who makes the Demand, more than him who is in actual Possession. \footnote{18} As in all Cafes of equal Claim the Possessor has the better Title, \footnote{19} not only by a Civil, but also by a natural Right: The Reason of this has been already laid down out of the Problems ascribed to \emph{Aristotle.} \footnote{20} And here we must further add, \footnote{21} that he, who is satisfied in the Justice of his own Cause, but cannot produce sufficient Evidence, should.

X. (1) See \emph{St. Austin}, \emph{De Doctrina' Chrijli.} \footnote{2} Lib. I. Cap. XXVIII. and \emph{Thomas Aquinas}, \footnote{3} \emph{Summ. Theol.} II. \footnote{4} 2 \emph{Quinquis.} \emph{XCV. Art. VIII. &c} \emph{ibid. Capit.} \emph{Grotius.}

2 See what I have said on this Head in my \emph{Discourse} upon the Nature of Lot, § 27, and what our Authors say below, \footnote{6} B. III. Chap. XX. § 42.

X. (1) See below, \footnote{7} B. III. Chap. XX. § 43. and \emph{Pufendorf.} \footnote{8} B. VIII. Chap. VIII. § 5. \emph{Laws of Nature and Nations.}

2 The Author of the \emph{Thebais} \footnote{9} or \emph{Silenca in the Phaini} in, according to the best Manuscripts introduces \emph{Jason} saying to her Sons \emph{Eteocles} and \emph{Polynices} Determine which of you shall reign, between yourselves: But let not the Kingdom be ruined.

\emph{— Rex fit e vos habet.} \footnote{Receiveth re当ter} \emph{Manaeus reges, quae sunt,}—

(Ver. 564, 565.) The Emperor \emph{OLeo} faid, that it was much juicth that one Man should perish for the Publick, than that a Multitude should perish for one Man. \emph{Dion} or rather his Epniorist \emph{Xiphilinus} \footnote{12} in \emph{Oibon.} \footnote{(p. 204. B. Ed. H. S. Peterborough.)} \emph{Grotius.}

3 \emph{Inuaras antiquam visum, &c.}, \emph{itiri utris imprens, fena magna elude, fena multo fanguin estrinque populi decem pofita.} \footnote{Liv. Lib. I. Cap. XXIII. Num. 9.} \emph{Livy.} \footnote{4} Upon Occasion of the single Combat between \emph{Pyrachus} and \emph{Digenus}, of which mention is made a little above, Lib. VIII. p. 548. B. \emph{Edit. Angl.} (537. Paris.)

5 \emph{Quemque hodie Turmus furat se opponere mori.} \emph{Æn.} \footnote{XI. Ver. 115.} \emph{Turnus} then should try

\emph{His Cause in Arms to conquer, or to die; My Right and his are in Dispute, the State Fail without Fault, our Quarrel to maintain.} \footnote{Dryden.}

\emph{Upon jest such an Account. Anthony sent a Challenge to \emph{Olivarius. Plutarch in his Life of Anthony,} \footnote{(p. 944. E. Vol. I. Edit. Wech. Grotius.)} It was not out of Compulsion for the Romans, that \emph{Mark Anthony} sent that Challenge to \emph{Olivarius}, but to oppose Bravado with Bravado: \emph{animosum in animosum.} as the cited Historian says.}

6 \emph{Lib. I. (Cap. II.)} See the Statue of \emph{Charles the Bold in S. Arnulfus,} \footnote{5} and the Treaty of \emph{Aix la Chapelle. The Lombards were as equitable. See \emph{Paulus Warnerfid, Lib. I. Cap. XII. Lib. IV. Cap. XVIII.} \emph{Lib. V. Cap. XL. Grotius. X. (1) In pari causis posuit potius haberi debebat. Digest. Lib. I. Tit. XVII. De diversis Reg. \emph{furiis, Leg. CXXXVIII.}}}

2 See \emph{Cap. V. of this Book, § 18. Note 4.}
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.

XIII. Where the Title is doubtful, and neither Party in actual Possession, or both equally, there he shall be reputed the unjust Perfon who refuses to accept the Half of the Thing in Controversy, when it is tendered to him.

XIII. 1. From what has been premised, That much controverted Question may be easily solved, Whether War can be just and lawful on both Sides, with Respect to the chief and principal Authors of it. * Here we must disdignish 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 Rightitude. Further, this strict and special Acceptation of the Word *justice*, is divided into that which regards the Action, and that which regards the Agent*. The first Sort of Justice may be called *purity*, and the other *negatively*. 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 *a* *δικαιος*, and *α* *δικαιος*, 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 just on both Sides, nor can any Law Suit be so, because the very Nature of the Thing does not permit one to have a moral Power, or true Right, to two contrary Things, as *suppose to do a Thing*, and to *hinder the doing of it*. But it may happen that neither of the Parties in War acts unjustly. For no Man acts unjustly, but he who is conscious that what he does is unjust; and this is what many are ignorant of. So People may justly, that is, may honestly and fairly go to War. Because Men are very frequently unacquainted with several Things, both as to Matter of Right, and as to the Fact, from whence Right proceeds.

3. In the general Sense and Meaning of the Word, it bears the Name of *just*, when the Agent is for his Part in no manner of Fault 4. 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 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 Bifinus it is not to abandoa 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 *ερωτευτων*, wicked or malicious, Quintilian 5 is of the same Mind, when he says, that a *Consiliarius* may lawfully plead on either Side. And Aristotle adds, that to assert that a *judgemen* pronounced a just Sentence, is an equivocal Expression; for it may be taken either as he judges, *καν*, entirely as he ought, without any Ignorance, or as he judges, *κατ*, according to the bias of his Capacity and his real Thoughts of the Matter. And in another Place he says, 7 *If he determined it out of Ignorance, he has not acted unjustly*.

4. But in a War it is scarce possible, but that Raffinefs and want of Charity will be there, on account of the great Importance of the Affair, which is indeed of

XIII. 1. Gratian, in an Addition to a Passage of the Canon Law, distinguishes between a Sentence, just in its Cause, just in regard to Order, and just in a Conscience, caufa, ordo, anima, Cauf. XI. Ques. III. Pgl. Cap. LXV. Grotius. 2 [The first Sort of *justice* may be called *purity*, and the other *negatively*] This Sentence had apparently been left out here by the Printers in all the Editions of the first. I restored it in mine published in 1729.


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. Retor. Lib. III. Cap. XVII. init. See Victoriu's Notes upon that Passage.

5 The Rhetorician says, that this can scarce happen but by a Sort of Miracle; because Caufes manifeftly unjust, are foreign to the Art of Rhetoric: *Μικρινα, ωθυμοπτα ερωτη*, &c. Infin. Ort. Lib. II. Cap. XVII. p. 195. E. Vol. I. Edit. Boemian.

such a Nature as to require not Reasons barely warrantable, but the clearest Evi-
dences in the World.

5. But if we conftrute the Word fuf, as it respects some Reasons of Right; it is
plain that War in this Sense may be on both Sides juft, as it will be made out by
what we fhall lay down by and by concerning a publick War, in form. In the
fame Manner as a wrong Sentence, and an unjust Poffeflion have some Effects of
Right.

3 That is to fay, unjust Effects, which may give some right before Man, but none before the Tribunal
of GOD.

CHAP. XXIV.

Exhortations not to engage in a War rashly, theo for juft 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, dißtant from Juftice, require or direct with refept to War; yet by the
way we muft obviate a certain Miftake, left any one should imagine, that whenever
he has a juft Caufe given him, he is thereupon immediately obliged to declare War,
or that it is warrantable at any Time for him 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 pursuie it. For we oberved above
in its proper Place, that we may very laudably 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 moft of any, who herein follow the exact Pattern of Chrift,
who laid down his Life for us, while we were yet Sinners and Enemies to him.
Rom. v. 6. which Inclination should much more excite and direct us not to be fo eager in
purifying our Rights to that Degree, as to bring upon others all those Inconveniences
and Mischiefs which War is attended with.

2. It is the Advice of Aristotle and Polybius, that we fhould not make War
on every fuch Account. Hercules was condemned by the Antients for declaring
War against Laomedon, and Augustus for not paying him for his Labour. Dion
Prusfenis in an Oration of his about War and Peace, fays that this was not the only
therefore, the other Damages we bear with abundance of Patience, yet if once they attempt to force us to re-
cede from our Conftitution, we then ever beyond our
Strength betake us to our Arms, and will maintain
them to the last Extremities. (P. 1080. C.) Gro-
tius.
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 sig-
nalize himself very much in the War he undertook
And he adds, that this was occasioned by the
powerful Support of the Achaides. Our Author,
in reading this Passage hastily, or quoting it by Me-
memory, might have imagined to find there that this
Expedition was not glorious to Hercules, and ex-
plained the Word a§9., implied that the Oc-
casion of the War was frivolous.
4 See an Account of this in Apollodorus,
Biblioth. Lib. ii. Cap. iv. § 2. in Diiodorus Si-
culus, Lib. iv. Cap. xxxii.
5 The Authors, I have cited in the foregoing
Note, speak of this : The first at § 4. of the fame
Chapter; and the other at Chapter XXXIII. of the
same Book.

Chap. XXIV. War and Peace.

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Of the Rights of

I. Especially when that Right confers in inflicting Punishments.

2. But whoever he be who goes about to punish another, does, as it were, perfonate a Magistrate, that is, a Father; in Allusion to which St. Austin, speaking to Count Marcellinus says, a 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 Admitter of Pittacus's Maxim, &c. &c. Who preferred Pardon to Punishment. And Libanius in an Oration of his De fiditione Antiochenae says, That he who would be like his Heavenly Father aphi's, &c. Must take a greater Delight in forgiving than punishing.

3. Circumstances too may sometimes fall out so, that 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 mentioned, there are some Persons, for whose Safety, tho' they afflict 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 says, that to omit something of what is our Right, is not only an Act of Generosity, but is commonly much to our Advantage. "Ariphides advises

II. (1) Where he speaks of Adviction or disburthening: Numpaid aphi's fans filiam, &c. De Clement. Lib. I. Cap. XIV. PHEL the Jews say also, that Fathers do not resolve to disinherit their Sons, till the Wickedness of the latter has overcome their paternal Tenderness and Affection. De Nofia. (p. 904. C. Parisi.). A Father, when he 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 Affiliates, according to Caturn, who was of Opinion, that the Father should content himself with bandishing him whether he thought fit; and for this Reason, because a Father ought to punish his Children with as little Rigour as possible. Dixit [Cesar Augustus] "Ridens amplius, &c. SENEC. De Clement. Lib. I. Cap. XV. The Same Thought is expressed thus in a Verse of Tercer

Pro pecato magnas paululum sapfclitatis attri offici patri.

Andr. (A.D. V. Scen. III. Ver. 32.) Cicer. fays, when a Perfon is accursed before his Father, he asks Pardon, confesses his Fault, implores it to Ignoraance, promises never to be guilty of the like again, and submits upon Branch of Word to all the Indigation his Offence deserves. Whereas, before the Judges he denies the Fault, maintains that the Crime is forged, and the Witnesses false: Aphi's, judicis: erravit, &c. Orat. pro Leg. Grotius.

2. SENECA in his eighth Epistle fays, That good Nature forms another's Blood as it would

its own, knowing that we Man may not be loved of another's Life. Diodorus Siculus, in Frug. 6. &c. &c. Not every who offends may by all Means be punished, but those only who perish in their Crimes without Repentance. St. Chry- stostom, De Sintisi 61, &c. Let all those who are Strangers to our Faith know that the fear of Christ bridles and restrains every Power. Honour your Masters, and forgive your Fellow Servants that he may have the greater Reward to you, that he may stay at the Day of Judgment remembering this Tenderness and Humanity of yours, show you a kind and propitious Contenance. And Gratianus, Cap. XXXIII. Deq. IV. cites the following Exposition 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 desires Punishment, the Man claims our Pity. See both what follows there, and what we have said above, at Chap. XX. § 12. § 26. and 27. Grotius.

3. This Passage is quoted in the Jus Canonic. Cap. XXIII. Deq. V. Cap. I. 4. Si quidem de jus juris, &c. De Offici. Lib. II. Cap. XXI.

5. I doubt whether this Passage be in Ariphides 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 ano- ther, as for Influence, Ariphides for Dion Phragi- on.

States
Chap. XXIV. War and Peace.

States ἡγεῖον, &c. to resign and give up Matters of indifferent Consequence; and gives this as a Reason for αρχόντες, &c. for you highly extol those private Men who are often called Tyrants, as trenchant; to obey rather to subdue some Lobbies than go to Law. * Xenophon in the sixth Book of his Greek History tells us, that wise People will not engage in War, no, they are important Reasons for it. And Apollonius in Philostatus, 7 that War is not to be undertaken, everywhere where the Pretexts are great.

III. 1. As for Punishments, it is a principal Duty of ours, if not as Men, yet certainly as Christians, to be ready and willing to forgive those Injuries that are committed against us, as GOD forgives us in CHRIST, Eph. iv. 32. Not to be angry at those Things, says * οἴκλευσθε, for which they are guilty of them are liable to suffer Death, is a near Approach to the Divine Nature.

2. Seneca says of a Prince, * that He should be more easily prevailed on to pardon Injuries done against himself, than those done against others; for he is far from generous, who is only liberal of what is none of his, but he is certainly liberal who takes from his own Stock what he befores 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 Posthum and Retaliation; who consider, that it is the Property of a noble and elevated Spirit, to support itself in Injuries, at a Time when it has the greatest Power of returning them; and that nothing is more truly glorious than an injured Prince, who knows to take any Revenge. And Quintilian, We would persuade a Prince to aim at the Reputation of Tendernefs and Humanity, rather than to seek the barbarous Pleasure of being cruel and revengeful. This was the sublime Character that * Cicero might bestow upon C. Cæsar, that he was never forgetful of any thing but Injuries. Livy, in her Difcourse to Augustus, in * Dion, speaks thus, οἴκλευσθε ἀξίους, &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. * Antoninus the Philosopher, in his Oration to the Senate, says, that * Revenge of a personal Injury looks little and mean in a Prince; for the 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, εὐπρεπεῖα, &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 * 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 expreffes thus, * 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; or when what is committed against us, proceeds from human Fraelity, and consequently excusable, when the Offender gives plain Demonstration of his Sorrows and Repentance. Cicero says, * There is a Meafure to be observed in our Revenge, and our Punishments, and I do not know whether the Offender's Repentance be not a sufficient Satisfactory. A wise Man (says * Seneca) forgives many a Crime, * De Cenem, and will face any an ill-inclined Person, provided he finds him not incurably bad.

7 This Passidge 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. fud. Lib. II. Cap. III. p. 49. C.
3 St. Chrysostom, speaking in commendation of Clemency, ἀνακάλυφακτόν. &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 prodigious for a Prince's Repatisfaction 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. Groitus.
6 This Passidge of Cicero is cited above, Ch. XX. § 39. Num. 3.
7 Procopius, Vandal. II. Μηλαμόται γὰρ, &c. When Offenders are festival with a timely Sorrow and Concern for what they have done, the Particular injured are commonly induced to forgive them. Groitus.
8 K And
And there are the Reasons which Charity suggests to us for abstaining from War; a Charity we either owe to, or which we may and ought to bestow upon our Enemies.

IV. A Prince is often to decline going to War, both for his own and his Subjects Safety. 

IV. 1. Besides it often happens, that it is for the Interest of us and ours to do all we can to decline a War. Plutarch, in the Life of Numa, acquaints us, that after it had been concluded by the Priests called Fidiales, that a War might justly be undertaken, 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 P楮ure of such as deliberate with great Care and Attention) and confedereth, 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 Embassador, and defteareth 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, In vain did the Romans seek an Occasion of quarrelling with the Æduli, who not only, according to the Contributions demanded of them, supplied them punctually with Money and Arms, but did, ever and above, furnish them with Provocations at their own Ex pense. So Queen Amalafantha declared positively, to Justinian's Embassadors, that the would not break out into a War with him. 

3. One may sometimes too moderate the Matter, as Strabo mentions that Syrmis King of the Triballi did, who denied Alexander the Great the Liberty of Landing upon the Island Peace, and yet, at the fame Time, sent him some very valuable and magnificent Presents, in Order to make it appear to him, that he did it out of a just Fear, and not out of any Hatred or Difequity to his Perfon. And what 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 fame other's Death mark out: 
In their Debates, bad they been their Fate, 
Mad Greece had never fallen by the Sword.

Think with yourself, says Livy, not only of your own Strength, but of the Power of Fortune, and the common Hazards of War. And Tucylides gives this Caution, Consider before you enter into it, what unexpected Incidents there are in War.

V. 1. When People are deliberating, they lay before them not only the 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 conduct to the End, either one Way or the other. And therefore, in all our Considerations, 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, What one prophecy by any Action is of
two Sorts, either an Advantage or a Possibility. Which Companion has the third 3 following Rules for its Direction.

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 involves of Evil. This is what Aristides means by the Expression, * When the Good hoped for is less than the Evil apprehended, it is better to make Peace. Andronicus Rhodon, in his Character of a Man of Bravery, says, that * He will not expose himself to Danger upon every slight Occasion, but when he has Reasons of the least Importance for it.

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 disproportional, and the Disposition of the Affair in Hand to produce the one or the other, no less disproportional, we may still venture upon it, * 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 * 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 * 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 Raffle: And therefore, in Attempts of any Danger, we should imitate the Practice of faithful Physicians, who to their Patients that are but a little indisposed, 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, * Where no great Advantage can accrue to us, if we meet with Success, and the least Mischance may be fatal, what need we run any Risk at all? * Dion Phusenus, in his second Tarquinius, delivers himself thus, *new kx, &c. Suppose this be an undetermined and unworthy Treatment of us: We must not however, the our Ulyss be unjust, by our struggling and contentious Humours expose ourselves to further Inconvenience. And afterwards, *jmepp ajm, &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. * When our Fears, says Aristides, are greater than our Hopes, we ought not to expose ourselves to the Danger.

VI. I. Let what * Tacitus relates, that the States of Gaum consulted about, Whether they should change 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, and in an Aristocraticy 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
War, prevents the utter Ruin of the whole State; that is, Cicero illustrates this Question, in a Greek Passage, &c. If the State be in Danger of being entirely undone. As when, suppose, having examined and considered thoroughly the Consequence of the Matter, we can find nothing but the sad Prefage 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 1st Poet,

How easily may
A Man’s own Hand from Slaevry 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 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 advises the Hebrews, by his Prophet, to surrender themselves into the Hands of the King of Babylon, lest they should die by Famine and Pefilence. Wherefore, tho’ the Antients highly extolled

Yet is it a Conduct very far from deserving any such Commendation, no more than the Means that lead to it.

3. For utter Destruction, in such Circumstances, is to be looked on as the greatest of Evils. 3 Cicero, in his second Book of Invention, lays down this as a Case of extreme Necessity, that the Caesars were forced to surrender themselves to Hannibal, tho’ their Necessity had this Exception, unless they chose rather to starve. And Diodorus Siculus’s Judgment of the Thebans, who lived in Alexander the Great’s Time, was the /{\textit{agraphma}}, &c. That is, with greater Courage than Prudence they had drawn upon themselves the entire Ruin of their Country.

4. And

This Passage from Cicero, is quoted in the Place referred to in the foregoing Note.

Lucan says this,

Non tantum ignora, post hae exempla vivorum,
Peregrinat gentes, quam fit non arduo virtutis
Senvium fugisse manus
Pharal. Lib. IV. v. 175, & seq.

They burnt themselves, with their Wives, Children, and all their Effects. See Livy, Lib. XXI. Cap. XIV. Our Author cites here, without laying from whom he takes it, a Verse which makes a Part of the Speech that Lucan puts into the Mouth of the Marcellian Deputies, addressed to Caesar. This is it, with that which precedes,

Nee vectis hic populos pro liberitate fabere
Obfitionem Patro gefti quod martre Saguntum.
Lib. III. v. 349, 350.

Athen. Lib. VII.

Anaxiames, who had surrendered the City of Byzantium, for Want of Provisions, justified his Conduct by saying, that Men are to fight against Men, but not against Nature. This Xenophon tells us, (Hist. Græc. Lib. I. Cap. III. § 12.) Procopius observes, that Men do not commend those who make Death their Choice, while there is any Hope that appears greater than the Danger. Gellius. Lib. IV. (Hist. Mjfc. Cap. XII. in

Botticelli’s Speech to persuade the Garrison of a Citadel to surrender. A German Poet makes Guido Spinabresen 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 Vanity, to expose one’s Self to certain Destruction when it may be avoided;

Omnia secuti pro libertate fermaet.
Sed libertates contemptus nemo jactate.
Suns amori: Neque enim cerea jacteptis cladis.
Pyram vitare quaeris, nisi cum ravisse Salutis,
Libertatis amari, sed gloria nona putanda est.


Ancient 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 committed their Glory well, but had uselessly mistaken their Interest; because it was a Danger they hurried themselves into, without any Manner of Neceffity
Chap. XXIV.

War and Peace.

4. And Plutarch 1 pronounces against Cato before mentioned, and Scipio, who after Cæsar's Victory at Pharsalia, would not submit to him, *Alius opinat* &c. that They were highly to blame for destroying so many brave Men in Africa, without any Occasion for it.

5. What I have spoken in Relation to Liberty, I would have understood of other defirable Things; we ought to sacrifice them, when we have as much or more Reason to fear a greater Evil. For, as Ariëtides 2 well observes, The Cæsars is to favor the Vixiel, with the Lofts 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 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 Justice itself, that political Justice, which from the very Nature of Government does not less oblige a Prince to take Care of his Subjects, than it does the Subjects to obey their Prince. From whence it follows, (as Divines do with Reason teach us) that A King who undertakes a War upon frivolous Accounts, or to inflict some needless Punishments, and such as will involve his Subjects in a great Deal of Trouble, is obliged to make up the Damages they suffer thereby: For tho' he cannot be accused with any Injury done to his Enemies, yet may there be a heavy Charge laid against him of wronging his Subjects, by plunging them in so much Misfortune and Misery for such Reasons. *Livius* 3 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 defines when he says, *Ost. 1.*

**Let the Soldier wear**

No other Arms than what defensive are.

VIII. The 1 Cafe therefore very seldom happens, wherein War cannot, not ought not to be forbore; and that is, as *Florus* 4 express it, When all the Justice we can expect is more cruel than War itself. One runs into Danger, says Seneca 5; when we cannot apprehend the same Inconveniences if we forts till; Or perhaps greater. Which *Ariëtides* thus explains, *Terra navi, &c.* It is then advisable, that the Event be uncertain, to prefer an Hazard, when to be at Quiet is evidently worse. It is Prudence, says *Tácitus,* to exchange a miserable Peace for a War, when, as the same Author has it, 6 either our Courage will procure us Liberty, or, if we lose the Day, we are just as we were before; or, when (as *Livius* speaks) Peace with


VII. That he ought to forbear pursuing a Punishment by Force of Arms, unless not much superior to Power.

VIII. *War not to be engaged in but out of Necessity.*

'Army miserable in name.' *Generaliter dictum iram bellicosum,* &c. In *Anecd. X.* (ver. 738, 759.)

*Grotius.*

3. Here is only the Expedition which gives our Author's Sense, and that different from the Historians. It relates to *Sabinus 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 primam Tegam, & famissima armis juru viderunt, dux Arminiano arma corrigit. *Liv. IV.* Cap. XII. Num. 32.

3. *Incurri in pericula, ubi quisquis porta metuuntur.* This is the Manner in which our Author quoting the Passage, which I can find no where.

4. In his first Oration concerning Peace, *Vol. II.* p. 47, B.


7. The Sammites say this, When about to throw off

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*Di Tivis in tellis iram migraturn inanem Amborum, & tanta mortalia suae laboris.*
Of the Rights of

slavery is more inapplicable than war with freedom. But not if (according to 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 Emissation, 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 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 Scipio Africanus and L. Amilicus Paulus used to say of an Engagement, that We should never fight, but in Cases of extreme necessity, or of some very favourable Opportunity. What I have said ought especially to be observed, when there is a Prospect of gaining our Point by the Terror and Rumour of our Preparations, with little or no Hazard on our Side. This was Dion's Advice for delivering Syracuse.

And in Pliny's Epistles there is this Passage, He vanquished them by the Fear of him, which is the bandit's Victory in the World.

X. War, says Plutarch, is a most cruel Thing, and brings along with it an Ocean of Calamities and Violences. And St. Austin very explicitly expresseth himself thus, if I should attempt to speak of what Mischiefs and Misfortunes, 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 reflecteth 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 War, because, unless we were satisfied of the Justice of them, he could not hope had any Hand in them, and from hence it is plain, that a Prince of Prudence and Thought would, by his good Will, base no War at all; for it is the Injustice of the adverse Party that thrills him into Wars, which are not only just, but sometimes inevitable; which Injustice every Man ought to bewail, as it is human Injustice, to do it not oblige us to Arms. Whoever therefore confounds with Regret, such great, such barbed, such horrid Ills,

off the Yoke of the Romans: Rebellofis, quod pax
forestitiibus gratior, quam liberis bellum effet. Lib. X. Cap. XVI. Num. 5.

8 He speaks both in regard to under-taking War, and giving Battle, after having had Recourse to Arms. Preedium quidem cot bellum
sine dolorum omnino negatam, nisi quid major usuali
menti nos, quam danni metu offendiur. 

X. Miser-
s of War

Sicul. of the Wars, &c. Lib. VII. ad Attic. Epist. VII.

IX. (3) He speaks both in regard to under-taking War, and giving Battle, after having had Recourse to Arms. Preedium quidem cot bellum
sine dolorum omnino negatam, nisi quid major usuali
menti nos, quam danni metu offendiur. 

SICULUS, in August. Cap. XXV.

2 Num [Scipio Africanus] negat aliter cum
tobis confici debere, quam si aut acciso obviisit,
at necfasas incidisse, VALERIUS MAXIMUS, Lib. VII. Cap. II. Num. 2.

3 In quo de Publico Africano, Pauli fils ita
turpi que: Num fe patrem fumum aulidae dixerit,
L. Emilia Patrem, nimis hocum imperatorum feg-
nis collatis non decerrari, nimi fumma necelitudo,
si fumma ei occatio data effet. AULUS GELLIUS. Not. Attic. Lib. VII. Num. 2. 

4 PLUTARCH, in his Gracchus, in 3 sec und.
&c. It is neither a good bargain nor a good Politician, to act and back, unless there is the merit of necessity for it. It is Marcius's Exprefion in ZOARAS, ΜΑ αδιακαι Ιερασιαν και, των
παινιαν αυτος, A Prince ought never to think of
War as long as he may enjoy Peace. St. Austin, in his fifteenth Epistle to Seneciofis: Peace should be our Choice, but War the Reform of Necessity alone; they therefore call GODS to be from that Necessity, and perform us in Peace. GROTIUS.

The last Passage is not in the fifteenth, but the two hundred and fifth Epitaph to Baniface, and there is even some Difference as to the Terms in the Editions I have seen.

5 The Lion learning to use the Weapon Nature gives him, for a large Time defends himself by his Ter-
or only, and does at it were fierce that he is forced to engage. This Passage is in PLINY'S Natural History, Lib. VIII. Cap. XVI. GROTIUS.

6 Of such-like, miferam gentem (good for pulcherriorem victoriam genus) terrae perducent [Sparina] Lib. II. Epif. VII. Num. 2.


2 Qvarum malorum, [que ex bello nascumentur] 
&c. De Civit. Dei, Lib. XIX. Cap. VII.

3 The Lacedemonians say, in an Harangue extant in DIODEUS SECVULI, Lib. XIII. Θωσωσα κε 
ει παθος, &c. Seeing so many animalities, and so many other shocking Incidents in War, we think it our Duty to declare, both to God and Man, that you are not any Ways the Authors of such Things. PLUTARCH, in his Name, Τα ζησιν, &c. If any one says to me, Has not Rome improved by Wars? He asks me a Question that requires a long Answer; when we have to do with those who make Improvement to conftrict rather in Riches, Luxury and Empire, than in Safety and Humanity, in justice and Contentment. Stephani, S. Physicin, says in PROCOPUS, Persic. Lib. II. to Chresten the Persian King, Ουκ αι 
ωτησαν βενεσε, By being employed in Mejiares and Battles, and ensnaring of People, you may probably, great Prince, acquire some other Title, but you can never by such Methods get reputation Good. Add to this a famous Passage in GUICCIARDIN, Lib. XVI. (§ 4. in the Speech of the Bishop of Ojina.) GROTIUS.
Chap. XXV.  WAR and PEACE.

myself own, that he is unfortunate, in being obliged to occasion them; but whoever can endure them, or make 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, 5 That the Good never engage in War but out of Necessity, whereas the Wicked make Delight in it. 6 Maximus Tyrtius tells us, 6 as also others, &c. that Tho' there were no Injustice in a War, yet the very Necessity of it is deplorable. And again, 6 &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 profite of another's Blood. Publ. 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 Pelts and Scourge of Mankind; meaning that Mafacres and Devastations of Cities were Acts that most resembled a Plague, and that nothing was more worthy of, and heroic 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, 8 was obliged to fly for it. If GOD would not suffer 6 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 Perdon 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 our selves 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, Who soever killed his Enemy, in what War for ever, was 6 excommunicated for the Term of three Years.

7 Alian. Var. Hift. Lib. IV. Cap. XI.
8 Osv. Phil. &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. Tho' there are Josephus' Words, Lib. VII. Cap. IV, where there follow more to the fame Purport. And Pliny, Lib. VII. Cap. XXV. after having related the Battles of Caeasar the Dictator, says, I cannot indeed think it for his Reputation, it has brought so many Miseries upon Mankind, tho' he had even been forced to it. Philo, in his Life of Moses, § 30 et vijltus, &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, as the Account of that common Relation we hear in one another, and therefore such Homicides were obliged by some Purgations to expiate the repeated Crime. Gro- tius:

C H A P. XXV.

Of the Causes for which War is to be undertaken on the Account of others.

I. I. AboVe, when we 5 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 Perdon's: And therefore those Reasons that can justify a Man in undertaking a War for himself; the very same can justify those who engage the Cause of others.

2. But our main and chiefest Care should be, 1 for those 5 who are under our

2 Direction

4

5 Num. XXXV. Dent. xxv. 1 Chron. xxviii. 5.
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, who had surrendered themselves up to them. 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 Matter of a Vessel detained, or any Trader plundered. The same Romans, thò 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 Companions addressed the Romans thus. Thò you will not guard our State against the Violence and Infolts of its Enemies, yet surely you will protect your own. And Florus tells us, that the Alliance between them and the Romans became more strict, upon the Surrender of all they had. And Livi says, It was believed to be a Point of publick Faith, not to fail and desert such as gave themselves up to their Disposal.

II. A Prince is not always obliged to take up Arms, whatever juft 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. And therefore, If one Subject, tho' altogether innocent, be demanded by the Enemy to be put to Death, be may, no Doubt 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 Vafquez, argues against this Point; but if one does not do so much mind his Expressions as his Meaning, one may find that what he intended was, that such a Subject should not rashly be forfaken; provided there were any Hopes of being able to protect him. For, amongst other Inftances, he alludes that of the Italian Infantry, who deferted Pompey, before Matters were grown desperate, upon their Assurance of Security on Caesar's Side, which Aét he very justly censure.

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 Demofthenes proposed that remarkable Fable concerning the Dogs, whom, as an Article of Peace, the Wolves demanded the Sheep to give them up. Vafquez is not the only Perfon who is a-gainst this, but Soto too, even he whole Opinion Vafquez blames, as authorizing Perfidious. But Soto would have it, that such a Subject is obliged to surrender himself to the Enemy: And this is what Vafquez denies for this Reason, because it is not required by the Nature of a Civil Society, which every one enters into for his own Safety and Advantage.

3. But from hence all that can be gathered is, that no Subject is, by any Right strictly so called, obliged to this, but that Charity permits him to do otherwise. For there are many Duties, not of stricte Justice but of Charity, which are not only

Tim jam fides a& vijsa, dediis non profi. Ubì supra. Num. 7.

III. (1) See Pufendorf, B. VIII. Chap. II. § 5.

2 See the Patriarch Nicophorus's Advice given to Michael Rangabu, about delivering up some Deserters to the Bulgarians General, as an Article of the Peace, where you have in Zonaras the following Period, &c. &c. Judging it much better for a Pea, than an immense Multitude to suffer. (Vol. II. in Mich. Rangab.) Groton.


4 As if the State broke the Engagement they had entered into with the Subject demanded by the Enemy.
very commendable, (as Valpues owns) but which cannot be dispenced 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 Praxiteles, in Euriptid’s Eratbeus, 6 designes by saying,

"Et haec absque iuda, &c.
If I know any Thing at all of Numbers, Any Thing of more and less, a single House Can never a publick Misry exceed or equal, However great its own Misfortunes be.

And thus Phocion 4 solicited Demosthenes, and others, after the Example of Lens’s Daughters and the Hyacinthids, 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 failing 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 face the Joy, 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 the first that were ever known to judge it reasonable that their Country should perish for them.

But granting all this, there still remains a Doubt, Whether be can be forced to do that, which be 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 obverse that the Cafe is not parallel between Subjects and Subjects, and between Sovereigns and their Subjects. For one equal cannot compel another, unless it be to that, which by the strictest Right he owes him. But a Sovereign can oblige a Subject 10 to other Things also which any Virtue directs, because 11 that is a Power included in the Right of Sovereignty as Sovereignty. 5 Thus in Time of great Scarcity Subjects may be compelled

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 Cafe, whether there be sufficient Certainty on that Head. He who demands an innocent Peron, in Order to destroy him, gives Reason, by that Demand, to fear every Thing from him. If he be capable of deriving to a Peron of Life, who has done nothing that merits Death, he will be as capable of breaking his Engagement to leave the State in Tranquility, when the Peron 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 Jews, says, it is not just that the Whole should be deemed an Appendix of one of its Parts. De metaphr. Lib. I. (p. 672, B.) In the same Place are other Things well worthy of being read. Grotius.

7 Etiam si mihii in aliqua nova, &c. Orat. pro Sextio, Cap. XX.
8 Ut enim leges omnium, &c. De fami. bon. & mal. Lib. III. Cap. XIX.
9 Quae non rabies, inquis, agitatis, &c. Lib. XLV. Cap. XXVI. Num. 8.
10 So among the Lucani there was a particular Punishment for the Extravagant; among the Macedonians for the ungrateful, and among both the Lucani and Athenians for the idle. Add here what is said B. I. Chap. I. § 9. Note 6. Grotius.

As for the Law of the Athenians against Idleness, the Rester 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 Damonensis, in Stoic. Phaen. Tr. XLI. See other Examples of in Belian, Par. Hist. II. 5. W. 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 Macedon is read for Medorum. See what I have said upon Puffendorf, B. III. Chap. III. § 17. Note 3. Edit. II.

11 As Sovereigns may prescribe Things indifferently to themselves, when the Good of the Publick demands it, with much more Reston 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 Cafe, 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.

6 M
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 before mentioned, declared that Things were come to such an Extremity, that if Alexander demanded the dearest Friend he had, as Nicceles for Injustice, he would be the first to vote for the delivering him up.

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, if in his Power to do it, is as much to blame, as he who wrongs him. But such Articles do not reach so far, (as it was before observed) as to involve us in an unjust War; and for this Reason the Lacedemonians before they entered into War with the Athenians laid before their Allies the Justice of their Cause, to be determined by their Opinion of it; and so were the Romans for having the Greeks Judgment upon their War against Nabir. But we may add here that an Ally is not obliged to give his Assistance, when there are no Hopes of Success, because Alliances are entered into on the Account of making some Advantage by them, and not to People's Prejudice. And we may protect one Ally against another of our Allies, unless there is a Clause in a former Treaty to the contrary. Thus might the Athenians have come in as Auxiliaries to the Carcereans if their Cause had been good, against the Corinthians, those more antient Allies.

V. A third Reason for War is the Protection of our Friends, whom tho' not under any formal Promise, yet upon the Score of Friendship we are under an Obligation of affisting, provided we bring not ourselves into any great Trouble, and inconveniences by it. Thus Abraham took up Arms in behalf of his Kinman Lot. And the Romans charged the People of Antium not to presume to meddle with the Greeks to plunder them, because related to the Italians. And the same Romans very often actually engaged in War, or at least threatened so to do, not only for their Allies, whom they were bound by Treaties to defend, but for their Friends too.

IV. (1) Qui enim non repellit a Suis injustium, &c. Olib. Lib. I. Cap. XXXVI. That Father does not speak there of Allies, to whom our Author applies the Paftage, as appears from the Example that follows, of what Abijai did in killing the Egyptians, who infulded one of his Nation. Socratus therefore means here all thole, with whom we have any particular Tie or Relation.

2 See Simler, De Republica Helvetiorum: If the Lord makes War upon any one, and it is known to be just, or not known to be otherwise, the Vaffal is obliged to affift him. But if it be infulded that he inter- ters it into without any Grounds for doing so, he shall help him to defend himself, but not to affilt the other.

Lib. II. De Fidei, Cap. XXVIII. at the End. Grotrius.

3 In the Peloponnesian War. See Thucydides, Lib. I. Cap. CIX. CXXV. Edin. Oxon.


5 The Cafe, of which our Author speaks, happened a little before the Peloponnesian War. See Thucydides, Lib. I. Cap. XXX. & seqq. and what is said above in Chap. XVI. of this Book, § 15. Num. 4.

V. (1) A Perfon having formerly confuted the Oracle at Delphi, the God told him, he would give him no Answer, only that he should forthwith depart out of the Temple; because he had not affifted one of his Companions, who had been kill- ed by Robbers:

'Andi ψαλτι διευλόρητον παρέναι πλοῖον ἐν ἄγεσιν. οὐ γάρ ἐν τυρνηταῖς περικαλλος ἐνεγερευτότα. Grotrius.' This Oracle is in Ælian, Var. Hist. Lib. III. Chap. XLIV.

2 Our Author has without Doubt taken this Fact from Strabo, for neither Livy, nor Dionysius Halicarnasenhus, nor any other Author that I know of, says any Thing of it. The Geographer fays, that the People of Antium had formerly Ships and exercised Piracy in Conjunction with the Egyptians, even after they were subjected to the Romans. Alexander complained to the Romans upon this account, and Demetrius after him, that every Ally, if they laid all the Prizes 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 Cæsas and Pallas, beneficent Divinities, whom all the World honoured with the Name of Saviours, to lend Corfairs into Greece. Upon which the Romans put a Stop to those Piracies. Geograp. Lib. V. p. 354, 355. Edinc. Anglo. 1727. Parif. 1746. This does not seem to agree entirely with what Livy fays; that after the Defeat of the Antiaris, they were prohibited Navigation, and their Ships taken from them, some of which were kept at Rome, and others burnt, with the Reels of which the Pulpit for Harangues was adorned, and from thence took the Name Rofra: Novis inde ingrati, &c. Lib. VIII. Chap. XIV. Num. 8. 12.

Or else the Romans muft loon after have become more rigorous, with regard to the Antiaris, and have suffered them to fit our 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 Hithilities on the Part of a dependent People, and not the adding of Friends against an Enemy, over whom one has no Authority.

VI. The
VI. The last and most extensive Reason of all for as illering others is that Relation that all Mankind stand in to each other; and this alone is sufficient. 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 1:

The Rocks Protection to the Beasts afford,
The sacred Altars to the trembling Slaves;
And for one suffering Town a safe Retreat
Another Town provides.

That Courage, says St. Ambrose, which defends the Weak, is Justice in Perfection; but of this we have already treated.

VII. 1. Here it is an Inquiry whether one Man is obliged to defend another from Injuries, or one People another. Plato is for having him punished, who does not keep off a Violence that is offered another. The fame the 3 Egyptian 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, 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 forsakes 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 There are none People, perhaps, whom it is no Disreputation not to protect. Sallust in his History has these Words, All who when their own Affairs are as they could wish them, are invited to a confederate War, should thoroughly consider whether they may without any Hazard still be at quiet; and then, whether what they are solicited to, be a Thing that is just, safe and honourable, or whether it would not be a Dishonour 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 persifing, provided I can do it without ruinning 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 to do it, if the assaulted cannot be rescued without killing the Aggressor. For if he who is set upon may value the Invader's Life above his own, as we elsewhere have told you he might, 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.

VI. (1) Home in adjutarium mutuum generatur. De Ira. Lib. I. Cap. V.
2 plorer 50 xalovguv, &c. Sop. Ver. 267. & seqg. The Paffage quoted here by our Author from St. Ambrose has been already recited above, B. I. Chap. II. § 10. Num. 5. Note 18.
VII. (1) Our Author cites here in the Margin, Lib. IV. De Legibus, in which there is nothing like this. He meant to refer to the ninth Book, where however the Law is not general, as the makes it. The Philosopher speaks of those, who seeing a Son in his right Servi's best 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, &c. 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 les.
2 The Rabbins are also for having such a Man punished. See Moshe, De Karai. Pricjnce jubene. 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. Dion. 503.

VII. Yet it may be let a Man without any Crime if one's afraid for his self, or that he may kill the Aggressor.
8 Lusi. I. 2. c.4. Duh. 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 Heracleid 1.

We, who this City do inhabit, can ourselves dispense our Justice.

Nor do the following Verses imply any Thing else:

That Sparta beautify which is your Share,
Upon Mycene I my Care shall fix.

And Thucydides 2 amongst the Tokens of Royalty, puts the Supreme Power of Justice, as well as a Power of making Laws, and constituting Magnifies. To which alludes that of Virgil:

The Realms of Ocean and the Fields of Air
Are mine, not bis; by fidal Lot to me
The liquid Empire fell, and Trident of the Sea.

Dryd.

And that of Ovid not unlike it:

Nor may the Gods the Aés of Gods reftind.

And that alfo of Euripides,

That the Rule and Cufom of the Gods is this:
That none must e'vn another's Will oppofe.

The Reason of this is, as St. Ambrofe very justly explains it: Left by intruding into each other's Provinces they should quarrel among themfelves. And the Corinthians in Thucydides reckoned it very equitable, 3 that every one fould punish his own; and Pericles in his Diáouve to Martius, refufes to make any Apology for himself, for what he had acted againft the Dolopes; For, fays he, I only put my own lefleful Authority in Execution, fince they were my Subjects, and under my Command; but tho' Reasons may take place where Subjects are really in Fault, or, if you please, when it is uncertain whether they are or no. 4 For to this End was the Diftribution of Empires firft made.

2. But if the Injustice be visible, as if a Bafiris, a Phararis, or a Thracian Dianeses exercise fuch Tyrannies over Subjects, as no good Man living can approve

VIII. (1) The Herald Copread demanded on the Part of every one the Heracleid to be delivered up; who had taken Refuge at Athens, and had been, as he fays, condemn'd to die in their own Country. To which he adds, that every Prince has a Right to execute Justice upon his own Subjects, Vers. 143, 144.


3 It relates to Allies and not Subjects. The Orator of the Corinthians fays, that every State had a Right to revenge the Injuries done it by its Allies. Lib. I. Cap. XLIII. Ed. Oxon.

4 St. Austin fays, Lib. II. De libero Arbitrio: It is no Argument of Justice to punifh People who are under another's Jurisdiction, because it is a Proof of a Man's Goodufu to do Straughters a Kindnefl. Procopius, I. 13. Asippus. &c. It is proper that every Man fould look after his own Province, and not concern himfelf with Affairs of other States. Grotius.

This last Paffage is in Gelimer's Anfwcr to the Emperor Justinian's Letter, Cap. IX.

5 In doubtful Cases the Prefumption ought to be in Favour of the Sovereign. Otherwise a Handfe would be given to other Powers for intermediate what paffes out of their own Dominions.

6 This Bafiris is faid to have been King of Egypt; and to have facrififed the Strangers who came into his Country to Jupiter. Thus he is represented in fabulous History. See Apololidus, Biblioth. Lib. II. Cap. V. § 11. But some ancient Authors justify him as to this Charge; and others maintain, that there never was fuch a Perfon as Bafiris. See Marsham's Canon Chronus, p. 50, 79. Ed. Lipt.

7 He was very cruel Tyrant of Sicily, and was faid to have eaten his own Son. See Dr. Bentley's learned Difquifition upon the Letters of Phalaris, p. 512, 513. Ed. 1699.

8 This King of Thrace is faid to have fed his Horses with human Flesh. See Diocletian Seculius, Lib. IV. Cap. XV. Apollodorus, Lib. II. Cap. V. § 8.
of, the Right of human Society shall not be therefore excluded. Thus Constan-
tine made War against Maxentius and Licinins; and other Roman Emperors
against the Perfians, or threatened them with it at least, unless they left off per-
cuting Christians on the account of their Religion only.
3. And indeed tho' it were granted that Subjects ought not, even in the most
pressing Necessity, to take up Arms against their Prince (which is what tho' very
Gentlemen who are such Advocates for the Power and Prerogatives of the Crown,
are, as we showed you, in fulphure about) we should not yet be able to conclude
from thence, that others might not do it for them. For whenever the Obftacle to
any Action arises from the Perfon, and not from the Thing, then what one is not al-
lowed to do himself, another may do for him; supposing the Cause 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 may without an Order or Commiffion plead for a Person
abent. Now what prohibits the Subject to refift, does not at all proceed from a
Caufe, which is the fame in a Subject, as in him who is not so; but from the
Quality and Circumstance of the Perfon, which Quality does not pafs to others.
4. And therefore, according to Seneca, I may make War upon a Man, tho'
he and I are of different Nations, if he disturb and molefts his own Country, as
we told you in our Discourse about Punifhments, which is an Affair often attended
with the Defence of innocent Subjects. Antient and modern History indeed in-
forms us, that Avarice and Ambition do frequently lay hold on such Excuses; but
the Ufe that wicked Men make of a Thing, does not always hinder it from being
just in itself. Pirates fail on the Seas, and Thieves wear Swords, as well as others.
IX. 1. But as we have already shewed, that tho' Alliances which are entered
into, with the Design and Promise of Affiftance in any War, without regarding
the Merit of the Cause, are altogether unlawful; so there is no Course of Life
more abominable and to be detefted, than that of mercenary Soldiers, who without
ever considering the Justice of what they undertake, fight for the Pay; who
By their Wages the Goodness of the Cause compute.

Which Plato proves from Tyrtæus. And this is the very Thing that Philip
objected.

9 Every Man, as Man, has a Right to claim the Aid of other Men, in Necessity, and every Perfon 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 nor to implore a
Foreign Aid for Slave Injuries, or even great ones, that affect only few Persons. But when all the
Subjects, or the major Part of them, groan under the Oppreffions of a Tyrant; the Subjects, on the
one Side, re-enter into all the Rights of natural Liberty, which authorizes them to seek Aid where-
ever they can find it; and on the other, tho' who are in a Condition to give it them, without consider-
able Prejudice to themselves, nor only may, but ought, to endeavour with all their Power to deliver
the oppressed; for this very Reason, that they are Men, and Members of human Society, of which
Civil Societies are Parts.
10 This is what the Roman Law terms Defensor; a Term which our Author uses here, in Opposition to
Preparator. See above, Chap. X. § 2. Num. 3.
11 This Paflage has been cited above, Chap.
XX. § 41. Num. 3.
12 All the Editions of the Original have: Cum defensores innocentiam conjicierit. But it is plain the
Author, or the Printers, have left out the Word Subtitionum. For it is always supposed, that Stran-
gers oppressed, or injured, are innocent.
IX. (1) Zund Plato ex Tyrtæo probat. Our
Author expresses himself thus after having cited the
Verfes only in Latin in their Words:

Ita fès, ubi plurima mercès.

He does not point out the Place of Plato's Words, which he had in his Thoughts, and which I
have already shown you shall here be found. There is not one Verse of Tyrtæus in it, nor even a Thought of that Poet, that relates to the Application our Author makes of it. The Philosopher blames the Poet, because in his lofty Praifes of Military Valour, he seems to have considered only that they were against foreign En-
nemies. He says, 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, indolent, profligate Fellow, and the most imprudent of Mankind: zευς άνδρας 4ης ἔτη, 4ης
II. Ed. H. Steph. In speaking of the Incredibility of those mercenary Soldiers, the Philosopher uzes the
Word διασωλήνα, by which, as Henry Ste-
phens observes, he alludes to the two following
Verfes of Tyrtæus, which he explains in Terms not very poetical:

Ἀλλὰ τε ἐν διασωλήνα μὴν ἐν αὐτοῖς
Συναφέες ἔστιν γὰρ, χωρὶς ἐξοντος δομοῦ.

That
objected to the Rutilians; and Dionysius Mileus censured the Arcadians for in the following Terms, 3 Wars become a Trade, the Arcadians live upon the Greeks Misfortunes, and Groundless Wars engage them on any Side. The Cæfe of a Soldier, as 4 Antiphanes describes it, is really a miserable one,

"Of the Rights of the World.

Who to support his Life to Death reports.

And 5 Dion Phusenēs 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 tell only their own Lives it were no great Matter: but they tell also the Lives of many an harmless inoffensive Creature: 6 So much more odious than Hangmen, by how much it is worse to kill without a Reason, than with

The last Pfaffage 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 Lusean Plantium of PAREUS, which is very exact in printing out all the Pfaffages, where there is any Expreffion in the least remarkablc. But I remember a Thought very like it in MANILUS, in regard to those who fold themselves to fight in the Sews of Gladators:


The second Greek Verfe of Antiphanes is in STORZUS, where there is one before it, which, joined with it, makes the whole Pfaffage, to be, That it is taking pay of Death, to hazard Life for the Means of living:

"Τις δ' ένοχον κατηγορευται ὡς φίλοις, οὐ εικονις, &c."

Florest. Tit. LIII. Our Author cited here also a Pfaffage from SENECA, which however treats of something else. The Philosopher ridicules the Pfaff for amassing Riches at the hazard even of Life, in order to employ them in Things, which contribute to shorten Life: Μεγίς ριθίδος, quæm eignemovi, vel parai ca, in quibus vita confimatur, Quæst. Natural. Lib. V. Cap. XVIII. in fine. Lib. & Cap. 6. KAI τι έν οὗ το έν ψευτος, &c. which the ingenious LA BRUERE has expressed thus in his excellent Characters of the Age: There is nothing Men are more fond of preserving, and take Life Care of, than their Lives, p. 362. Edit. de Bruyl. 1697.

6 Seneca says, What can a Man call this but Madnes? To carry our Dangers about us, and to involve People you 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 know as Moners of Hatred against. He says quid ait, &c. Lib. V. Cap. XVIII. A German Poet, describing those who fare thus without examining whether the War be just or unjust, says, that they feel nothing but Pay; that they change Sides according as it suits their Interest, and look upon, as Enemies, whomsoever those that pay them please.

"Este dato conducta cebors, & bella miles Deux faimos, pretetique suam naturam servorum nurtum, & accepta pariter cum mortuus belle, Hum bakriss, datu preti quim jisfiris hadim."
Chap. XXVI. War and Peace.

one. Antisthenes used to say, that "a common Executioner was abundantly better than a Tyrant; for the one puts Malefactors to Death only, but the other the Innocent." 2. Philip of Macedon said of that Sort of Men, who got their Livelihood by fighting, that War was Peace to them, and Peace War.

3. War is no proper Employment, nay, it is so horrible, that nothing but mere Necessity, or true Charity, can make it lawful, as may be gathered from what has been said in the foregoing Chapter. To bear Arms is, in St. Austin's Judgment, no Crime, but to bear Arms on the account of Booty is wickednesse with a Witeness.

X. 1. Nay, it is so to fight for Pay, if that be the sole and principal View; 'tho' it is otherwise very justifiable to receive Pay, for who (says St. Paul) ever goes to War at his own Cost? 1 Cor. ix. 7.

7 STORERUS has preferred this Saying in his Flexigism. Tit. XLIX.

C H A P. XXVI.

Of the Reasons that justify those who under another's Command engage in War.

I. We have already treated of those who are at their own Liberty and Disposal; there are others, who are in Circumstances of Obedience and Subjection, such as Sons in Families, Slaves, Subjects, and likewise every individual Member of a State, if compared with the Body of the State of which he is a Member. II. But those 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.

III. 1. But if 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 Apologies, but of Socrates also, that we should obey GOD rather than Men, Acts v. 29. And we have the Opinion of the Hebrow Rabbins for not obeying our Prince, when he enjoins any Thing repugnant to GOD's Law. It was St. Paul's Cap's saying a little before his Death, διδομεναι, &c. 3 We have learnt to pay to Governments, to the Powers ordained by GOD, all due Honour, provided that Honor does not obtrude or hazard our eternal Salvation. And St. Paul's Advice, Ephes. vi. 1. is, Children obey your Parents in the LORD,

3. Ου γάρ τι μένος τινί κατεσθάνει τάκτον οὐχ αὐτοί, τοιούτως τάκταν. This was not enjoined by Jupiter, (PHILOTRAT. Vit. Apoll. Tyanae. Lib. IV. Cap. XXXVIII. Edit. Olar.) GROTIUS.
4. Joseophs 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 confederating such Representations was prohibited, than the Decrees of Men. Antiq. Jud. Lib. XVII. See the Passage of a Rabbin cited by
5. DRESCHER, on Acts v. 29. GROTIUS.
7. ST. CHrysostom explains this Passage in the LOD R D, thus, "rectio in te et me superest: commissio, That is in those Things you do not offend GOD by. And in his Letter ad Patrem, infidelis, 3 quod ea superest, &c. For it is no small Reward that is dignified us if we honour our Parents, whom we are commanded to regard as our Lords and Masters, and to obey them 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 the over the Belly of thy Father, which is a rhetorical Expression, borrowed from the Rhetorician Laws, in SENECA; and thus too what you have in St. Ambrose, Deus Virginitatis, and in St. Austin, Epif. XXXVIII. Ad Lactum, and in the fourth Canon of the first Council of Nice, according to the Arabic Tractation. GROTIUS.
for this is right. Upon which St. Jerome says, 5 it is a Sin in Children not to obey their Parents, but because Parents may command something that is ill, he added, in the LORD. And 6 of Servants he subjoins, When their Master, according to the Flesh, bids them do any Thing different from the Injunctions of their LORD, according to the Spirit, they are not to obey. And in another Place, they are subject to Parents and Masters only in such Things as are not against the Commandments of GOD. For that same Apostle had declared before, Ephes. vi. 8. that every Man, whether he was Bond or Free, should receive from GOD according to his Works. And Tertullian 7 tells us, that the Apostle's Precept of obeying Magistrates, Princes, and publick Powers, is sufficient Injunction 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 contain the Roman Laws, that we may observe the Commandments of GOD. To 9 Green in Euripides making this Demand,

It is not fit my Orders be obey'd?

Antigone replies,

No; if you order what's unjust and cruel.

And Maffonius says, that 5 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, Injurios nor Wicked.

2. Gallius 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 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 Command. And 13 Quintilian, There is no Necessity that Children should do all that their Parents bid them. There are several Things which cannot be lawfully done; for Insence, 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 falsely answer, this is what ought not to be done. Seneca says further, Neither is it lawful for us to command all

6 St. Chrysostom, 1 Cor. vii. 24. s &c. etc. For the Servant too has his Limits preferred him by GOD. And it is particularly injurious him how far to go, beyond which he must never pass. For when his Master commands him nothing displeasing of GOD, he is to be punctually followed and obeyed, but no farther. And Clement Alexandrinus speaking of a good Wife, τὰς τις τῆς ἱδίας, etc. She complies with her Husband in every Respect, nor does he do any Thing against his inclinations, unless what she thinks may be of some Consequence in regard to Virtue and her own Salvation. Grotius.

7 See some illustrious Examples, both of Punishment and Commendation, in 1 Sam. xxii. 18, 19. 1 Kings xvii. 4. 13. 2 Kings i. 10. 12. 14. And among Christians, Manuel and George refused to execute the Order for killing Amphigoras, Nicetas in his Life of Alexius, Manuel's Son. (Cap. XVI) Grotius.
10 There are two noble Instances among the Hethsians, of who some did not obey their Princes in a dishonour Action, that of Papinian is sufficiently celebrated, and the other is of Hephzibah in Ammian. xxxii. 2, 10. And Socrates would not pardon those who had killed a Senator, tho' by the Emperors Orders. See Xiphilinus. Grotius. The Emperor Caracalla having caufed his Brother Geta to be cut to Death, would have obliged Papinian, as some say, to compose a Dispute, to excuse that Murder before the Senate or People. The Lawyer replied, That it was not to escape, 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 endeavor to blot his Memory. Spartian, in Antonin. Caracalla, Cap. VIII. IX. As to the second Instance, Constanfianus having commanded the Captain of the Life-Guard to put an innocent Perfon to the Rack, he refufed it, defiring the Emperor to dismiss him from his Office, and give that Commission to another. This Hephzibah was not a Pagan, as our Author supposes, but a Christian. See Valois upon the Paffage here quoted. In regard to Severus, he declared, 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.
13 Ergo non omnium eis necesse sit fieri liberis, &c. Declam. CCLXXI.

The famous 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 barthenome and dangerous, since they would reduce us to the Necessity of committing even Crimes: Non omnium esse praefatam, atum parentum, &c. Declam. CCCXXXIII. Things
Things; nor are our Servants bound to obey in all Things; they shall not obey us, when we command them to do any Thing against the State; they shall not assist in our Crimes. Sopater says, 16, &c. We must obey a Father, and do we well to obey him, provided his Commands are according to the Law; but if they are contrary to Honesty, it is by no Means proper. 16 Stratoches was formerly laughed at for aiming to constitute a Law at Athens, that whatever pleased King Demetrius should be reckoned an Act of Piety towards the Gods, and of Justice among Men. Pliny in his Epistle to Minvinius says, that he had made it his Business to demonstrate, 17 that Obedience was in some Cases a Crime.

3. Those Civil Laws that readily pardon slight Offences, are favourable to those who are under a Necessity of obeying, but not in all Cases. For they except 16 those Crimes which are of a very heinous and flagitious Nature, being apparently and in themselves wicked and detestable, as 17 Tully speaks; or as 18 Aelian 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 recollect and fly from.

4. "Josephus relates from Hecaton, that the Jews who bore Arms under Alexander the Great, could neither by Scourges, 19 nor any other Abuses, be compelled, together with the other Soldiers, to bring Earth for the Reparation of the Temple of Belus at Babylon. But we have an Instance more suitable to the Affair in Hand in the Thebæan Legion, which 17 we spoke of before; and in 20 Julian's Soldiers, of whom St. Ambrose writes thus; 'Julian the Emperor, the an Angelate, had Christian

14 Plutarch. Vit. Demet. Vol. I. p. 899, 900. Such was the Bond Andronicus Commonly demanded before Babylonia, "una in vis aequum, & 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 Chron. in Alex. Comnen. (Cap. XIV.) Grotius.

15 Heron antiqum crimina, & Lib. III. Epift. IX. (Num. 14. Edit. Collet.) Tertul- lian says, that he who commands an evil Action, deferves Punishment more than the Person who commits it; since the latter himself is not to be excu- ded, tho' he acts only in Obedience to the other's Commands: Pars causarum, qui jure, quando non est auctoritate, exeuntur. De Anima. (Cap. XL.) He observes elsewhere, that Justinus is more perfectly exercised among 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: Quam humana Confessor, &c. De Refutatione Carnis, (Cap. XV.) See Galli- lius, De Pia Paci, Lib. I. Cap. IV. Num. 14. Grotius.

16 Att. quæ non habent atrocitatem, &c. Dugell. 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: Servos non in omnibus rebus, sed tempore, domino dicit. &c. Leg XLIV. Tit. VII. De oblig. & action. Leg. XX. See Mr. N. Good, Ad Legem. Aquil. Cap. X. and Oferotto. Lib. II. Cap. XIV.


18 Malicia sponte, &c. In hoc loc.

19 In the Perilation, 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 unanimously bold. 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 Di- vinity, his Subjects might have refuted all Labour necessary for building such an Edifice; because in doing that Office, they would have contributed to the Introduction of Idolatry in a Country, from which GOD would have it entirely banished. And therefore Uriah the Priest, of whom the Scripture speaks, did wrong to execute the Order of Absol, in building him an Altar after the Model of that he had seen at Danauas. 2 Kings xviii. 10, &c. But here the Case is different. Idolatry had reigned long at Babylon, and would no less have retained th' some Jewish Soldiers had refuted 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 Naman, the Syrian, did, when the Prophet Elias's Approbation, of accompanying the King of Syria in the Temple of Rooms, 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. 1. Edit. Froben.) Julian, the Butcher of the Christi- an 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. Elphius & Scott, and thirty three of his Companions beheaded by Julian's Order, between the Cities of Toul and Grando. See also Joannes Antiochenus, in Exc. ex Ms. Petri- cii. St. Austin, Epift. L. Ad Bonifacium, cited by Gra- tiain, Cap. XI. Quæst. III. Julian was an underwinding Prince, was not he an Apostle and an Idolater ? Christian Soldiers served an Infidel Em- peror, but when they came to the Cause of Christ, they acknowledged no Sovereign but him in Heaven. When he was far from having them worship and offer In- creases to Idols, they preferred GOD before him. Grotius.

6 O Soldiers
Soldiers under him, to whom when he said "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 were converting to Christianity, chose rather to die, than be concerned in the Execution of Christians.

5. It will amount to the very same Thing, if a Man is persuad'd 1 that what he is commanded to do is unlawful; for to him it continues to be so, till he is convinced of the contrary, as appears by what has been said above.

IV. 1. But suppoze 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, Ad not at all in a doubtful Cafe; for he who is irruptulous 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 Cales the Distinction of the Judgment into Speculative and Practical, takes Place. The Civil Laws of other Nations, as well as of the Romans, do 2 only indemnify those who obey in such a Cafe, but will allow of no civil Action against them: He, say they, 3 does the Damage, who commands it to be done; but he is in no Fault who is obliged to obey. The Neceffity of obeying him who has Power to command furnishes a lawful Excuse: And such other Maxims.

2. And 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 Perfon, because a Slave has not all the Judgment necessary 4 to distinguish what is just from what is unjust, according to the Proverb, "Ημενυς μόνος τε νίκης, &c.

The Day a Man's a Slave he loses half his Wit.

And this other like it,

"Ημενυς γνατ τε νίκης, &c.

27 This Pageage, 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, Esstitit infidels Imperator, &c. Which our Author quotes from Lett. L. of the Father to Boniface; and he adds, that the Page age is inserted in T. Can. V. Quod. III. Can. XCVIII. But Gratian gives it us, as from the Commentary on the Book of Psalms: And we are referred in the Margin to Psal. cxxiv. 25. The Word judged, or one of the same Signification, has been omitted here in all the Editions of the Original.

IV. (1) St. Chrysostome, De Providentia III. παλαιάν ἀπειρώματα, &c. Many a Magnificence being imprudent in putting People unjustly to Death has been punished, but Nobody ever indded the Executioner, who was employed in the Murder, tho' the very Person whose Heads committed it, was ever inquired after him, because the Neceffity he was under excludes him as well by the Dignity of his Principal as his own Subjection. And ULP. ANAN. o. CELEIUS says, That it is not in no Matter of Fault who kills obey his Master, Lib. II. D. De Nat. Ad. He is supposed to do it against his Inclinations, who only complies with his Father's or his Master's Order. D. De regibus Juris, and C U A C I U S there. SCHEC: There is Force upon a Person who has willing. Add the Lambert Law, Lib. I. Tit. IV. Chap. II. Mitidridate: diemitted Attilius's freed Man unpunished, 'tis guity of an intended Murder against him, and the Friends of his Son who had revolted from him. APPIANUS, Mitidridate. And Tiberius Gracchus was acquitted from the Crime of the Numantine Treaty, because it was by another's Command that he had offended. GROTIAN.


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, Chap. XII. He expressly in another Place calls Slaves, animate Infrumments, and Infrumments, inanimate Slaves: O & άτέχνη, ο νήματες ἡμών ο' εὐαυτός σοι, &c., Lib. VIII. Cap. XIII.

4. This, in my Opinion, is what our Author means by the Words: In famulo vitis deliberatio non est; as when he says above of Infants very young, that they have not εὐαυτός, Chap. V. of this Book, § 2. num. 1. And from this want of Judgment it is suppos'd, 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 Dificeration, and to Subjects, his Thought is, that according to that whole 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 immediate 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.

2 Half
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Half understanding love allots to those Whom he appoints to lead a servile Life.

And that which Philo utes:

Δύνας ἀγώνας ἢ μάχης συ λόγον.

5 Thou r't a Slave: Thou no Reason hath.

And to the same Purpose is that of Tacitus, 6 The Gods have given the Prince the Power to judge severely, leaving Subjects the Glory to obey. And the same Writer informs us, that Tibullus 7 cleared the Son of Pip 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. Anjin 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 Juristic King, he may safely venture to fight when he is commanded, without doing any Thing contrary to the Order established for the Tranquility of civil Society, provided he is fully certain, that the Orders 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, Where a Soldier in obeying his Officer who has a Right to command him, kills a Man, 10 the Laws of his Country acquit him of Murder; nor, 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 every Fatal 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, that as to Subjects a War may be just on both Sides, that is, except from Injustice; agreeable to which is that of the Poet,

To know in War which Side the Jusfer is, Is none of our Busines.

4. There is however some Aburdity in this. And 11 Adrian, a Dutch Man, who was the last Cisalpine Pope, maintained the contrary, which is proved not from that particular Reason which he alludes, but by this more convincing one, that he who doubts in Speculation, ought in his Practice to make choice of the Jusfer Side. And the Jusfer Side is this, 12 not to go to War at all. The Essentials are mighty

5 This Verse is in the Treactate of Philo Judæus intitled, Everygood Man is free. p. 871. D. 6 Edit. Paris. For the others, he has apparently taken the first from LONGINUS, who quotes it as Homer's. p. 326. XXIII. That Rhetorician had a Passage of the Odylye in View, Lib. XVII. Ver. 322, 323.

7 Πολλοί τως τιμήτων ἀναδιδόμει τιμήν Λιμάτης, οὐ δὲ μεταίχθη διὰ τοῦτο καταλλήλου. 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.

8 He puts this into the Mouth of a Roman Knight speaking to Tibullus: Tibi solumnam verum judicium Diti deliri: Nihil obstat ubi praebet relicta est. Annal. Lib. VI. Cap. VIII. Num. 5. 9 Post quem Tibullus adsulentum [Philonem] crimine, op. 3. Annal. Lib. III. Cap. XVII. Num. 1. 10 The fame 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 unaware and without Dojen 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 inferred this in Con. XXII. Quæst. V. GROTIUS.

11 Our Author here cites two half Verses, without faying from whence he has them.

—Quæ justijns indicat armos, Scire nefas—

LucAN says this is in regard to the War between Caesar and Pompey: Phærai. Lib. I. Ver. 126.

127. The Reason he alludes for this Uncertainty is, that the Gods declared for Caesar, but wife Cats for Pompey:

—Magna se judicis quæque tutur: Vicipa causis Dixi placatus, sed visus Cateni.

A Thought which has been cenured with Reap, as too bold, and injurious to the Divinity, commended,
commenced, because, among other things, they took an 15 Oath, To hurt no Body, the commanded to do it. The Pythagoreans followed their Example, who, as Jamblicus records, abstain from War for this Reason, that 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. 4 Disobedience in such Cases is in its own Nature a less Evil than Homicide, especially than taking away the Lives of many innocent People. The Antients tell us, that when Mercury 15 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 Martial altogether excuse Pathinius, one of Ptolomy's Guards, in the following Lines,

Of the Rights of

Less criminal indeed Photinus is
Than Anthony, for what he did be bad
His Master's Order for, but the Master's Fact
Was by his own Injigation done.

Nor is that which some produce to the contrary of any great Importance; 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 Desigins, for this be true of the Motives, yet it is not so of the justifying Reasons of War, which should be made plain and demonstrable, and consequently, such as should and ought to be laid before all the World.

6. What Tortullian said a little too indifferently 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 is the Law punishes: No Law should itself only be conscious of its Justice, but should communicate it to those it expects a Compliance from. For indeed a Law is very much to be suspected, which does not care to submit to an Examination. And it is a tyrannical Law that

12 This is Right, when Men are at Liberty either to enter, or not to enter, into a War. But here it is necessary to compare the Uncertainty in regard to the Justice of the War, with the evident Obligation to obey a legal Superior. So that the safe 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 now affured 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 lays upon this Question, B. VIII. Chap. I. § 8. or lat.


14 De Vita Pythag. § 186. Edit. Kuyper. 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 affured that the War is unjust, the least Evil on the contrary, is Obedience.

15 I cannot tell in what Work of the Antients our Author has found this Circumstance, and he has done better not to have alleged it; because, as OBRECHT observes upon it, the Example is not to the Purpofe. 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 off pejar, quam causa Pathini:
His facius dominu prestitit, illi fui.


This Example is full worse applied than the former. For every Body knows it was Photinus himself who inspired King Ptolomy with the Design of causing Pompey to be affilialed, solely to ingratiate himself with Cæsar.

19 But besides this, it may happen, as BORCHE obserbs, (Diff. de Religioni Mandati) that it may not be proper to allude 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 that their whole Force, on Account of the very Subject which requires Discursions above their Reach. Hence it would be easy for them to form Scruples, or to frame Pretences from them for their Lazines, and Inclination to disobeys. In general it is dangerous to admit, that a simple Doubt may disperse 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 Pretension should be in Favour of the Subject.

20 Nego eius falsitates. &c. Apologet Cap. IV. See also Ad Nationes, Lib. I. Cap. VI.
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requires absolute Obedience, thé it cannot alledge any good Reason to prove the Justice of it. * Achilæus, in Statius, to Ulisses, who is inviting him to a War, says,

Tell me the Causes of the Grecian War, I will show them to excite just Rage.

And * Theoct, in the same Poet,

March boastful on, let the Justice of your Arms Advance your Courage.

It was * Properties of Observation, that

The Cause does raise or sink the Soldier's Heart, If that be bad, his Reputation's gone.

Parallel to this is that of the * 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 27. 'If a man, he armed, * 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 all Mankind, as it were, might judge of the Justice of it. Prudence, * according to Aristotle) is indeed a Virtue peculiar to the Prince, but Justice belongs to every Man as he is a Man.

S. But Adrian's Opinion, before-mentioned, seems absolutely to be relied on, if the Subject is not only in Suspence, but is, by probable Arguments, more inclined to believe that the War is unjust; especially if he be to take up Arms offensively, and not defensively.

9. And it is probably true, that an * 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, * in Order to satisfy himself that if Peron deserved Death; and this is fill usual in some Places, and is what the Hebrew Law, Deut. xvii. 7. has an Eye to, when it injons, that when a Malefactor is to be stoned, the Witnesses shall throw the first Stone.


23. I have already quoted the Passage, upon our Author's Preliminary Discourse, § 28. Note 2.

24. That Panegyrist is NARIUS, in his Panegyric on Conстанtius, which is the ninth in the Collection which has been made of this Kind of Pieces. The Passage is, Tantum etiam inter arma basa conficiens fide vindictas, et jam carceris non virtutis magis quam integritatis, ejf victoria, Cap. VII. Num. 2. Ed. Cler. Reg. 268. 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 try, 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 Peron 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 Servants, PUPENDORF, Law of Nature and Nations, B.VIII. Chap. I. § 5. Note 4.

25. Some draw the Word 712,77, 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 712,77, ejf eir. &c. I am willing just to shew you how justly we entered into this War, being not allied to it from the Injuries of our Enemies. For if you understand this, it must needs be a very great Incitement to your Courage. GROTIUS.

The Sense which the Interpreters our Author speaks of, gives to the Words of the Book of Genesis, is not well founded. There is great Reason to believe that the sacred Editor intended to say only, that Abraham led his People armed, or provided with Arms to Battle. See Mr. Le Clerc upon that Place.


27. And therefore Saul's Servants, who had more Honesty and Goodness in them than Doeg, would not kill the Priests of Nob, 1 Sam. xvi. 17. And Abish's third Captain refused to hurt Elishah, 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 B \v{a}t, Lib. I. Cap. VII. Grotius.
V. That it is an All of Clemency and Goodness, in such a Case, for a Prince to off
port with the Service of his Subjedts, and in the Lieu of it to impose upon them some extra-
ordinary Taxes.

V. 1. But if sufficient Satisfaction cannot be given to the Subjects, by explain-
ing to them the Reasons of the War; it is a good Prince's Duty to impose upon them rather some extraordinary Tax, than a personal military Service; especially when there are others who are ready to serve him, whole Intention, he it good or bad, a just King may make Use of, as GOD sometimes does of the Devil and the Wicked; and as a Man is in no Fault, if, when prefixed with Poverty, and in ex-
ense, he borrows Money from a gripping Ufurer.

2. Nay, tho' the Justice of the War is not at all to be questioned, yet we can-
not judge it reasonable that Christians should be forced to carry Arms against their Confcit; since to abstain from War, even when it is lawful to fight, is rec-
knowed a greater Piece of Sanconity, a Sanconity which has been constantly required from the Clergy, and from Penitents, and what is to all others recommended in several Manners. 4 Origens makes this Aniver to Celius, upbraiding the Christians for their Refulf 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 Idle Priests, and the Ministers of your reputed Gods, do keep their Hands undecked, on the Account of their Sacrifices, that they may offer them up to your pretended Deities with innocent Hands, hands with Murder unspotted: Nor in War are your Priests ever lifted. 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 oblige, as the Priests and Worshipers of GOD, they preserve their Hands in-
vid 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 Faj-
lage Origens calls every Christian a Priest, according to the Language of the Holy Writers, Rev. i. 6. 1 Per. ii. 5.

VI. 1. But yet I am of Opinion that it may sometimes so fall out, that not on-
ly 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 Confcience, to put to the Sword such

V. (7) But as Henniges, one of the Com-
mentators 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 ad-
mitting this Supposition, ought not to serve him with their Arms, can neither in Confcience aflih him with their Estates; as No Aid whatsoever ought to be supplied for the Execution of a bad Action.

2. It would be well indeed, not to pre cis any one as long as a sufficient Number of Soldiers are to be had, whether Natives or Foreigners, who would lift voluntarily. But, as Troops may happen to be wanting, the State would find itself without De-
ence, if the Sovereign were never permitted to pre cis his Subjects, tho' his Cause for taking Arms be never so just. Mr. Budeus, who believes, in other Respect, 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 Differ-
tiation, De Office Imperatorum circa confequendum militum, amongst the Selecta Juris Nat. et Gen-
tisem. Wherein I do not know whether the Prin-
ciples of this ingenious Author are sufficiently con-
firmed with themselves. For however well founded a Prince may believe his justifying Reasons to be, and tho' they are in effect; yet should his Sub-
jects say, that they do not find them so, and that they doubt of their Solidity; as every Man is the sole Judge of what suffices in his own Confcience, no one could ever convict them, that they were

fully satisfied with Regard to the Justice of the Caufe, and confequently, they could never justly be forced to ferve. The Truth is, that by a nec-
fary Confequence of the very Nature of Civil So-
"vereties, the Sovereign has a full Right to oblige his Subjects to carry Arms, when he determines to un-
dertake a War by justifying Reasons of the utmost Evidence, and he cannot find elsewhere a sufficient Number of People who will lift 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 Caufe is unjust, when the Justice of it is evident. The moft fimpli-
can hardly more than doubt in that Caufe; and Doubt, in my Opinion, does not exempt from Obedience. Upon the Whole, the Confcile which might arise between some Mens Rights of Con-
fcience, and the Rights of the Sovereign, might authorize fuch Men to refuse Obedience; but could not hinder the Sovereign from maintaining his Authority. The Good of the State ought not to be facrificed to vain Scruples.

3. This is founded upon the Definition of Coun-
sels and Precepts, which we have refuted elsewhere, B. I. Chap. II. § 9. Note 10. On the contrary it may be faid, that in order to be defpiffed with from the War, when it is neceffary, we always propofe it, with our Author, is not only Cowardife, but Want of Charity, or rather a Violation of the Engagements every Citizen, as fuch, is under, to defend his Country.


Subjects
Chap. XXVI.  **WAR and PEACE.**

Subjects as are innocent, and have no Share in stirring up the War, unless it be in his own necessary Defence, or by 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.

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.

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**H. Grotius,**
H. Grotius,

Of the Rights of War and Peace.

Book III.

Chapter I.

Certain General Rules, shewing what, by the Law of Nature, is allowable in War; where also the Author treats of Deceit and Lying.

I. We have already seen, not only who may make War, but for what Reasons too they are permitted to engage in it. We are now to enquire, what is allowable in War, and how far, and in what Circumstances it is so. And this we must consider, either simply in itself, or with regard to some antecedent Promise. What is simply in itself allowable in War, shall be considered first from the Law of Nature, and then from that of Nations. To begin with what Nature allows.

II. And here we must observe, First, That in Things of a moral Nature, as we have often said before, those Means which conduce to a certain End, do assume the very Nature of that End: And therefore we are supposed to be authorized to employ those...
War and Peace.

Things, which are (in a moral, not a physical Senfe) 2 necessary to the obtaining our just Rights. By Right I understand what is strictly so called, and imports that 3 Power of acting which is intirely founded on the Good of Society. Wherefore, as we have remarked elsewhere, 5 if I cannot otherwife save my Life, I may, by any Force whatever, repel him who attempts it, tho' perhaps, he who does so is not any ways to blame. Because this Right does not properly arise from the other's Crime, but from that Prerogative with which Nature has invested me, of defending myself.

2. By which also I am impowered to invade and feize upon what belongs to another, without considering whether he be in fault or no, whenever what is his threatens me 4 with any imminent Danger; but I am not to claim a Property in it, for that is not necessary to the End in Question, but only to detain it till my Security be sufficiently provided for; as we have elsewhere 4 declared. So by the Law of Nature I have a Right to take from any one what he has of mine, 4 and if this cannot easily be effected, I may take what is equivalent to it; and 6 this I may do too for the Recovery of Debt. And in those Cases I become Proprietor of what I have taken, because there is no other Way of redeflying the Inequality that was to my Disadvantage.

3. So likewise where the Punishment is just, there all Manners of Violence and Force, and whatever is a Means necessary to execute that Punishment, or is a Part of it, is just too; as Defautations by Fire, or otherwise, provided that they exceed not the Bounds of Equity, but bear a Proportion to the Offence committed.

III. We must remember, Secondy, That this our Right is not to be accounted for only by the first Occasion of the War, but also from other Subsequent Causes; as in a Suit of Law, where the contending Party does often acquire and find out a new Right, after the Process is commenced, which was not thought of before. Thus they, who join with him that invades me, whether they be Allies or Subjects, do give me a Right of defending myself against them likewise. Thus they who engage with others in an unjust War, especially in a War which they might or ought to have known to be unjust, are thereby obliged to reimburse the Charges, and to repair the Damages of it, because it is through their Fault that they are sustained. Thus too, those who are into the Measures of a War, undertaken without any warrantable Reason, are themselves culpable, and obnoxious to Punishment, in Proportion to the Injustice that accompanies their so doing; according to Plato's 1 Opinion, which justifies the Continuance of a War, Till the Guilty are compelled to undergo the Punishment which the Party offended shall inflict upon them.

IV. 1. We must observe, Thirdly, 1 That many Things sometimes fall in indirecftly, and beyond our Design, to be lawful to us, to which, in the Nature of the Things, finplyly considered, we have no Pretense. How this holds good in the Case of Self-Defence, we have elsewhere 4 shewn. Thus, in the getting of our own, 6 if just so much as is precisely our Due, cannot be, we have a Right to take more, but: under the Obligation of restoring the Value of the Overplus. Thus a Ship full of Pirates, or a House of Thieves, may be sunk and fired, tho' within the Ship, or the House, there may be Children, or Women, or other innocent Persons, who from such an Assault must needs be exposed to manifeft Dan-

2. Our Author does not mean Things effentially bad, and which, as such, cannot be lawful in any Case, or to any End whatsoever; but only tho' which a Man could not do otherwise, without the necessary Connection they have with a lawful End. See what he says afterwards, at the End of Paragraph 6. Things bad in their Nature are indeed generally not necessary, with Regard to the Necessity in Qeuestion. But, admitting they were, as that is not impossible; and that: a Perfon, for Instance, could not obtain or preserve his just Rights but by Adultery, Blasphemy, Sacrilege, Abjuration of the Religion he believes true; the Innocence of the End would neither hinder the Means from being utterly unlawful, nor discharge him from the Obligation of renouncing the most lawful Pretentions, rather than to employ such Means.

3. Facultatem agendi in fols Societatis respeccta. See our Author's Preliminary Difcourfe, § 7, 8. Not that the other Kinds of Rights which impel an imperfect Obligation, do not contribute to the Good of Society. But they are not absolutely necessary to maintain it in Peace; and therefore they cannot be pursued by the Methods of Force.

4. See above, B. II. Chap. VII. § 2. III. (1) This Paflage has been cited above, B. II. Chap. XX. § 8. Num. 8. at the End.


6 Q. ger.
Of the Rights of

Book III.

g—er. * Nor is he guilty of Murder, says St. Austin, who has included his Estate with a Wall, * if any one by the Fall of it shall be wounded and die.

2. But, as we have frequently advised before, every Thing that is conformable to Right properly so called, is not always absolutely lawful; for sometimes our Charity to our Neighbour will not suffer us to use this rigorous Right. Wherefore, in such Cases, we ought to take all possible Care to prevent all such Accidents, which may fall out beyond what we aim at; unless the Good we design be far greater than the Evil we fear, or unless, where the Good and the Evil being equal, our Hopes of obtaining the Good be greater than our Fears of the Evil, which Prudence must determine; yet so, that always in a doubtful Case we incline, as the safer Side, to that Part which provides rather for another’s Advantage than our own. Let the Tares grow up, (says our best Teacher, Matt. xiii. 29.) left whilst you gather up them, ye root up also the Wheat with them. 3 To destroy whole Multitudes, says Seneca, without Difinction, looks like the Rage of Fire, or the Fall of Buildings. History tells us how much Sorrow and Repentance such an immediate Revenge cost the Emperor Theodosius, upon the Reproof of St. Ambrose.

3. Nor tho’ GOD does so sometimes, ought it to be an Example to us, because of that absolute Right of Dominion which he has over us, which he has not granted us to have over one another, as 4 I have observed elsewhere. And yet even GOD himself, who is the just Sovereign of Mankind, does often spare a Multitude of wicked Men, for the sake of a Few that are good; thereby declaring his Equity, as he is a Judge; as fully appears from Abraham’s interceding with GOD for Sodom. (Gen. xviii. 23.) And from these general Rules we may easily perceive, how far our Right extends against our Enemies, by the Law of Nature.

V. 1. Here also there ues to arise another Question, what we may lawfully do to those, who are not our Enemies, nor are willing to be thought so, and yet supply our Enemies with certain Things. There have been formerly, and still are, great Disputes about this Matter, some contending for the Rigour of the Laws of War, and others for a Freedom of Commerce.

2. But first we must distinguish between the Things themselves. For there are some Things which are of use only in War, as Arms, &c. Some that are of no Use in War, as those that serve only for Pleasure; and lastly, there are some Things that are useful both in Peace and War, as Money, Provisions, Ships, and naval Stores. Concerning the first, (viz. Things useful only in War) it is true what 5 Amalasuntha said to the Emperor Jujlinian, he is to be reputed as siding with the Enemy, who supplies him with Things necessary for War. As to the second Sort of Things, there is no just Caufe of Complaint. Thus Seneca says, 3 I will be grateful to a Tyrant, 4 if what I present him with neither encroaches, nor confirms his Power of ruining the State, for such Things a Man may give him without contributing to the common Calamity; which he thus explains, I will not supply him with Money to

2 Unde nec runt efl morii, aliciae, quia sumus pacificationum morarum ambitum circumvexit, aliquis ex ipso genere auctus intulit. Epist. ad Publicol. 

CLIV. Our Author cites this Passage thus in the first Edition, and in those of 1632, and 1642, the last in his Life Time. The later Editions have been changed, I know not why, according to the Original, in which there is murorum ambitum, and f aliquid est inter e aliquid — interiit. Our Author had followed the Reading in the Canon Law, Cauf. XXIII. Quod. V. Cap. VIII. But the Corrector of the Edition of Rome has since inferred, upon the Authority of a Manuscript in the Vatican, ex ipso genere morum circundavir. which is better. In the Words that follow, some Editions of the Original have ex ipso genere ruini, instead of ex ipso genere. The latter Reading seems to be the best, provided it be corrected, and to say be put for an, as it ought in my Opinion; it being esy for such an Error to have crept in. The Senex plainly requires it; and Gronovius, who is for reading prolaxis instead of preclusus, was not aware that it would then be clearly and distinctly the Fault of him who should get upon the Wall; whereas the Question relates to certain Cases, wherein Damage seems to arise from what a Person does in Consequence of his Right; as in this Example, wherein St. Austin means, that a Man has not the less Power to build a Wall, for the enclosing his Possessions, because that Wall may happen to fall down and kill somebody. Which Senex is followed in the Translation of this Passage.


V. (1.) At Athens it was prohibited to export Cordage, Casks, Timber, Wax, Pitch, &c. See the Commentator upon Aristophanes’s Comedy of the Frogs, (ver. 363.) and that of the Knights, (ver. 282.) Grotyus.

2 It is in that Prince’s Answer to Justinian’s Letter, both which Procopius recites, whom our Author quotes in the Margin. Getbic. Lib. I. Cap. III.

3 Sed quiescis hoc tua sit, &c. De Benefici. Lib. VII. Cap. XX.

pay
Chap. I.  

WAR and PEACE.

pay his Guards, but if he wants Marble, or Robes of State, I shall injure nobody, by procuring him such Things, to gratify his Luxury. I will supply him with neither Soldiers, nor Arms; but if he will take it as a Kindness, I will help him to Comedians, and other Things that may contribute to the softening of his fierce Temper. I would not send him Gallies and Men of War, but I would procure him Ploflure Boats, Galliots, and other such Vessels, for Diversion and Recreation. So alo Saint Ambrose, 4 It is not a commendable Liberty to affiže him that confesses against his own Country.

3. As to the third Sort 5 of Things that are useful at all Times, we must distinguish the present State of the War. For if I cannot defend myself without intercepting those Things that are sent to my Enemy, Necessity 6 (as I said 7 before) will give me a good Right to them, but upon Condition of Restitution, unless I have just Caufe to the contrary. But if the Supply lent hinder the Execution of my Designs, and the Sender might have known as much; as if I have besieged a Town, or blocked up a Port, and thereupon I quickly expect a Surrender, or a Peace, that Sender is obliged to make me Satisfaction for the Damage 8 that I suffer upon his Account, as much as he that shall take a Prisoner out of Custody, that was committed for a just Debt, or helps him to make his Ecape, in order to cheat me; and proportionably to my Loss I may seize on his Goods, and take them as my own, for recovering what he owes me. If he did not actually do me any Damage, but only designed it, then have I a Right, by detaining those Supplies, to oblige him to give me Security for the future, by Pledges, Hortages, or the like. But further, if the Wrongs done to me by the Enemy be openly unjust, and he by thofe Supplies puts him in a Condition to maintain his unjust War, then shall he not only be obliged to repair my Loss, but also be treated as a Criminal, as one that refuses a notorious Convict out of the Hands of Justice; and in this Cafe it shall be lawful for me to deal with him agreeably to his Offence, according to those Rules which we have set down for Punishments; and for that Purpose I may deprive him even of his Goods.

4. For thefe Reafons, those that make War 9 publish Manifesto's, and fend out Declarations to other Nations, as well to signify the Justice of their Cause, as also what probable Hopes they have to obtain their Right.

5. Now

4 Officers enim id volo, &c. Office. Lib. I. Cap. XXX.
5 Our Author here supposes the Cafe of being reduced to the left Extremity; and then his Decision is well founded, whatever Mr. Cocceus says, Differt. De Iure Belli in Amicis, § 12. whereon he only criticizes our Author, in Regard to what he advances elsewhere, that, in a Cafe of Necessity, the Effects become common. It is true it follows, that at such a Time the Goods of another may be used, without even the Proprietor's Consent. But as to the following Caves, that Lawyer has Reason, in my Opinion, to say, § 15, 17, that provided that in furnishing Corn, for Inflance, to an Enemy besieged, and prefled by another, it is not done with Design to deliver him from that unhappy Extremity, and the Party is ready to fell the fame Goods also to the other Enemy; the State of Neutrality and Liberty of Commerce, leave the Efigger no Room for Complaint. I add, that there is the more Reason for this, if the Seller had been accustomed to traffick in the fame Goods with the Besieged before the War.
6 See Examples of such Declarations, in the League of Christian Princes against the Egyptians, Saracens, and others, Cap. vii. de Tranflat. G. Ig- nific. de Judaeis, Extrav. Capif. de Judaeis, and Cap. I. Lib. V. Extravag. de Judaeis. A Book is written in Italian, entitled, Libro Confeffutio Ma- ritimà de Rebus, related the Confidences of the Emperors of Greece and Germany, of the King of France, Spain, Spain, Cyprus, Majorca, and Mi- noreca, and also of the Venetians and Genoese on this Subject. In Tit. CCLXXIV. of that Work, such Questions are treated of; and thus it is adjudged, if both the Ship and Freight belong to the Enemy, then, without Difpute, they become lawful Prize to the Captain; but if the Ship belong to thofe that be at Peace with us, and the Cargo be the Enemies, they may be forced by the Perfons at War, to put into any of their Ports, but yet the Marters must be satisfied for the Expenses of the Voyage. But on the contrary, if the Ship belongs to the Enemy, and the Goods to Neuters, we must then agree for the Ship; but if the Ship-Men will not treat, they shall be forced to carry the Ship into fame Port of the Captors Party, and to pay what they owed for the Ufe of the Ship. In the Year 1438, there being War between the Dutch and the City of Lubeck, and other Towns lying on the Beltic Sea, and the River Elbe, it was adjudged in a full Assembly in Holland, that the Goods found in an Enemy's Ship, which appeared to belong to others, were not to be reputed as good Prize; and this was from that Time establifhed there for a Law. So the King of Denmarck was of the fame Opinion, when in the Year 1597, he fent Embaffi- dors to the Hollanders, and their Allies, challenging a Liberty for his Subjects to carry their Goods into Spain, with which the Dutch had the most cruel War. In France it has always been permitted for the Nation at Peace to carry on Trade, even with the Enemies of the Kingdom, and thaf with fome Referve, that the Enemies have often, under other

&c. Office. Lib. I. Cap. XXX.
5. Now the Reason why we refer this Case to the Law of Nature, is, because we find nothing in Histories decreed by the voluntary Law of Nations concerning it. 

Menz Names, conceded their own Goods, as appears by an Edict in the Year 1541, Chryb XIII. which was renewed in that of the Year 1582, 5c. In which Edicts it is expressly provided, that their Friends might, in Time of War, exercise a free Trade, so that they did in their own Ships, and by their own Men, and carry on all Goods and Things whatever they pleased; provided that those Goods were not Belli instrumen., warlike Instru-

ments, which might assert the Enemy; in which Case the French were then allowed to take them themselves, paying a just Price for them. Here are two Things to be observed, 1st. That warlike Ammunition were not made Prize, much more were indifferent Merchandizes free from this Danger. I cannot deny but that the Northern Nations have sometimes acted otherwise; but the Practice there has been variable, and accommodated to the Circumstances of Times, rather than regulated by the perpetual Maxims of Equity: For when the English, upon Pretence of their Wars, stop the Dutch Traffick, there arose a War between those Nations long since, which had this Conclusion, that the English should lay a Tribute upon the Dutch called the Dutch Penny, which, tho' the Cause was changed, retained its Name even to the Time of William the Conqueror, who founded the present Royal Family in England, as Thuanus, an Au-

thor of great Credit, relates in his History, on the Year 1590. Again, in the Year 1575, Sir Wil-

liam Winter, and Mr. Robert Beal, Secretary to the Privy Council, were sent by Queen Elizabeth, a very wise Prince, to remonstrate, that the Eng-

lish could not bear that the Dutch should, in the very Heat of the War between Spain and the United Provinces, detain the English Ships trading to the Spanish Ports; as Rhedanus, in his Dutch History, on the Year 1755, and Mr. Cambden, an Englishman, on the following Year. But when the English, being themselves unable to trade with Spain, disturbed the Cities of Germany in their Trade with Spain, with what a disputable Right they did it, appears from the Writings published on both Sides, worth the Reading, in Order to understand this Controversy. And it is observable, that the English themselves acknowledged this in their own Writings; where they chiefly allege two Things for their Cause, viz. that they were Instruments of War that were transported by the Germans into Spain; and that their ancient Treaties had made it unlawful to be done: As afterwards the Dutch, and their Confederates, agreed with the Lueckers, and their Allies, in the Year 1613, that neither Party should permit the Subjects of their Enemies to traffic within their Territories, or affile the Ene-

my with Money, Men, Ships, or Supplies. And after that, in the Year 1627, it was agreed between the Kings of Sweden and Denmark, that the Dane should prevent all trading with the Danzickers, then at War with the Swede, and that he should not permit any Merchandizes to pass through Mere Cimbrium, the Sound, (or the Belt) to any of the Swedes Enemies, for which the King of Den-

mark, on the other Side, had Advantages allowed him; but there are particular Agreements, from whence nothing can be inferred that may be obliga-
tory for the Germans also lodged in their Writings, that all Merchandizes were not prohibited by Agreements, but those which had been once im-

ported into England, or were procured in Eng-

land. Neither did only the Germans blame the English, for depriving them to trade with their En-

emies, but the Pols also complained by their Embassador, that the Law of Nations was vio-
lated, because, on England's War with Spain, they were denied the Liberty of trading with the Span-

iards, as the aforesaid Cambden and Rhedanus relate, in the Year 1597. But after the Peace of Vervins, Elizabeth, Queen of Eng-

land, still continuing the War, being importuned by the English, that it might be lawful to search the French Ships trading to Spain, left any warlike Stores might be concealed, would by no Means grant it, alleging, that it was only a Pretext for Rapine, and to disturb Trade. And in that Tre-

try which the English made with the Dutch, and their Allies, in the Year 1525, it was agreed, that other Nations, whom it concerned to aid the Powers of Spain, should be allowed, in all Commerce with Spain; and if they did not do it freely, then that the Ships should be searched, whether they had in them any warlike Stores; but further than this, that neither the Ships nor Goods should be detained, or any Hurt done upon that Pretence; and this was confirmed in Peace. And it happens, that in the same Year, that some Hamburgers were going with a Ship into Spain, laden, for the most Part, with warlike Provisions, all which was challenged by the English (as Prize) but they paid the full Va-

lue for the other Goods. But the French, when their Ships going into Spain were confiscated by the English, declared that they would not endure it. We had Reason therefore to say, that publick Declara-
tions are requisite, which also the English themselves were sensible of; by whom there is an Influence of such a Declaration made, in Cambden, about the Year 1591, and 1598. Neither are such Notifications always regarded, but Times, Places, and Causes are distinguished: For, in the Year 1458, the City of Lubeck did not think itself obliged to take the Dutch Ship, the Declaration of the Dutch, that she was not at War, to them, not to traffic with the Malgenen and Memoeofos, then at Enemy with Danzaic. Ne-

ither did the Dutch obverse it in the Year 1551, when the Lueckers declared to them, that they should not trade with Denmark, with which they were then at War. But in the Year 1522, when there was War between the Swedes and Danes, when the Danes declared of the Hanze Towns to have no Commerce with Sweden; some Cities indeed that float in need of his Friendship complied with him, but the others did not. The Dutch, when the War was hot between the Swede and the Pole, no-

ver suffered trafficking with either Nation to be interrupted, but always referred to the French what Ships the Holland Vessels had intercepted, either with their Writings, or in their Return, or in which they were then at War. See the Dicours of Ludovicus ServEs, formerly the King's Ad-

vocate, which he made in the Year 1593, in the Affair of the Hamburghers. But the fame Dutch would not suffer the English to carry any Goods into Danzig, where they had then a Place: As the Danzickers declared to the Dutch, in the Year 1553, that they should carry nothing into the City of Konigsberg, according to Gaspar Scut-

tius, in his Pragmatic History. See Carret. De-

De Po, also lodged in his Writings, that the English, in Lib. de jure Imper. Lib. Afris, where he quotes several other Authors. Grottus.

7 The most learned Johannes Meursius has many Things of this Subject, in his Danish His-
The Cartbaginians sometimes took the Romans Prisoners, who carried Provisions to their Enemies; but upon demand set them at Liberty. When Demetrius had entered Aetica with an Army, and had taken the adjoining Towns of Eleusis, and Rhhamus, designing to harve Arbens, he took a Slip, attempting to relieve it, with Provisions, and hung up the Master and Pilot of it, and by that Means deterring others from doing the like, he quickly took the City.

VI. 1. As to the manner of acting against an Enemy; Force and Terror are the proper Characteristic of War, and the Method most commonly used: The Query is, whether Deceit be lawful; for Homer said an Enemy might be annoyed, 'six δίολον ἢ βίον, ἢ ἀμφαδίν, ἢ κρυφεόν,'

And Pindar,

By Fraud, or Force, openly or secretly.

Whether by Craft or Force we overthrow, All Means allow'd to crush the daring Foe.

And Virgil's Direction,

Let Fraud supply the want of Force in War. Dryd.

Is strictly followed even by Riphæus,

Just of his Word, observant of the Right. Dryd.

And Solon, so famous for Wisdom, also observes this Maxim; so did Fabius Maximus, commended for it by Silius:

Who to Force join'd Artifice.

2. In Homer, Ulysses, a very wise Prince, was famous for Stratagems of War; whence Lucian makes this Inference, that Deceit in War is commendable. There is nothing more profitable in War, than Fraud, said Xenophon; and Brafilas in ry, B. I. and XI. where you will find the Liberators and kers for Commerce, and the Damas against it. See also Græceus, Panopol. B. XIV. Thucydides, on the aforesaid Year 1589, of Hif. XCIV. Cambden, besides the above-mentioned Places, on the Years 1530 and 1595, where that Dipharte between the Englishe and the Hanoe Towns is treated of. Grotoius.

8 Not much unlike to this is what Plutarch relates of Pompey, in his History of the Mithridateck War, He set Guards at the Bophorbus, to observe if any sailed into the Bophorbus, and whosoever were caught were put to Death. Vit. Pomp. (p. 659.) Grotoius.

VI. 1. 't is easily, &c. So our Author quotes that Verse from Homer. But all he says is:

'Ante ιτατα μεγατας η μεγατα η μεγατα τεταρτη Κλεος, ει δυσον η αμφαδη η γαλαζη, &c.

Osson. Lib. XI. Ver. 118, 119. It is the Shade of Tertiacus who tells Ulysses, that when he returns Home he will kill his Wife's Sutorus, either by Fraud or open Force. See also B. I. Ver. 395, 396. where Mercurus says the same Thing to Telemachus. Our Author has taken the Verse he recited from the Collection of Storches, who ascribes it to Antisthenes, as made by him in Imitation of the ancient Poet: 'Αντισθενον ἡ τραγῳδία, ταυτα τοι τεταρτη στρατηγικα, οπιοι ιταται, &c. Fluring. Tit. LV. (or LII.) De Imperatoribus, &c. p. 365. Edit. Gelfer 1549.

2 Iñc. Od. IV. 81, 82. 3 Upon Occasion of fame Trojans who had put on the Arms of the Greeks their Enemies:

Μεταμεθατας, Δαυανομακην ιναξιν
Ατημας. Δαλος, αν τινς, κη σαλκαφηραιται?
Ανεμ. Lib. II. Ver. 539, 540. And one of those, who uses this Stratagem, is ranked amongst the justest and most virtuous of the Trojans:

Hec Riphæus, hac ιης Δυνας, ομοιος ιουντιτος
Leta facies

Cæsi & Riphæus justissimus unus,
Qui fuit in Trocis, & sverantissimus equi.

(Ver. 539, 426, 427.)


5 Tacitius quae

Eia virtutis hanc demum

De bella Panic. Lib. XV. Ver. 326, 327.

6 He not only speaks of War, but of all Caes, in which Fraud is the means, or Remedy, for extirpating People out of Danger, as the Falsehoods made use of by Ulysses for his own Prefervation, and to obtain the return of his Companions. In Philosoph. circ. Init. p. 326, 327. Edit. Amphil. Vol. II.


8 Thucydides.
Of the Rights of Book III.

8 Thucydides gives the greatest Honour in War to cunning Strategems. And in
9 Plutarch, Agesilaus said, It is both just and lawful to deceive an Enemy. And Polybius, 10 Military Exploits performed by open Force are less considerable than what is done by Strategem and making good Use of Opportunity. And from him Silius brings in Carusius speaking thus,

11 Bellandum est aequi, levior laus in duci dextra.

Ambush in War is still by Fortune crown'd,
The Captain's soul for Policy renown'd.

So also thought the rigid Spartans, as 12 Plutarch observes, therefore they offered greater Victims for a Victory obtained by Policy, than by plain Force. 13 The fame Author highly commends, 14 Lycurgus, aequus tu esse, sociusque signum, verfed in all the Arts and Skill of War. He also praises Philopoemen, 15 that being instructed in the Cretan Discipline, he united the plain and open Way of fighting with Slights and Strategems. And 16 Ammianus was of Opinion, that Without any Distinction of Value, or Cunning, all prosperous Successes in War deferve Commendation.

3. The Roman Lawyers 17 accounted all Fraud used against an Enemy, innocent; and that it mattered not, 18 whether a Man baffled his Enemy by Force or Fraud. Enyllatius on the 17th of the Iulian observes that Decret is not to be blamed, as be-

8 Lib. V. Cap. IX. Editt. Oxon. What Thucydides expreffe here by the Word vègapeia, Virgil calls also Belli fortes, Ed. Lib. XI. (Fer. 515.) upon which the Grammarian Servius cites a like Passage in Sallust : Gentis ad foras bellorum peritum. Gravius. The last Passage is a Fragment which I find in Nonius Marcellus at the Word Partum, p. 310. Edit. Paril. Mercer. See Mr. Wasse's Note upon that Fragment, Addid. p. 291. col. 2. It is in Lib. I. Cap. XX. of the Collection.


10 Lib. IX. Cap. XI. p. 766, 767. Isaac Casaubon translates the Word δαιμονία in this Passage, in a Manner which would render the Application of it not very just, patience, &c. But that learned Interpreter does not seem to have given sufficient Attention to the Connexion of the Discourse, and was led into the Mistake by the Word πέλαγος in the following Period, which in Reality implies the Number, and not the Quality of the Actions in Question; from whence he probably believed that the Word δαιμονία should be taken in the same Sense in the preceding Period: Whereas the Historian's Thought is, that the Conduct of a Strategem in War is not only of greater Consequence, but more difficult; Experience proving, that People more often miscarry than succeed in it: "Oh γαρ ποινυρίων &c. By all which he intends to prove, that the Ufe of Strategem is very laudable. So that our Author was in the right to tranlitate, quo tui peifant in bello minoris confedens, &c. And I find, that Justus Latinius understood this Passage in the same Sense, which he quotes in his Politic, Lib. V. Cap. XVII, where he exprefles it thus: Parumnum militarium et offis minoris lauds ac momenti, &c.

11 Thus our Author cites this Verfe with Reason, which agrees with the bell Manuscript unless it be better to read dextra than destra, as the last Editor Mr. Drakenborgh, Professor at Utrecht, has done in his Text. The vulgar Editors have subdus destra; of which Cellarius has made, subdus destra, and explains it in this Manner: Si actiones bellie, pridem quidam fiant, quaft indice diuici effus praecursusque. But this Explication is contrary to the Deign of the General, who speaks.

He intends to fhew, as appears by what goes before, that the Resolution he takes to make ufe of Strategem, is not only necessary with regard to the Conjunction, but that it will not be less glorious for him to succeed that Way than by mere Force. Whereas according to Cellarius, he would lay on the contrary, that Exploits are more glorious, when performed by open Force. Besides, this Interpretation is somewhat forced, and is not supported by any Example of an Expressyon, that seems extraordinary enough. What our Author observes with great Probability, that this is an Imitation of a Passage in Polybius, which we have seen in Note 10. refers also to confirm the Manner, in which he gives the Verfe. He cites here also in a Note a like Thought from the Alcoran, in which Mahomet says, that War makes Decet necessary. He remarks further that Virgil puts not only Anger, but Ambivalda in the Return of the God Mars :—

Circumque atque Ferminidis ara
Fragilique fique Dei comitatu aguntur.


13 Vide Lycurgus, p. 437. The Historian does not speak there of his own Head, and those whole Opinion he gives blamed on the contrary that Conduct, as appears by what follows and goes before.

14 Vide Plutarch compares him to Sulla, in whose Mind Carbo foid, there was the Lion and the Fox. Vide Chart. p. 314. Lib. X. Cap. XVII.

15 Vide Philopoem. p. 535. E.

16 Illets in Sophocles' Letter to the Emperor Conflantius, where that Prince says, this Maxim of the Romans had never been received by his People: Illeque apud nos suscepimus, &c. Lib. XVII. Cap. V. p. 179. Edit. Koff. Gran.


18 Diggel, nihil interdum, &c. Lib. LXXIX. Tit. XV. De Captiv. &c. Leg. XXVI. 

Iunging
Chap. I. W A R  A N D  P E A C E.

 longing to a Soldier. And among the Divines, 19 St. AuguHine, If the War be just, it concerns not Justice, whether it be managed by Force or Craft. And St. 20 Chrys.

flom says that those Generals, that overcame by Subtily, are most commended.

4. But there are Opinions which seem to maintain the contrary, of which I shall mention some hereafter. To decide this Question, it must be considered, whether Deceit be one of those Things that are always Evil, and in which the Maxim takes Place, that we must not do Evil, that Good may come of it; or whether Deceit be to be reckoned among such as are not Evil in their own Nature, but that it may sometimes happen, that they may be good.

VII. We must then observe, that some Fraud consifts in a negative Act, and some in a Positive; and here I enlarge the Word even to include those Things which conftit in a negative Act, according to Labes, 2 who referred it to that Fraud which is not Evil, when a Man by Diffimulation prefers either his own, or another's. 3 Cicero overftretched the Point, when he said, Diffinage and Diffination should be banifh'd out of human Life. For since we are not obliged to discover to others all we know, or defire; it follows, that it is lawful to diftlemand some Things before some Men, that is, to hide and conceal them. We may sometimes safely con-
cel the Truth (said 4 St. Auffin) under some Diffinage. And that this 5 is sometimes necessary and unavoidable epecially in Governors, Cicero confesses in many Places, We have a remarkable Instance of this in the Prophet Jeremy, Chap. xxxvii. 27, where the Prophet being asked of the King concerning the Event of the Siege, by the King's Advice, wisely concealed it from the Princes, alluding another Caufe of their talking together, which yet was not false. So Abraham told Abimelech true, when he said Sarab was his Sister, according to the Custom of speaking in those Days, being his near Kinfwoman, wisely concealing that she was his Wife.

VIII. But

19 Quam autem juftum bellum fubfripere, &c. Quæft. X. fuper fubfrip. Our Author has changed some Words in this Place, from having followed the Summary of a Canon, in which this Paffage is re- cited. Conf. XXIII. Quæft. II. Cap. II.

20 The Paffage will be cited below, § 17. Nov. 2.

VII. (1) That is to fay, when by not faying or doing a Thing, we deliberately give room to others to believe, what we know is fale. From whence may easily be difcover'd, wherein deceiving by a positive Act confifts.


or below, § 9. amongst thofe who believed fome

Lies innocent.

4. Libet veritates secundum, &c. Lib. contra Mendacianum, Cap. X. The fame Father fays in another Place, that there is a Difference between lying and concealing the Truth. Quamion eit eft, &c. In Pflam v. v. Perks amm. The Paffage is cited in the Canon Law, Conf. XXII. Quæft. II. Cap. XIV. See THOMAS AQUINAS I. 2 Quæft. LXXI. Art. III. in Ref. ad tertium: As alfo SYLVEST. in verb. Bellum, Part I. Num. 9. GROTIUS

The fame Paffage of St. Auffin, cited here by our Author, is not translated in the two Treatises of that Father contra Mendacionum: But I find the Senfe of it in the Chapter of the fex 트 Treatie, to which he refers, where the Example of our Savi-

or JESUS CHRIST is alluded; who did not lie in telling his Disciples that he had many Things to fay to them, but that they could not yet hear them: non autem hoc of sectarum veritatim, &c. Lib. contra Mendacianum. Cap. X.

5 Our Author refers as here in the Margin to Orat. pro Milone, and that pro Plancio, &c. Lib. VII. Epift. IX. The left Citation is fable as well as many others, which I correct without taking Notice, for the Paffage is in Letter VIII. of B. X. and moreover the Letter is not Cicero's but PLANCIUS, who in giving an account of the Conduct he had obferved during the Troubles of the Repub-

lic, fays, that he had been obliged againft his Will to feign and diflemand many Things to attain his Ends: Ina nonquam diffimero, multa me, ad effe-

ctum hominum confilidum, &c. The Paffage of the Orration for Milan, relates to a different Thing. The Orrator endeavours to execute Pompey, for having given Credit, upon too flight Grounds, to the fable Reports, which had been spread concerning Milos: He fays for that Purpofe, that thofe who have the Government of the State in their Hands are obliged to hear too many Things, and that they cannot avoid doing fo: Laudamur euidem incredibili, &c. Cap. XXIV. I am deceive'd if this Miflake of our Author did not arise from his having the Politicks of JUSTUS LUSIUS before him, when he quoted this Paf-

fage; which Author, in this, as he doth in many other Places, applies the falt Words to a Subject different from that upon which they were writ. For he also quotes the two other Paffages; of which the left, that remains to be examined, is more to the Purpofe. Ci-

bero fays, that the People are pleased to give their Suffrages in fuch a manner, as will leave them at Li-

berty to carry fair with every Body, and to conceal their Inclination to favour fome Competitors more than others: Estimam fi papae gratia fet tabula, &c. Orat. pro Plancio, Cap. VI.

6 St. Auffin fays, that the Patriarch did not lie, and that he only concealed the Truth: Sed veritate

voluit color, non mendacium dici. In GESEN.

Quæft. XXVII. This Paffage is quoted in the Can-

on Law, Cap. XXII. Quæft. II. Cap. XXIII. GROTIUS.

See PUFFENDORF, Law of Nature and Nations, B. IV. Chap. I. § 11. This Chapter with the Notes should be always compared with this Place,
VIII. But Fraud, which consists in a positive Act, if in Actions is called a Feint; if in Words, a Lye. Some make this Difference between these two, that Words naturally signify the Intent of our Minds, but Actions do not. But on the contrary it is true, that Words of their own Nature, and independently of the Will of Men, signify nothing, unless it be such a confounded and inarticulate Noise as is caused by Pain, which comes rather under the Denomination of an Action than a Speech. But if it be objected, that it is peculiar to the Nature of Man, above all other Creatures, that he can discover the Conceptions of his Mind to others, to which Uterus Words were invented; which is certainly true; yet this also should be added, that such a Discovery is not made by Words only, but by Gestures, &c. as among Perions that are dumb. Whether those Gestures have naturally something common with the Thing signified, or have only a Signification by human Inuition. Like to which are those Characters which (as Patitus & the Lawyer fays) signify not Words formed by the Tongue, but the Things themselves, either from some Likeness, as the Egyptian Hieroglyphicks, or from mere Fancy, as among the Chinese.

2. There is therefore another Difinition to be observed in this Place, which we made Use of to take away all Doubtfulness and Obciurity, concerning the Term of the Law of Nations. For we then faid, that the Law of Nations signified, either what was allowed of by every Nation without mutual Obligation, or that which implied a mutual Obligation. In like manner, Words, Gestures and Characters (as we as it treats the fame Subject with more Extent and Exactness. As to the Words of St. AUtin, which our Author cites, they are indeed to be conceived in the Canon referred to; but they are not to be found in Euglium XVI. upon Genus. Which proceeds, as is remarked upon that Canon, from its being composed of different Paflages of St. AUtin, which Grattan has joined together. That Father expreffes himself in this manner upon the fame Subject in his Second Treuitt, cont. Mendac. Alquid ergo vers tacuit, non falfi alquid dict, quodam tu- citus vere, dicti forem. Ad Conftantium, Cap. X. CLEMENS ALEXANDRINUS observes, that Abram intimates that it was not lawful in that of Times to marry a Sitter by the fame Mother; by which he evidently fuppofes, that Solomon was actually the Sitter of that Patriarch by the Father, and not merely a Relation in some more remote Degree. Strom. Lib. II. Cap. XXIII. p. 592. Edit. Oxon. I find the Paflage has been already cited by Mr. Le Clerc, upon the twenty-fifth Chapter of Genus, where the Story is related. The late Mr. Bayle remarks in the Article Solus of his Historical and Critical Dictionary, (p. 2536, col. 2, of the third Edition) but he explains the Word casus ejus, as only Signifying an Utterine Sitter, And indeed that is the proper Sense of the Term. But I do not know whether CLEMENS ALEXAN- DRINUS has not improperly taken it for a Sitter both by Father and Mother. Thus be underfiands the Word Pediagn, the Condition both of those who have Wives at the fame Time, and of those who have several one after another, as appears from the Paflage recited below, Chap. IV. of this B. III. § 2. Note 3.

VIII. (1) There was a People of Ethiopia according to Pliny, who had not the Ufe of Speech, and conveyed their Meaning to each other by nodding their Heads, and by various Motions of the other Parts of the Body: (Rexdiam pro formae nativo mutuus movemens cli. Hift. Natural. Lib. VI. Cap. XX. The Roman Lawyers have decided, that if those who cannot speak express their Thoughts by the Effuvs, which they make to be understood in other way or manner, and by an inarticulate Voice, such Endevours ought to be deemed a sufficient Declaration of their Will, which otherwise ought to be declared in Words: Nam eft privo atque poter-
we have said) were invented to signify by mutual Obligation, which Aristotle calls κακωμος, according to common Agreement, but other Things are not so. Hence it follows that it is lawful for me to use other Things as I please, tho' I foresee that another may place a wrong Construction upon it; I speak of the Use of those Things in itself, and not of the accidental Consequences that it may have. Therefore we must here suppose Cases, where no Harm can ensue, or where the Harm itself, setting aside the Consideration of the Deceit, is lawful.

Of the first we have an Example in our Saviour, who to the two Disciples at Emmaus, (Luke xxiv. 28.) presentibus, made as tho' he would have gone farther, unless we had rather believe he really intended so, if they had not importuned him to stay: As GOD himself is said to will many Things conditionally, which yet come not to pass, the Condition being not performed. And in another Place, (Mark vi. 48.) CHRIST himself made as tho' he would have passed by his Apostles falling on the Sea, that is, unless they entreated him to come up into the Ship. Another Example may be given in St. Paul, (Acts xvi. 3.) who circumcised Timothy, 'tho' he well knew what Sense the Jews would put upon it, viz. that the Law of Circumcision (tho' it was now really abolished) did still oblige the Children of Israel, in the Opinion of St. Paul and Timothy; whereas St. Paul had something else in View, that he and Timothy might obtain a greater Opportunity of a familiar Conversation with the Jews. For neither did Circumcision, the ceremonial Law being abolished, by its Institution any longer signify such a Necessity, neither was the Evil, which followed upon the Error, in which the Jews would continue for a while, (tho' afterwards to be laid aside) so great, as that Good which St. Paul designed, which was a more easy Propagation of the Doctrine of the Gospel. The Greek Fathers often call this differentiating ἀκρομα, good Management, of which we have an excellent Sentence of Clemens Alexandrinus, who differing from a good Man, says, ιη, τω παραγεν σοι δειναι μην παρεχε ναι τω, ἂν μη παραγγελον τω παρεχεθης.  

8 He will do some Things for the Benefit of his Neighbour, which otherwise he would not of his own free Will, and first Intention. Such was the Act of the Romans, who, when they were besieged, threw Loaves of Bread from the Capitol, into the Enemies Camp, that they might not be thought of want of it. An Example of the other Cafe, is the pretended Flight of Jefbus before the Inhabitants of Ai, which is often practised by other Generals. For we suppose here the consequent Harm to be lawful, from the Justice of the War. But such a pretended Flight signifies nothing by Instigation, tho' the Enemy may take it as a Sign of Fear, which the other is not bound to guard against, using his own Liberty of going this way or that way, faster or slower, and with such or such a Countenance, as he pleases. The same Thing may be said of those, who use the Enemies Arms or Habits, or set up his Standards or Flag, as we read in many Histories. For all these Things every Man may make use of, as he pleases, tho' contrary to the general Custom; because that very Custom is established by the Pleasure of particular Perfons, not as by common Consent, and therefore obliges none.

are otherwise obliged to prevent by Virtue of a Law of Nature, whereby we are to avoid all Things that may occasion Evil, directly or indirectly, to those who have not deserved it. Now this would alone Place, admitting that the Effect should result from the Use of Speech; if, for Instance, we had Reason to believe, that a Perfon, either thro' Ignorance, Distraction, or otherwise, should take in a wrong Sense what we say to him in the most common and clear Terms.

4 De Interpret. Cap. IV.
5 As Michel did to save David her Husband.
7 Thus St. Chrysostom says it ought to be called, and not προσκελεσθαι Περσον, in his first Book De Sacrorum. And again, the same Author upon 1 Cor. iv. 6. This was not Cheat but a certain Compliance and Condescension. And again, on ix. 20. That he might convert those that are really so, he became such in Appearance only, and did the same Things as they, but not with the same Intention. To this we may refer the contradictory Manners of David, (1 Sam. xii. 12.) Grotius.

See a Passages of St. Cyril, which will be cited below, §§ 13. Note 2. and that of Clemens Alexanderinus quoted in Note 6.

8 Those Words that our Author quotes without mentioning the Place from which he takes them, are in Stronat. Lib. VII. Cap. IX. p. 863. Ed. Oxon. a little after the Paffage, which he cites below, § 14. Note 10. in as loose a Manner. The Father speaks in both of his Guttick.
IX. There is a greater Dispute concerning those Signs which enter, if I may say so, into the Commerce of Men, and in the wrong Use of which a Lyce does properly confift; much is found in Holy Writ against Lying, *A righteous Man bateth Lying*, Prov. xiii. 5. Remove far from me Falsehood and Lies, Prov. xxx. 8. Thou shalt destroy all those that speak Lies, Psal. v. 7. Lie not one to another, Colof. iii. 9. And this St. Aulfn flilflly defends; with him agree many Poets and Philosophers. Remarkable is that of Homer,

1 Hated to Death may that grand Villain be, Whose Heart and Tongue do ever disagree.

And Sophocles,

2 'Tis never handsomc to report a Lyce; But if on Truth a certain Mischief wait, You may diftlemb.

And Cleobulus,

3 The truly wise abhor a shameful Lie.

4 Arifalbe said, καὶ ἀκό αὐτοῦ, ὄμων χωρίς, φαντάζοντας, ὥστε εἰς τὸ καλὸν τὰ εἴσωσιν, Lying in itself is vile and base, but Truth is beautiful and commendable.

Neither does the other Side wants its Defenders: As first in Holy Writ, it has the Precedents of Men, whose Probity is commended, who nevertheless have sometimes lied, without being any where blamed for it: As also the formal Decision of many antient Doctors of the Christian Church, as Origen, Clemens, Tertullian, Lactantius, Cyprianus, St. Jerome and Caftanns; and indeed almost of all the primitive Christian Writers, as St. Aulfn himself confesses, herein dissenting from them, but owning it to be a very difficult and intricate Question, and by the Learned variously disputed, for these his very Words.

Among the Philosophers, the open Maintainers of this Opinion are Socrates, and

IX. (1) *ἐχεισιν γάρ μει ἒκ νόες, &c.* Illud. Lib. IX. Ver. 312, 313.

2 Καλοὶ μόνοι εἰς, &c.

This is a Fragment of a Tragedy that is lost, intitled Appendix, preferred by STOB. EUS. Florieg. Tit. XII.

3 Υόδες δε μοι πάντα ἐστὶ Φάσμιοι καὶ εἰσώσιν.

STOB. EUS. has also preferred us this Verse in the fame Place, Tit. XII, where is another very like it, which immediately follows, attributed by the common Editions to MENANDER; but in that of our Author, who he revised upon the Manuscript it is called anonymous.

Υόδες δε μοι πάντα εἰσώσι καὶ φασιοί.


5 St. IREN. EUS. tells us, he was taught this Maxim by an old Priest; that we ought not to condemn those Things which the holy Scripturees relate simply, without cenestre: De quibus Scriptura non incursant, sed simpliciter sunt positae, ne non debeant fieri accessoris. Lib. IV. Cap. L. GROTIUS.

The Maxim had down by this good Priest so generally, is undoubtedly felle. But it is certain that of all those Things, on which the Scripture decides nothing clearly and incontrovertibly in regard to their Nature, there is not one, whereas we find so many Examples in holy Writ, as of thofe innocent Lies, pralificed by virtuous Persons without (curple of Confidence. Besides, as MOSES AMYRAUT observes in his Christian Morals, *There

IX. Of that in the latter Sense, the Quotation is difficult.
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his Disciples 10 Plato and 11 Xenophon; as also 12 Cicero; and, if we believe Plutarch 13 and 14 Quintilian, the Sticks, who reckon this among the Accomplishments of a wise Man, to lie in a proper Place and Manner. Neither does 15 Aristotle himself seem to differ from them in some Places, whose καθ' αὑτό, in itself, which we have cited, may be interpreted commonly speaking, or the Thing considered in itself, without respect to Circumstances. His Expositor, Andronicus Rodius, said thus of a Physician that told a Lyce to his Patient, 16 απαθην, ἓρε, ἀπαλω, ἓ ἐκ τοῦ, He deceives indeed, but yet he is not a Decever. And he gives the Reafon, ἐ γὰρ τις ἦν τοῦ απαθην τό νοοθνο, ἀλλά τὸν σώματα, Because he has no Deceit to deceive his Patient, but to cure him. 17 Quintilian beforementioned defending this Opinion said, Many Things are honest, or dishonest, not simply from the Fact, but from the Motives of it. So 18 Dibipus,

If a kind Lyce the Life of Man can save,  
Where is the Crime to rescue from the Grave?  

When Neoptolemus in 19 Sophocles asked Ulysses,

What! not abban'd by Palkwood to offend?  

Ulysses answered,

No, if our Safety thereupon depend.

The like may be brought out of 20 Pifander and Euripides; so in Quintilian also we find, it is allowable in a wise Man sometimes to tell a Lyce. And 21 Eustathius upon the second of the Odysseys, said Ψυχικα καθα καρδι ἐ σφάς, A wise Man will tell a Lyce upon Occasion. He also produces Testimonies out of 22 Herodotus and Icrocrates.

10 Some Paffages of this Philosopher will be cited below, upon Paragraph XV. Note 2, 4.

11 The Paffage cited in Not 9. suflices to shew the Opinion of this Philosopher, who, as the Diigul of Socrates, approved without doubt all the Sentiments of his Mafter which he has given us. See also thofe cited above, upon § 6. Not 6.

12 Miicabi Cicero, says our Author. See the Paffages which he cites below, Not 15. and thofe recited in Puerendorf, B. IV. Cap. I. § 31. with what I say there in Not 1.


sophers may be foon explained at large in Storbus, Edig. Ethic. Cap. IV.

14 This Orator by way of Example the fmall Lyes told to a fick Child; thofe invented to preserve the Life of a Perfon fallen into the Hands of Robbers, or to deceive an Enemy, when the Safety of a Man's Country requires it: Ac primum renatu, mihi, &c. Inflit. Orat. Lib. XII. Cap. I. p. 1054. Edit. Burman.

15 I fhall give the Paffages quoted by our Au-

thor in the Margin, where the Figures are a little faftly in the Editions before mine. The Philo-

sopher speaking of the Virtues oppofite to Veracity, gives as one of the Extremes, the pretending to have advantageous Qualities which we have not, or not to have what we have. Ethic. Niconach. Lib. II. Cap. VII. p. 29. Vol. II. Edit. Paris. By which he gives us to understand, that Feigning and Diffimulation are not always vicious, but only from the Excess or Defect in the Things feigned or difguifed. And he fays in fo many Words in the other Paffage upon this Head, that those who difguife with Mofle-

ration, and in Things that are not obvious, pafs for polite People, Lib. IV. Cap. XIII. in fn. p. 56. B.


17 Sic judicat, paraphrag eff, &c. Inflitut. Orat.

tor. (Lib. XII. Cap. I. p. 1054. Edit. Burman.) He says in another Place, Nam et Morali-

cum dicere, &c. (Lib. II. Cap. XVII. p. 127.) Gro-

tius.

18 Ιταλαμεμον κα το νοοθθν, &c.

These Verfa have been preferved by Stobæus, Floril. Tt. XII.

19 NE. Ουκ εισηγητον ἐν ηδονη λεγον;  
OL. Ουκ, ὑπεν το ενδεχον ητι το νοοθθν φινεν.  
Phil.edit. Ver. 107, 108.

20 Ου πιστευον κα το νοοθθν, &c.

This Verfe is also in Stobæus, Tt. XII.

21 This perhaps is what he makes Ulysses fay, that, when he was discovered as a Spy in Troy, he invented a thoufand Things to avoid Death:

ΕΚ. ΤΙ ἐντελεχεια, ἐδαφος ἐν ὕμνο τετειν;  
OL. Πολλων ληγον τοιουτοικ δε μη κανει.

Hercb. Ver. 249, 250. In Mr. Barnes's Collection of Fragments there is one which might be applied here, Incert. Ver. 73. But it is Menan-

der's, and is in p. 208. Ver. 57. Collect. Cleric.

22 What he calls there καθα καρδι, the Gram-

martian Donatus expellis by in tempor, adding, that some Moralists approve of Deceit when reafon-

able: Λυσιακαμ και ἡπαμ fallere in tempor, quidam de Officiis eriti, rectam patior. In Adelph. Art IV. Sen. III. (Ver. 18.) Cicero infinuates, that there are honest and charitable Lyes, as thofe by which we endeavour to fave the Life of an unfortunate Citizen: Σι βουλατα και νεφαδακα fhahat eipt feiftam, &c. Orat. pro Ligur. (Cap. V.) Grotius.

23 The Historian makes Otanes fay, it is nec-

esar to lie when some Reafor require it: τοια  
τα διεναι το μαθαμαι νηκαια, νηκαια, Lib. III.  
Cap. LXXII.

X. Thefe
X. Thence to different Opinions may perhaps be reconciled by the common Distinction of Lies, taken either in a stricter or a looser Sense. For we do not here take the Word *Lye* so largely, as comprehending every Untruth that one lays, without knowing it to be such, as *Gellius* 1 distinguished between *manda tion dicere*, and *mentiri*, to tell an Untruth, and to *Lye*. But here we take it to signify a Falsehood spoken knowingly, in a Sense contrary either to what we think or design. For what is *falsus*, *etipso*, and immediately declared by Words, or any other Signs, are the Conceptions of the Mind: Therefore he does not lie, who tells a Thing that is false, yet supposing it to be true; but he that tells Truth, at the same Time thinking it to be false, does certainly *Lie*. It is the Falsehood therefore of the Expression which is requisite to the common Nature of a *Lye*. Whence it follows, when any Word or Sentence is *exordium*, of divers Significations, either by common *Ue*, or by the Custom of Art, or by any Figure that is intelligible, then if our inward Meaning agree with any of these Significations, it is not to be reputed a *Lye*, 2 tho' the Person to whom we speak may take it in a different Sense.

But these ambiguous Expressions are not rashly to be allowed, but yet may upon Occasions be judicious. As if it relates to the instructing of one committed to our Charge, or to avoid some captious Questions 3. Of the former CHRIST gave us an Example in himself, when he said our Friend Lazarus *repeathed*, John xi. 11. which his Disciples understood of his taking rest in Sleep. And when he said, *John* ii. 20, 21. *Destroy this Temple, and in three Days I will raise it up*, meaning that of his Body, he knew very well that the Jews understood it of the real Fabric of the Temple. So again, when he promised his Disciples, *Luke* xxii. 30. *That they should sit on twelve Thrones, judging the twelve Tribes of Israel*, and *Mat*. xxvi. 25. *That they should drink new Wine with him in his Father's Kingdom*, he knew very well, that they understood it of a Temporal Kingdom, whereof we were full of Hopes even to the very Moment of his Ascension, *Acts* i. 6. Thus he speaks to the People in Parables, that bearing they might not understand, *Matt*. xiii. 3, that is, unless they came with such Attention and Docility (or Willingness to be

1. *Usurpatam*.
2. *Exordium*.

X. (1) He cites upon it the Words of P. *Nigidius*, contemporary with *Julius Caesar*, and *Cicero*: *Verba sunt hae ipsae*, *P. Nigidii*, *et*. Lib. XI. Cap. XI. St. *Austin* observeret, *et* that Nobody is guilty of Lying, when he believes what he says to be true: *Rebus infandum non facit nisi mens rae.* De verbis *Apolloi*, *Serm. XXVIII*. Nonnominum judicandus, *et*. *Enchirid.* Cap. XVIII.

Thee two Passages are quoted in the *Canon Law*, *Conf. XXII*. *Quaet. II*. (Cap. III. IV.) *Grotius*.

2. That Abraham when he was going to sacrifice his Son upon the Mountain *Mount Mariah*, said to his Servants: *Abide you here with the *Aß*; and I and the *Lad* will go yonder and worship, and come again to you.* In which he spoke ambiguous according to St. *Ambrose*, left, if those People had known his Design, they should have endeavoured to hinder him from executing it, or importuned him against it with Cries and Tears. *Capitulis auctem inopehatur*, *et*. Lib. I. *De Abraham*, (Cap. VIII.) That Father of the Church approves the Patriarch's Conduct, and *Gratian* after him, *Conf. XXII*. *Quaet*. II. *p. 220* [Cod. XX.] *Grotius*.

This Example includes more than a simple Ambiguity. "Every one fees that if *Abraham* did not speak contrary to his Design, he spoke at least contrary to his Hope, and by his Words put other Ideas into the Minds of his Servants, than he had in his own, *Erat aut aut fays very well, "*Miracle Christiane.*" Vol. IV. p. 523. It does not suffice in order to say there is no Lie, that the Words we use are culpable of a Sense which answers to what we think; it is moreover necessary, that in the present State of Things, and the manner the Persons to whom we speak, are disposed, they have room to take our Words in that Sense; other

wife a Door would be opened for Deceit in Relation to Affairs, wherein all the World agrees, that we ought to speak sincerely what we think. This our Author was well aware of, since he observes immediately after, *tamen hec non inferam tetere nom pro pronondam*. See *Pependorv*, § 13. of the Chapter which answers to this. Now could Abraham's Servants, ignorant as they were of the Order of Heaven to that Patriarch, ever imagine, that the Words we will come again to you, could mean only the Father, and not the Father and Son, whom we here mentioned just before? I go therefore to maintain, that tho' the Words are conceived in such a manner, that tho' to whom they are spoke could with good Attention, fee thro' the Ambiguity, and know the Sense that the Speaker has in his Mind; if however the latter has Reasen to believe, that they will take them in a Sense quite different from his Thoughts, it is then, with regard to them, a down-right Lie, since it produces the same Effect as if he had used Terms, that were susceptible only of one Sense, contrary to the Thought of him that employs them. So that not only *Abraham*, and many other holy Persons, but also our Saviour *JESUS CHRIST*, having used, as our Author observes a little lower, Expressions, which they well knew, would be understood in a different Sense from what they had in their Minds; hence refulls, I conceive, the ambiguous Line, which is the Sense of the contrary rigid Opinion, who affers, that we are always guilty of a criminal Lie, when we speak, or act, in a manner, whereby we would make others understand something different from our own Thoughts. It signifies nothing to say, that it was for a good End our Saviour spoke in this manner; for the End does not make the Ue of a Means, bad in itself, innocent. 3 See my Reflection upon the preceding Note 2.
taught) as was requisite. An Influence of the latter Case we meet with from profane History in the Person of L. Vitellius, who being importuned by Narefius to explain himself, and to speak freely (in regard to the loofe Life of Mejerina) would not be prevailed upon, but still gave such doubtful and uncertain Answers, as would admit of various Senses. Hither we shall refer the Hebrew Saying, 5 That a Lye should be banished from all human Commerce, borrowed from the old Attic Law, 9 No lying in a Market. In which Places the Word Mundacum is to be taken so largely, as to include even obscure Expressions, which we, properly speaking, do not comprehend under the Notion of Lying.

1. It is then required to the common Notion of a Lye, that what is either spoken, written, intimated by Characters, or declared by any Gelftere, cannot be otherwise understood than in such a Sense 1 as differs from the Mind of the Peron who expresses it; but to a Lye strictly taken, as it is naturally unlawful, there is necessarily required some peculiar Difference; which if rightly considered, at least according to the common Opinion of Nations, can be nothing else than the Violation of a real Right, and that subsisting without any Diminution, belonging to him, to whom we make a Sign, or direct our Discourse. For it is certain, that in Respect of himself, let him speak ever so fallacy, no Man can lye. I do not here mean every Right, and what is foreign to the present Affair; but that Right which is proper and essential to the Matter in Hand, which is nothing else, 2 but the Freedom of him, with whom we discourse to judge of the Conceptions of our Minds, a Freedom which, as by a silent Contract, we are supposed to owe him 1. For this, and no other, is that...
that mutual Obligation, which Men intended to introduce by establishing the Ufe of Speech, and such other Signs; for without that such an Establishment had been to no Purpose.

2. It is also requisite, that this Right to judge should subsist without any Diminution, while we discourse. For it may happen, that tho' there were such a Right, it ceases or may be taken away, by fome other supervening Right, as a Debt may ceafe by an Acquittance, or Non-Performance of fome Condition. It is moreover required, that the Right that is violated be his, with whom we discourse; and not any other's; as in Contracts there arises no Injustice, but by the violating the Right of the Contraders. Hence perhaps it is, that after Simonsides, Plato 8 refers the speaking of Truth to Justice; and that the Lying which is forbidden, Holy Writ often describes by bearing falfe Witnefs against our Neighbour, and what St. Austin himself puts into the Definition of a Lye, 9 A Purpofe to deceive; and Cicero 9 will have the speaking of Truth referred to the Fundamentals of Justice.

3. But as this Right may be taken away by the express Confent of him, with whom we deal; as if any one fhall declare before hand that he will speak falfe, and the other allows it, fo also by a tacit Confent, or a Prefumption founded upon just Reafon, or by the Opposition of another's Right, which by the Judgment of all Men is far more considerable; from these Principles rightly understood many Inferences may be drawn, which may be of Ufe to reconcile those different Opinions formerly mentioned.

Words, which are re trenched in the later Editions, serve for our better understanding the Ideas of our Author. He founds the Obligation we are under to speak Truth, upon the tacit Agreement Men entered into amongst themselves, in introducing the Ufe of Words, that this, and other such Signs, should be used, &c. as to make known reciprocally what they thought. But this Agreement is no better founded than the other with which he compares it, and of which we have fhewn the Ufefulness in the Notes upon Puffendorf, Law of Nature and Nations, B. IV. Chap. XII. § 3. Note 1. The Establishment itself of the Signification of Words, tho' it is made by a kind of Confent of Mankind, is not made by a Convention properly fo called, and of an obligatory Force, as we have proved in the same Notes, B. IV. Chap. I. § 1. Note 1. And it is not at all necessary to fuppofe, that Men have agreed amongst themselves to manifest their Thoughts to each other by the Ufe of Words, and that in a manner proper for making them known. Men being often obliged to communicate their Thoughts reciprocally, in order to discharge what they owe to each other; and having no other Means to do that, than Words used in a certain Sense, which is generally the moft common, it follows from that alone, that they ought to make such an Ufe of them, by Value of the known and inconfiderable Rule, that whoever is bound to procure an End, is also bound to employ the Means neceffary to obtain that End. Neither, in my Opinion, is there any need to fuppofe, that when we begin to speak to another, we make a particular Agreement, by which we profefs our Consent to enter into this general Agreement. Which however is pretended by the ingenious Author of a Piece, published in the Journal Litteraire de la Hague, Vol. V. Part II. p. 356. & fop, which the Reader will do well to perufe, and wherein the various Extremes are avoided. But it seems to me more fimple to fay, without fo many turnings and windings, that the Question about Lying is reduced to this, whether there be any fome Reafon, which obliges us to make known our Thoughts to thofe with whom we discourse: For if fuppofe there are Cafes, in which there is no fuch Obligation, we may then make what Ufe we pleafe of Speech. Now the greatest Partisans of the rigid Opinion, confefs, that we may sometimes conceal what we think from others; and thence it is, that they would have us get off either by faying nothing, or by declaring we will not speak what we think. Now what does it signify to others in thofe Cafes, whether they are left in their Ignorance, or made to believe Things which are not? When the Queltion is about any Thing, which we are not obliged to tell them, it is the worfe for them if they rely upon our Words; and much more when there is good Reafon to hinder their knowing what we think. So that there being many Cafes, wherein neither the Laws of Justice, nor thofe of Humanity or Charity, lay us under any Obligation to discover our real Thoughts to others, it is often allowable to difguize them, without the Inconveniences I have spoken of in my great Note upon Puffendorf, B. IV. Chap. I. § 7. Note 1. on account of which we ought not to indulge ourselves in it, but for fome confiderable Reafon; yet thofe Inconveniences do not hinder, but that there may be certain Cafes wherein we not only may, but ought to fume fome innocent Falhood either to procure ourselves or others fome great Good, or to avoid fome great Evil. The Advantage of human Society makes both the one and the other equally requisite.

4 All this is manifeftly fuperfuous according to the Sytem laid down in the foregoing Note.

5 The Parflage has been cited before, B. II. Chap. XI. § 1. Num. 8.

6 In all the Editions without excepting the fift, the Text here has only, Deferiant etiam fermo, quod honeste nodum praecipiam. But it is plain, that either the Copift, or the Printers, have left out the Word fals, which is absolutely neceffary to denote the Idea of Lying in the Expreffion of the Scripture, of which the Decalogue gives us an Inftance in the ninth Commandment. I have therefore ventured to correct this evident Omifion in my Edition of the Original.

7 The Parflage is: Omni autem, qui munire contra id quod animo sentit, legis obedientem fal- ludi. Enchirid. Cap. XXII. This is reftated in the Canon Law, Cap. XXII. Nafeft. H. Can. IV.

8 A Christian fhand neuer cil a Lye, with a Difpenfe to deceive or hurt; Utrum motitum unum, &c. Laclant, Inflitut. Lib. VI. Cap. XVIII. (num. 4. Edit. Cellar.) Grotius.


XII. First,
Chap. I. 

War and Peace.

XII. First, when we talk to Children or Madmen, if what we say be false, yet it cannot be reputed a criminal Lye. Because it is generally allowed, 

' Ut puerorum atas improvida judicetur.'

That imprudent Youth may be thus deceived.

And Quintilian says, speaking of Children, We make them believe many Things for their Advancement. But the immediate Reason is, because Children and Madmen not having a freedom of Judgment, they cannot be injured in that Liberty which they have not.

XII. Secondly, whilst we discurse with one Man that is not deceived, if a third Person be thereby deceived, it is no Lye; no Lye in Respect of him to whom it was spoken, because his Judgment continues unperverted, as does his who hearing a Fable, takes it as such, or he who hears a figurative Speech, whether not sparsu portum, by way of Irony, or asf credatur, by an Hyperbole, which Figure brings us to the Truth by something which is not true; as Sextus speaks, and Quintilian calls it, A lying Exaggeration. Neither is it a Lye in respect of him, that hears it by the by; because he is not concerned in the Discourse, and therefore we are not any ways obliged to inform him right; but if that Person mistake our Meaning, he may thank himself, and not any Body else, for his being deceived. For (if we consider it rightly) the Discourse between ourselves is no Discourse at all in respect to a Stander by, but a mere Sound that may indifferently signify any Thing. Therefore neither was Cato the Censor to be blamed for promoting Affiliation to his Confederates, tho' fallly, nor Flaccus in reporting to others, that Remiilis had taken the Enemies City by Storm; tho' the Enemies were deceived by it. Plutarch relates the like of Ageglaits. For nothing was here said to the Enemy, and the consequent Damage was an accidental Thing, and not in itself unlawful to wish, or cause to an Enemy. And to this Kind do St. Cbrysollon and St. Hierom refer that Saying of St. Paul, wherein he reproved St. Peter at Antioch for too much Judaizing, supposing that St. Peter well understood, that he did it not seriously, but to accommodate himself to the Weakness of those who heard him.

XIV. Thirdly, When we are certain that he with whom we discourse will not only be not offended, tho' his Judgment be for that Time imposed upon, but on the contrary will be thankful for it, on account of the Advantage, that he shall get by it, there is no Lye properly so called, or unjust Deceit, committed, no more than he can be charged with Theft, who presuming the Owner's Consent spends something of his of small Value to obtain him a great Profit. For in such Cases, where we have so much Reaon to be allured of what we think, a Prefumption of another's Will has the same Force as an express Consent. And it is an incontestable Maxim that no Wrong is done to him that is willing. Wherefore a Person seems 

XII. (2) Lucret. Lib. I. Ver. 939. 
2 The Passage in which this has been cited above, "9, Note i3.

XIII. (2) In his amnis hyperbole estiteritar, ut ed omnem mendacia

XIII. (1) De mensis hyperbole extenditur, ut ed omnem mendaci

XIII. (3) Add also St. Cyprius, in his Work against the Emperor Julian, Lib. IX. in fin. "St. Peter a did not differ in Opinion with St. Paul: a" But by adapting his Conduct to Occasions, he "endeavoured to obtain by all Sorts of Methods the "Advantage of those, who were desirous of being "his Disciples. Whereas St. Paul, acting in a "uniform Manner, thought himself obliged to give "St. Peter Advice upon that Head; left the In "tention of the latter should not be understood, and "for sake should take Offence at his Behaviour." P. 355. C. D. Edi. Spanheim.]

XIII. (4) Tertullian is almost in the same Opinion, Lib. I. contra Marcion, (Cap. XXI.) and Lib. IV. (Cap. III.) Lib. V. Cap. III. "Add also De praepirish. adv. Heret., Cap. XXIII.]

XIII. (5) See his Letter to St. Austin, Fel. II. p. 336.

XIII. (6) And when our Speech is ascribed to him, that is willing to be deceived.

The Prefage in which this has been cited above, "9. Note 13.

The Passage of Quintilian, is in Infinit. Ora "tor. Lib. VIII. Cap. VI. towards the End. But in "Oxford's Edition, in which he follows that of "Burma, and has corrected it exactly after several Manu "scripts, it is read, (p. 500) in a manner that conveys a "quite different Sense. Esi bun de tera firmeus ius "perjucello. That is to say, the Hyperbole is a reasonable Exaggeration, or which is not carried too far. The "left Edition, Mr. Burman, only recites the various M "scripts, most of them evidently faulty, of the Manu "scripts and Editions. Had Oxreut found his in some Manuscript, it ought certainly to be preferred to all others. But, to consider it only as a Conject "ure, the Line has been drawn from the Vulgus of "those corrupt Readings, and is confirmed by what "Quintilian says afterwards: Sed hujus quaeque rei
not to be culpable, when he comforts his sick Friend, by making him believe what is false, as Arrid did Patetus upon the Death of their Son, which Story is in

× Lib. 3. Epil. 16. n. 5. 4. 5. 6.

2. And Domitian, after that our Interest, and Xenophon, 2 when he gave us this Admonition, and offered Sacrifices for the Victory, 2 and that Physicin deceives his Patient, the General his Soldiers, and the Pilot his Mariners, and yet no Injury. And Proclus 5 on Plato gives this Reason, It is more advisable to be deceived, than to be deceived by false Logick. Or either Clemens of Alexandria, 2 or that a Book was written by a General's Order, 2 and of Tullus Hostilius, that he ordered the Alban Army to withdraw, in order to surroun the Enemy; (tho' he knew it was an Effect of the Alban General's Treachery) and that Solon's Mendacium, 2 that whole Books of Quisincins the Confus (as Histarians call it) to encourage his Army, gave out, that his left Wing had routed their Enemies; and of many others. But we must observe, that the Injury done to the Judgment in this Cafe, is of less Concern, because it is but as for a Moment, and the Truth immediately appears.

XXV. And when he that speaks untruth, it is not that Sovereign Power that he has over his own Subjects.

XIV. (t) This Saying is preferred by Stobæus, Floridg. Serin. XII.
2 I do not know from whence our Author took these Words. The Paffage cited above, § 9. Note 9. includes the Searf, but not in the same Terms.
3 He maintains, that in this Cafe it is rather telling a Lie than Lying, and atlengths the Example of a Physician who deceive his Patient in order to cure him. Stronat. Lib. VII. Cap. IX. p. 873. Edit. Oxon. See a like Paffage of O r i o w n which Gronovius notices upon § 9. and what P H I L o says, De Chorubin, p. 110. Edit. Paria, a Paffage which I find also quoted by the Bishop of Oxford.
5 There is the fame Thought in this Verfe of Menander's:

Ex incert. Connam. apud Stob. Tit. XII.

And when physicians came into Beatia, and there understood that Piferon was vanquished in a Sea fight by Pharnabazus and Conon, he published the contrary in his Army, and passing on a Crown, offered Sacrifices for the Victory. Plutarch in the Life of Archiaus, p. 607. C. G R O T I U S .
6 Et Romanus, qui pacis sacris, St. Liv. Lib. II. Cap. LXIV. Ann. 6.

XV. (t) Homer tells us, that Agamemnon, General of the Greeks, in order to found his Army, pretended that he would have them return Home, and he speaks of this Feint as of an innocent Artifice, allowable for him to use:

Προεκκλησία τινὰ τῶν ἐναυσίων, &c. Iliad. Lib. II. Ver. 73, 74. G R O T I U S .

But it is another Question, whether the Feint of that General was feasible or not; on which Point, as well as many others, the Abbé Terrasson has cut our Work enough for the extraffive Admirers of Homer, in his judicial Critical Differtation upon the Iliad, Vol. I. p. 357. & seq.
2 De Repub. Lib. III. p. 389. B.
4 That Philosopher thus proves, that it is not consistent with the Divine Nature to lie. G O D says he, has no Occasion to lie, either to represent like the Poets, ancient Things under ingenious Fictions, as if he was ignorant how all Things have pulled: Or to deceive his Enemies, as if he feared them: Or to prevent the Effects of the Folly of his Friends; for no foolifh or mad Peron is the Friend of GOD. De Repub. Lib. I. p. 382. D. E. Vol. II. Edit. Hist. Stych.
5 For GOD, having an infinity of Means for the Attainment of his Ends, has no need of this to which Men are obliged to have recourse, because they cannot otherwise effect certain Things they propose to themselves. From whence it appears

2 that
2. An Example of this, perhaps, innocent Falhood we have in Joseph, and commended by Phile, who being Viceroy, pretends, that against his Knowledge, to charge his Brethren, first with being Spies, and afterwards Thieves. And in Solomon, who gave a remarkable Demonstration of his divine Wisdom, when to discover the true Mother, he commanded the living Child to be divided, when he intended nothing else. 1 Kings iii. 25, 26, 27. 

True is that Saying of Quintilian, Sometimes the common Good requires that some Falhoods should be maintained.

Chap. I.

WAR and PEACE.

2. An Example of this, perhaps, innocent Falhood we have in Joseph, and commended by Phile, * who being Viceroy, pretends, that against his Knowledge, to charge his Brethren, first with being Spies, and afterwards Thieves. And in Solomon, who gave a remarkable Demonstration of his divine Wisdom, when to discover the true Mother, he commanded the living Child to be divided, when he intended nothing else. 1 Kings iii. 25, 26, 27. True is that Saying of Quintilian, Sometimes the common Good requires that some Falhoods should be maintained.

XVI. Fithhly, When the Life of an innocent Person, or something equal to it, cannot or otherwise be preferred, as was the Fact of Hypermenæa, might be asked, whether the use of Peace, to suppress a garrulous, lazy, and injurious Person, prevails over the use of Force, and a short, necessary, and thorough Execution.


XVI. Or perhaps, when the Life of an innocent Person, or something equal to it, cannot or otherwise be preferred, as was the Fact of Hypermenæa, might be asked, whether the use of Peace, to suppress a garrulous, lazy, and injurious Person, prevails over the use of Force, and a short, necessary, and thorough Execution.

But to be Defend, or an ordinary Person; he declares however, that admitting the latter, No one can justly blame their Behaviour, or maintain the Truth, that they would have added, though more Sacraely, the they observed a different Conduct. He afterwards reduces, (as I do below, and as I have already done, in my great Note upon the Chapter of Pufendorf which answers to this) The Dictation made between their Intention, and the Means they employed to put it in Execution. Vol. I. p. 9, 11. It is, however, this Author will explain himself still better upon the Question of Lying, in the Sequel of his Work, where, on the Occasion of Rhab's History, related in the Book of Josua, he will give the World a Difcussion in Form upon thatSubject.


XVI. (1) St. Austin on the fifth Psalm, related by Gratian, in Cap. XXII. Quæst. II. C. ne quis. There are two Sorts of Lies, not much to be blamed, yet not wholly blameles, when we either jest, or tell a Lie to serve our Neighbour. The pecu- lar one is not parricius, because it does not deceive, for he to whom it is directed knows it was spoken in joc. And the other, the officious Lie, is the less sundy, because it has in it something of Kindness (or Charity). Turtullian, in his Book De pudicit, among our daily Sins of Injuriou, to which we are all subject, puts alo this, To Lye out of Necelis. Cap. XIX. Grotius. 

2. The Commentator says decently, for it is a brave

that Men are no more obliged to imitate GOD in this Regard, than to desire to be omnipotent like him. This might suffice to anse the specious Objection which is deduced from the Example of the Supreme Being, and which opens a fine Field for Declamation. But to form Booths more, in Order to set the Weakened of such an Argument in its full Light. It is with Pleasure I find that the learned and judicious Mr. Noordt has answered this Difficulty in a few Words, in an Addition made by him to the second Edition of his Treatise, De fomma mensule deli male, &c. * It will be objected, says he, that GOD, whose Perfections Men ought to imitate as much as possible, is true in his Words. Be it so; but who does not know, that the same GOD, who is true, is also, above all Things, a Lover of the Good and Prevarication of Mankind? Why therefore should not Man, to whom the Example of GOD is proposed, continually labour to make himself useful in all respects to the Rest of his Species, if that can be, by telling them the Truth; it not, by using Disingue and Diffimulation necessary to their Good? * Let us add some Reflections, which will serve more clearly to shew, that those who make the Object on Under Consideration, extend too far what is here truly imitable in the Divine Perfections. The Veracity of GOD engages us to love Truth; but not all Sorts of Truths; and still less to speak always whatever is true. We are obliged to love and seek after those Truths only which are useful in Regard to our Condition; as for those which are not so, we may neglect them; and are even obliged to do so sometimes, because the searching after them would injure the Knowledge of useful Truths. When we have discovered those useful Truths, we ought to communicate them to others; but we are not obliged to do it at all Times, and in all Places. There are Conjunctions wherein the Discovery of this Kind of Truths would produce no good Effect, or even sometimes occasion more Hurt than Good; they may then be concealed. Our Saviour JESUS CHRIST has for us an Example of this, when his Apostles have imitated. If this may take Place in Regard to Truths the most useful to others, why is it not allowable in Relation to Things, of which the Knowledge is of no Service to those we speak to, or which might give them Occasion to hurt either our selves or others, whether with or without Design, and thereby to commit an Imprudence, or a Sin; why, I say, is it not allowable to conceal, not only the Truth, but even to tell them positively something false? It is not necessary to pull these Reflections to their utmost Extremity; those who will consider them without Prejudice, and give Attention to all that has been said above, and in the great Work of Pufendorf, will easily be convinced, that there is no Subject on which all the Evidence of common Sense is more visibly contradicted, than it is by those who maintain the Opinion I oppose. But I cannot hope helping the Reader further to some Passages of an Author which I have cited above, and which I again direct to, because, in the Judgement of some People, there are Authorities which add great Force to Arguments, and even sometimes make more Imprudence upon the one hand than Reasons on the other. This Author is Moses Amvraut, whose Moriae Christianae may be seen, Vol. III. p. 249, 307. and IV. p. 574, 532. Tho' he has not cleared up the Point so well as has been done formerly, he has however abundance of judicious Reflections, and solid Anwser to divers Objection, deduced either from Reasons or the Holy Scripture. Since I wrote this Note I have an Opportunity to add a more modern Authority, and which will decide no left a great Number of Passions: It is that of the celebrated Mr. Saurin, Paffor of the Hague, in his Hiftorical, Critical, Theological, and Moral Difcourses, upon the most memorable Events of the Old and New Testament, where he treats of the innocent Artifice of the Egyptian Midwives, tho' he does not venture to determine, whether what they told Pharaoh was true, or an officious Lie; he declares however, that admitting the latter, No one can justly blame their Behaviour, or maintain the Truth, that they would have added more Sacredly, had they observed a different Conduct. He afterwards reduces, (as I do below, and as I have already done, in my great Note upon the Chapter of Pufendorf which answers to this) The Dictation made between their Intention, and the Means they employed to put it in Execution. Vol. XLIII. p. 71. Edit. in Oct. 9. I knew this Author will explain himself still better upon the Question of Lying, in the Sequel of his Work, where, on the Occasion of Rhab's History, related in the Book of Josua, he will give the World a Difcussion in Form upon that Subject.


XVI. (1) St. Austin on the fifth Psalm, related by Gratian, in Cap. XXII. Quæst. II. C. ne quis. There are two Sorts of Lies, not much to be blamed, yet not fully blameles, when we either jest, or tell a Lie to serve our Neighbour. The peculiar one is not parricius, because it does not deceive, for he to whom it is directed knows it was spoken in joc. And the other, the officious Lie, is the less sundy, because it has in it something of Kindness (or Charity). Turtullian, in his Book De pudicit, among our daily Sins of Injury, to which we are all subject, puts alo this, To Lye out of Necelis. Cap. XIX. Grotius.

2. The Commentator says decently, for it is a brave
Of the Rights of Book III.

Splendid mendax, & in omne Virgo Nobilis avum.

Lib. 3. Od. 11.

A Virgin famous for her pious Lyc., Whose glorious Memory shall never die.

XVII. That it is lawful for a Man to deliver his Enemy, when driven by necessity.

XVII. 1. What we have now laid down, does not extend so far as the common Maxims of some wise Men, who affirm in general, and without Restriction, that it is lawful to Lye to an Enemy: Thus *Plato and * Xenophon among the Greeks, * Philo among the Jews, and St. Chrysostom among the Christians, to the Rule given against Lying, add this Exception, Unless we have to do with an Enemy. Hither we may perhaps refer that Meligaje sent by the Men of Japhet Gilead to the Ammonites, by whom they were besieged, 1 Sam. xi. 10. And that of 3 Editha the brave Thing to lie for Justice. Like to that of St. Chrysostom, on Rabab, O excellent Lyc! O laudable Decret! Not of one that betrayed the Interest of Religion, but that did an Act true, and brave. And St. Austin, of the Egyptian Midwives, O brave Invention of Humanity! O pious Lyc to save Life! St. Jerome also commends those Midwives, and believes the Rewards given them to be eternal, upon Ezekiel xi. 22. Isaiah lii. St. Ambrose, on Ignatius, B. VI. and St. Austin himself, to Confiniut, Against a Lye, Cap. XV. varying here, according to Cuthm, are of the same Opinion. Tostatus says there is no Sin in it. And St. Austin doubts of it, B. II. Sauffat,覆 Exod. And Thomas, h. 2. Sauffat, XC. Art. LV. Ad. IV. And also Cajetan. See also E rasmus’s Moria Euenom, and the learned Masius upon Joshua ii. 5. Grotius.

St. Ambrose should not be named amongst those, who praise the Conduct of the Egyptian Midwives; for that Father, on the contrary, speaks as if he doubted whether they did well. The Paffage our Author had in View is this, *Qui locut, ut supervisi illis ad Hicrarna falam, ina religio confesfionis ad obstetricum fumis, quae differentem ments pro salute, & fide sua pro circumciptione. Lib. VIII. Epift. LXIV. p. 625. A. Edit. Paris. 1669. In regard to Rabah’s Lye, see what is laid upon Pu fendorf, Laws of Nature and Nations, B. IV. Chap. I. § 16. Note 2. The first Example of the Egyptian Midwives is very remarkable, and fur vishes an Argument to which it would be very difficult to say anything plausible by Way of Anfwier. I have spoken of it in the great Note upon Parag raph 7. of the Chapter now cited, and shall add two weak Evraions utid, after other Writers, by the late Mr. Bernard, whole Knowledge and Judgment I otherwise refer to, and for which we ought, without Doubt, to honour his Memory. One of these Subterfuges is, that GOD rewards the Actions of Men, tho’ imperfect; otherwise he would not reward any; because our best Works are attended with a thousand Imperfections. The other is, that the Rewards conferred upon the Midwives were proportioned to their Works, which being only materially good, were in Consequence rewarded ely only with some temporal Blessings. * Diceur enfupert Lying, at the End of the Trench Treatise Of the Ex cellency of Religion, Vol. II. p. 873. I say, with Respect to the first of these Anfwers, that the Im perfection of our Actions, which does not hinder GOD’s being pleased with, or rewarding them, does not regard the Nature of the Thing; but whether the Means employed in Order to succeed; but the Disposition with which we do them. When we do a good Action, and employ only lawful Means to that Purpofe, tho’ we are not actuated with all the Ardor we ought; and even the former human Conceriation has a Share in it, God, however, approves it, as if there were no Imperfection at all: This is worthy of his Good nefs, and does not clash with any of his Perfections. But the Holiness of GOD does not permit him to give the least Sign of Approbation, in regard to an Action bad in itself, or that has been effected by Means bad in themselves; such as Lying would be, according to the Principles of those against whom we dispute. However good the Intention may have been, that does not hinder the Action, upon the Whole, from being bad, and, consequently, pun ishable, rather than worthy of Reward. GOD may not punish, and may pardon it, in Considera tion of the other Part of the Perfon’s Conduct who has acted thus; but to pretend, that the most holy Being authorizes and approves in the least fac h an Action, upon Account of the good Intention of the Agent in doing it, is opening a Door for the most pernicious Maxims of the looseft Morality. So that tho’ things which be fo rigid on the Quetion of Lying, run into an extreme Looofeness of Principle, without perceiving it. The other Subterfuge, to which they have Recourse on this Occasion, is no less frivolous. Does the Nature or Degree of the Reward prevent its being a Reward; and, consequently, a Thing which necessarily supp oses an Approbation? And where do we find, that the former Blessings with which G O D vouchsafes to reward Men, are dipendent indifferently to tho’se who do Evil and those who do Good? If he makes his Son to rise upon the Righteous and upon the Wicked, and his Rain to fall upon the Lands of the Just and the Unjust, it is, with Re gard to the latter, an Edict of his Goodnes, which waits their Repentance; and of his Wifdom, which does not permit him to suspend every Day, by fertile Miracles, the Laws it has es.tablished in Nature.

XVII. (1) Our Author quotes in the Margin, the Book intitled De migratione Abraham, in which I find nothing that is to the Purpofe. But there is something upon this Subject in a Fafage which I have already referred to, § 14. Note 10. De Che radin, p. 110. D. Edit. Paris. 1669. That Father says, that if we examine the Ac tions of the most celebrated Captains in all Ages, we shall find that most of their Victories were the Effect of some Fraud; and that such as have ob tained Advantages in that Manner, are more praised than those who have performed Exploits by open Fruit. De facerdot. Lib. I. Grotius.

3 The fame Prophet gives us another Example, in the second Book of Kings, Chap. VIII. ver. 19. according
the Prophet, 2 Kings vi. 19, as also that of Valerius \(^4\) Leavinius, who boasted that he killed Pyrrhus.

2. To the third, fourth, and fifth of the Observations above-mentioned, we may refer that of Eusebius Archbihop of Nice, \(^5\) to the \(\textit{φιλοθείας} \) of his \(\textit{ανδρών} \) in \(\textit{ευθυκρίνειας} \) \(\textit{ού} \) \(\textit{οὐδὲν} \) \(\textit{αὐτών} \), \(\textit{εὐθυκρίνεια} \) \(\textit{οὐ} \) \(\textit{οὐδὲ} \) \(\textit{πρὸς} \) \(\textit{φιλοθείαν} \) \(\textit{οὐ} \) \(\textit{οὐδὲ} \) \(\textit{εὐθυκρίνειαν} \) \(\textit{οὐ} \) \(\textit{οὐδὲ} \) \(\textit{πρὸς} \) \(\textit{φιλοθείαν} \). "There is not always a necessity that a good Counsellor should speak Truth; for possibly a good Counsellor may confult how he may designedly tell a Lie, whereby either to deceive his Enemy, or force his Friend from Harm. Examples of these Kinds are common in all Histories. And Quintilian \(^6\) says, that a Lie, otherwise blamable, even in a Slave, will deserve Commendation, when a Wife makes Ues of it to hinder one from being murdered by Highwaymen, or to save his Country by deceiving an Enemy.

3. I know the Schoolmen of some Ages past will not allow of this, \(^7\) who out of all the primitive Fathers have generally chose. \(\textit{Si Aulici} \) for their Guide in almost every Thing; yet, tho’ they are icrepulous of admitting false Speaking in any Cafe, they take of tacit Interpretations, so contrary to all Ue, that it is doubtful whether it be not better to admit of false Speaking to some Persons, in the fore-mentioned Cases, or of some of them (for I do not here pretend to determine any Thing) than so generally to diftinguish them from Fallacy, as when they say I know not, they mean, I know not how to tell you so. Or, I have nothing, they mean, I have nothing to give you. And many such like mental Reservations, which even common Sense is ashamed of, and which, if allowed, will introduce plain Contrarities; so that he that affirms any Thing, may be said to deny it, and he that denies a Thing, may be said to affirm it.

4. For it is certain, that there is no Word \(^8\) but may admit of a double Interpretation, because every Word, besides its primitive \(\textit{Signification} \), \(^9\) has also a derivative one, and that divers, \(^2\) according to the Diversity of Arts, and also others by Metaphor, or some such Figure. Neither do I like their Device better, who, as if according to the Correction of the MSS. \(^{10}\) followed by the vulgar Translation, for \(\textit{Elijba} \) says thus to Elisha, \(\textit{Or,} \) \(\textit{joy to him} \) [King Benhadad] thou mayst certainly recover: \(\textit{Hewsit}, \) the \(\textit{Lord} \) hath \\(\textit{benedicted} \) me that be \\(\textit{bless} \) \\(\textit{fully} \) \\(\textit{die}. \) \(\textit{Grotius}. \)

\(\textit{Elijba,} \) as he has been observed, speaks of the Dis- ciple in which the King of Syria actuallyhad, and of which, in Truth, he did not die. This was a very true Answer to the Question that Prince had sent to ask him. But at the same Time the Prophet fore- told that he should die in another Manner, as the Event verified.

4. Our Author cites Nobody here: But he has undoubtedly taken this from \(\textit{Frонтинус}}, \) who does not say, however, that \(\textit{Valerius Leavinius} \) boasted of having killed \(\textit{Pyrrhus}; \) but only, that a \(\textit{Soldier} \) \(\textit{of} \) \(\textit{Pyrrhus\'} \) \(\textit{Army} \) having been killed, \(\textit{Valerius Leavinius} \) having the \(\textit{Sword} \) \(\textit{bloody with} \) which he had been slain, made both Armies believe that it was the King. \(\textit{Valerius Leavinius} \) \(\textit{averted} \) \(\textit{Pyrrhus\'} \) \(\textit{Epidetus} \) \(\textit{regem}, \) \(\textit{occis} \) \(\textit{quodam} \) \(\textit{gribbii}, \) \(\textit{leno} \) \(\textit{griecum} \) \(\textit{eunum} \), \(\textit{exercitium} \) \(\textit{tribus} \) \(\textit{peculiarum} \). \(\textit{Stratagemata. Lib. II. Cap. IV. Num. 9.} \) This happened, as we may see in \(\textit{Plutarch}, \) from \(\textit{Pyrrhus\'} \) having caused \(\textit{Macedon}, \) one of his Men, to put on his Armour and Habit; he was killed by a \(\textit{Roman} \) who believed him to be the King. \(\textit{Liv. Pyrrh. p. 593; E. F.} \) So that here was no \(\textit{Lye}, \) as our Author imagined, upon \(\textit{Frонтинус\'} \) \(\textit{Authority.} \) \(\textit{Quam}-\) \(\textit{oemba} \) \(\textit{biles,} \) \(\textit{deistantia} \) \(\textit{labes} \) \(\textit{credenti} \), \(\textit{convenient} \) \(\textit{sermone} \) \(\textit{memoria} \), \(\textit{se pavidit} \) \(\textit{officina recipiunt}. \) The Example of \(\textit{Jugurtha} \) might have been adduced with more Propriety, which follows, \(\textit{Num.} \) \(\textit{10.} \) who boasted falsely, that he had killed \(\textit{Marius} \) \(\textit{Sallust}. \) \(\textit{Bell. Jugurth. Cap. Cl. (CVII Ed. Woff.)} \)

5 In \(\textit{Eich. ad Nisnach. Lib. VI. Cap. IX. 4.} \)

6 The \(\textit{Palpe} \) has already been cited, upon \(\textit{Paragraph 9. Note 14.} \)

7 The \(\textit{Abbe Rupert} \) has writ against the \(\textit{Opinion} \) of that Father, who had himself been formerly of another. \(\textit{Grotius.} \)

8 This the Philosopher \(\textit{Chrysippus} \) maintained, according to \(\textit{Aulus Gellius; Chrysippus at}, \) \(\textit{omnibus autumambium natura eft}, \) \(\textit{quodnam ex cen- dem dux vel plura accipit psalm.} \) \(\textit{Noct. Attic. Lib. XI. Cap. XII.} \)

9 Rel. \(\textit{Seneca} \) says there are a great many Things that have no peculiar Names, and which we are obliged to express by borrowed Names. \(\textit{Ingens opus a rerum fine nomina, &c. De Beneicit. Lib. II. Cap. XXXIV. Grotius.} \)

10 \(\textit{Prima notionis.} \) This is what \(\textit{Cicero} \) calls \(\textit{Dominium proprium;} \) and derived \(\textit{Significations, Secunda notionis,} \) terms \(\textit{Migrations in alienum;} \) according to the learned \(\textit{Grorovius\'} \) \(\textit{Remark,} \) \(\textit{Unde illud tam sequer, velutdum fideler infer.}\) \(\textit{in.} \) \(\textit{in id} \) \(\textit{istum} \) \(\textit{locum} \) \(\textit{fideleri semel.} \) \(\textit{Cui} \) \(\textit{verbo} \) \(\textit{Dominium est proprium in officio, migrations in alienum mutat.} \) \(\textit{Num \& doctrina, &c. de- mas, &c. & cicer fideleri dicat poterit, &c. Lib. XVI. Ad familiar. Epist.} \)

11 \(\textit{St. Austin, &c. De mag.} \) That we have found out no \(\textit{Signs,} \) which among the other Things that it denotes, does not also signify itself. \(\textit{Nullum nos signum, &c. De Magistro. Cap. VII. Grotius.} \)

2 they
Of the Rights of

XVIII. This is not to be extended to words promissory.

XIX. Nor to Oaths.

XX. It is more generous, and more agreeable to Christian simplicity to abjura from Falsehood, even to our Enemies, illustrated.

XXI. We know there are some Kinds of Fraud, which, tho' naturally permitted, yet are rejected by some Nations and Persons, not so much on the Account of any Injustice in them, as out of either a Greatness of Spirit, or sometimes a Confidence of our own Strength. There is in Ælian a remarkable saying of Pythagoras, that Man comes near to God in two Things, in always Speaking Truth, and in doing Good to all Men. And in Jamblichus, Truth is the Guide to all Good, both divine and human. And in Aristotles, A Man of a great Soul delivers himself with Freedom and Truth. And in Plutarch, To swear at all, is base and servile to lie. And Arrianus of King Ptolemy, I am sworn by the all-seeing God, that I am much more in a King to lie, than in another. So the same Author, of Alexander, Or χρήσει ταν βασιλεία αλλά τι δι' αλήθειαν, πριν το τα τινεῖν, A Prince should speak nothing to his Subjects but Truth. And Mamertine speaks of Julian. Admirable is the Agreement between our Prince's Tongue and his Heart; he is sensible that Lying argues a base and mean Spirit, and is a servile Vice; and whereas Fear or Want makes Men Liars, that Prince is ignorant of his own Majesty that lies. Plutarch's records of Arisflides, φωνήσαντας καὶ εἰς θυσίαν καὶ πρεσβείαν τών τοὺς ἀτόνους, προφήτης, οχνή, οι σίγους τῆς τρίτης προφητείας. He was naturally so great an Admirer of Truth, that he would not allow of a Lie in Isi. And Probos of Epaminondas, So great a Lover of Truth, that he would not tell a Lie, tho' but

XVIII. (1) Agisflao, in Plutarch, distinguishes thus, To break Laws is to injure the Gods; but otherwise to deceive an Enemy, is not only jujt but glorious, and a Pleasure with Prufis. Grus.

The Original of this Puffage has been given above, § 6. Note 8. All the Difference, that here our Author quotes it, as it is in the Life of Agisflao, where the Terms are a little different, but the Sense exactly the same.

XIX. (1) See what is said upon B. II. Chap. XIII. § 14, and see.

2. This is not peculiar to an Oath; but we ought to express ourselves in that Manner as often as at those we speak to have a Right to require a faithful Discovery of our Thoughts; in a Word, as often as Lying cannot be innocent. See what I have said upon Note 1. of § 10. of this Chapter. So that Swearing would then only make the Lye more criminal.

3. Δι' τίς πραπά, etc. Some acribe this Saying to Lysander, some to Philip of Macedon, and others to Dionysus the Tyrant. See Ælian, Var. Hist. Lib. VII. Cap. XII. and the Commentators upon that Place.

XX. (1) Var. Hist. Lib. XII. Cap. LIX.

2. Propert. Cap. XX.


5. For which Reyon he considers Ptolemy as an Historian must be relied on, with Regard to the Actions of Alexander the Great. De Exped. Alexand. Lib. I. (init.)

6. Lib. VII. (Cap. V.)


4.
for Sport. Which ought the more religiously to be observed by 10 Chrifrians, who are not only commanded to ufe Simplicity, Matt. x. 16. but are alfo forbidden idle
11 Talk, Matt. xii. 36. having him for an Example in whose Mouth was found no Guile. Wherefore, as 12 Laeticianus faid, be that is truly benevolent and juft will not fay with Lucilius, Homini amico ac familiari non effe mentiri meum. It is not my Caflion to tell a Lyce to my Friend; but alfo will think it bis Duty not to lyce to a Stranger, or an Enemy; nor will his Tongue ever fpeak what his Heart does not think. Such a one was Neoptolemus, fays Sopboles, 13 έξετάζομεν άναξίως, ἣς ἔσπερος, Excelling for his generous Candor: As Dion Phuslenfis rightly obferved, who being urged by Ulyfles to ufe Treachery, replied,

I grieve to hear your secret Treacheries,
But should do more to add as you advise.
14 If I (Ulyfles) were not nobby born,
I yet should base unmanly Actions born:
But it would ever shame Achilles Son,
To feal by Craft what fould by Force be won.

And Euripides, 15

A gallant Soul will gallant Actions do,
And fcorne by Treachery to kill his Foe.

3. Thus 16 Alexander faid he would not feal a Victory; and Polybius 17 writes, that the Achaeans hated to ufe Fraud againft an Enemy, esteeming that the fueft Victory, which, to ufe Claudian's Words,

18 Confefius animo quoque subjugat Hostes.

A Victory confef'd by Enemies is true.

So were the Romans till the fcond Punick War; fo that 19 Aelian faid, ἐκατ οικομί άλληλοι οὖν ζη, 2. μᾶς δὲ τὸ ῥόσος ἀ πολλονίων τὰς ἐ χείφις. The Romans are very valiant, overcoming their Enemies, not by Craft and Subtilty, but by plain Force. And when Perfus the Macedonian King was deceived by the Hopes of Peace, 20 the old Senators disfallowed the Act, as inconfiftent with Roman Bravery, faying, that their Anceftors profecuted their Wars by Valour, not Craft, not like the fubtil Carthaginians, nor cunning Greecians, among whom it was greater Glory to overcome their Enemies by Treachery, than by true Valour. To which they added, That fometimes Cuning might for a little While prevail againft Valour, but his Courage was for ever left, who was convinced that in a regular and

10 Chrifianity, rightly underftood, prescribes nothing upon this Head more than the Law of Nature. It is not probable that our Saviour intended, be Infiance, to render the Condition of Chrifian Nations more unhappy than that of Pa
gon States, by prohibiting them to ufe the Strategems of War; by the Means of which great Advantages may be obtained, and great Dangers avo
ded.
11 The Term in the Original signifies more than Idle and ulefs Talk; it imports inconfiderate or malicious Words, which produce some bad Effect. See Hamfon and Le Clerc upon this Paf
cage.
14 What Neoptolemus fays of his Father Achilles, is confirmed by Horace,

Ille nee includus equo, Minerue,
Sacra mentis, &c.
Lib. IV. Od. VI. (ver. 13. & feq.)

Not he in great Minerue's Herne
Had cheated Troy, and Priam's heedeles Court,
Diffeked in Wine and Sport;
But fai, and deaft to all Remonf,
Had fiercely ftood our Walls with open Force.

CREEK.

Upon which the Scholafi remarks, that the Aver
fon of Achilles to the Strategems of War, arose from the Confidence he had in his own Valour and Strength. Achilles nihil frauda, fed fempier palam, virtutis fedia de caufa.

15 Rofs. ver. 510, 511.
17 Polybius, Lib. XIII. (Cap. I.)
18 In VI. Coful. Horae. ver. 248, 249.
19 Var. Hist. Lib. XII. Cap. XXXIII.
20 Herc. ut fumma ratione alta, &c. Livy, Lib. XLII. Cap. XLVII. Num. 4, 8.

6 X  just
just War, he was neither by Fraud, nor by Chance, but engaging closely in Battle, with his whole Strength, fairly vanquished. So in later Times we read in Tacitius,

That the Roman People avenged themselves on their Enemies, not by Craft or Cunning, but openly, and by Force of Arms. Such also were the Tiberians (a People of Cappadochia) who always proclaimed the Time and Place of Battle. The like does Mardonius in Herodotus testify of the Grecians in his Time.

XXI. As to the Manuer of prosecuting a War, this Rule is also necessary, that whatsoever is unlawful for a Man to do, is also unlawful for another to force or persuade him to. As for Example, it is unlawful for a Subject to kill his Prince, or to deliver up a Town without the Consent of a Council of War, or to plunder his Countrymen. Therefore it is also unlawful to persuade him, who continues a Subject, to do so; for he that causes another to sin, always sins himself; neither is it enough to say, that it is lawful for him who tempts another to a base Act to do it himself, as to kill an Enemy, suppose; he may kill him, it is true, but not in such a Manner. And St. Augustine says, it signifies nothing, whether a Man commit a Crime himself, or employ another to do it for him.

XXII. But it is another Thing if a Person shall freely offer himself, without any Perfuasion to it; for it is not unlawful for us then to make use of him, as an Infrument, to do that which it is lawful for us to do. As we have proved already, by the Example of GOD himself. We receive a Deferter by the Law of War, said Celsus, that is, it is not contrary to the Law of War, to receive him, who quitting the Enemy's Party, embraces ours.

21 Rerum ejusdem Scripturarum, &c. Lib. II. (Cap. LXXXVIII. Not. i.) AELIUS says the same.

22 This we learn from the antient Scholiast upon Apollonius, in Argonautics, Lib. II. &c. in ver. 1112.

23 This last Example is not very clear. All that Mardonius says in his Speech, to persuade Xerxes to make War upon the Greeks, is, The Greeks, as I am informed, generally make War in a very rash Manner, on Account of their Ignorance, and Want of Ingenuity: For after having declared War against each other, if they find a fine Level Country, they go thither, in Order to fight. HERODOTUS, Lib. VII. Cap. IX. Our Author might have here applied the Passage of LIVY, Not 20, with more Propriety than this.

XXI. (1) So MAIMONIDES teaches, l\.

2 See upon this PUFENDORF, B. VIII. Chap. VI. § 16. and what will be said below, Chap. IV. of this Book, § 18.

2 Nihil interjuxit, utrum ipso fuis ultimis, an alio quod ad ultemis velit. This is in his Tres-

XXII. (1) Transjugum jure belli recipitus,Digest, Lib. XII. Tit. I. De adquis. rerum Dent.,

2 Neither are we to deliver them up, unless it be for the Protection of the Articles of Peace, as in the Peace with Philip, the Antonian, and Antiochus, Per-

Menander, Pratell, is of the same Opinion. GROTIUS.

C H A P. II.

How Subject's Goods, by the Law of Nations, are obliged for their Prince's Debts: And of Reprisals.

I. 1. L E T us now come to those Rights which the Law of Nations allows us, which partly belong to every War, partly to some particular Kinds of War only. Let us begin with the first. By the bare Law of Nature no Man is bound by the Fact of another, but he that inherits his Goods. For when Property

I. (1) See the Beginning of Chap. I.

2 It is determined in the Decretals, that the Heirs of an Incendiary or Usurer, shall make good the Wrong he has done, or Damage caused, out of his Goods. ET HAREDES ejus mortuis, &c. Lib. V. Tit. XVII. De retpunitius, incendiariori.
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property was first introduced, it was then agreed on, that all Debts should pass together with the Goods to the next Possessor. The Emperor Zeno used to say, that it was contrary to natural Equity, that one Man should be troubled for another Man's Debt. Hence arose those Titles in the Roman Laws, that a Wife shall not be sued for the Husband; nor the Husband for the Wife; the Son for the Father; nor the Father or Mother for the Son.

2. Neither (as Ulpian says expressly) shall particular Persons be obliged for the Debts of the Community, that is, if the publick Stock be able to discharge them; otherwise they shall, not as particular Persons, but as they are part of the Whole. Seneca says, If any Man lend Money to my Country, I shall not own myself his Debtor, nor take it at my own Debt, but shall willingly pay my Proportion to discharge the Debt. He had laid before, as it appears, not for as myself, I shall pay, but advance it for my Country. So, again, Every particular Person owes, not as his own Debt, but as part of the Publick. Hence it was particularly provided by the Roman Laws, that no Peasant should be obliged for the Debts of another Peasant; and in another Place, that no one's Peculation should be disfranchised for the Debts of another, nor even for the Publick; and in Justinian's Novels, canon. 19, Repretialis, are expressly forbidding; giving this Reason for it, because it is not just that one Man should be the Debtor, and another be forced to pay the Debt; where also Iuch Excutions are called odious. And Theodorick, in Cassiodore, called it a base Licenae, for one Man to be kept as a Pledge for another.

II. 1. Tho' this be true, yet by the voluntary Law of Nations, it may be, and as appears has been introduced, that whatsoever Debts any State, or the Prince, shall

incendiarii, &c. Cap. V. Qud Filii ad refintuendas auro, &c. Tit. XIX. De auro, Cap. IX. See what we have said above, B. II. Chap. XXI. § 4.


4. Si quis universitate debitor, &c. Digest. Lib. III. Tit. IV. Qud quoscumque universitatis nomin, vel contra, tam aequas, Leg. VII. § 1.

5. Si quis patre nec pecuniam, &c. De Benefici. Lib. VI. Cap. XX. Deinde ergo quoque illis, &c. Cap. XIX. Debeat autem fonti, &c. Ibid. 6. The Law has been cited a little above, Note 3.

6. See above as § 3.

7. Nullam posililium alterius, &c. Cod. Lib. XII. Tit. LIX. De Executoribus & Exauditiss. Leg. IV. 8. Indebthas pigratorium, &c. Novell. III. prime. & Cap. I. What the Emperor here calls Pigratorium, is the Translation of the Greek Word ἀναθεματικ, and in barbarous Latin it is expressed by the Word Reprefulias, which has been received in the vulgar Tongues; as appears by the Decretals, Et pigratorium, quasi vulgaris ecclesiae Reprefulias nominat, &c. In VI. Lib. V. Tit. VIII. De injuriis, &c. Cap. uninc. Where is it better to read with some Manuscripts, Reprenfliliis, for that Word answers exactly to the Sensus Wirthenianum. But Ulie has carried it for Reprefulias. Gratius.

See lower § 4.

9. deudum efi, inter iura publica, &c. Var. IV. 10. II. 1. This is not an arbitrary or voluntary Estabishment, founded upon any pretended Right of Nations, of which the Existence cannot be proved, and where all is reduced to a Cutilm more or less extended, but which, if itself, has never the Force of a Law. The Right in Question is a necessary Consequence of the Constitution of Civil Societies, and an Application of the Maxims of the Law of Nature to that Constitution. In the Indepen-

dence of the State of Nature, and before there was any Kind of Civil Government, one could come upon those only who had done the Wrong, or upon their Accomplaces; because there was then no Tie between Men, by Verity of which a Man might be deemed to have committed, in some Manner, to what others did, even without his Participation. But after Civil Societies were formed, that is to say, Bodies, of which all the Members were united together, for their common Defence; these resulted from thence a Community of Interests and Wills; whereby, as the Society, or the Powers which govern it, engage to defend each against the Injuries of every other, whether Citizen or Stranger; so every Individual may be deemed to be engaged to answer for what the Society, or the Powers which govern it, do, or owe. No human Estabishment, no Tie into which Men enter, can discharge the Obligation of that general and involuntary Law of Nature, That Damage or Wrong ought to be made good; unless those, who are thereby exposed to suffer Wrong or Damage, have mani-

fested their Right to demand that Reparation. And when such Kind of Estabishments prevails, in certain Receptions, the injured from obtaining to edify the Satisfaction due to them, that Difficulty should be made up, by supplying the Persons interested with all other possible Means of doing themselves Justice. Now it is certain, that the Society, or the Powers which govern it, by being armed with the Force of the Whole Body, are encouraged to battle, and may often with Impunity baffle, Strangers, who come to demand something due to them: And every Subject contributes some Way or other to enable them to act in this Manner, so that he may thereby be deemed to content it. But if he does not actually content, there is, after all, no other Means to facilitate, to injure Strangers, the Prosecution of their Rights, become difficult from the united Force of the Whole Body, than to authorize them to come upon all those who are Members of it, whether they have or have not conferred. Besides, how can Strangers know
shall contract, either primarily by themselves, or be engaged for by not restoring to others what is their Right; all the Goods, both corporal and incorporeal, of their Subjects, shall be obliged to discharge. But this was occasioned by a Kind of Necessity, otherwise there would be such a Loafe given, as to let in all Manner of Injuries, for the Goods of Princes cannot so easily be seized upon as those of private Men, who, being many in Number, have each their own. Wherefore Tulianus reckons it among those Rights which Nations have established amongst themselves, because they judge it useful and necessary to Mankind.

2. Neither is this so disagreeable to Nature, that it might not be brought in by Custom, and the tacit Consent of Nations, since Sureties stand obliged for other Men's Debts, without any other Caufe than their own free Consent. It was also believed, and with Reason believed, that Foreigners, for whom little Regard is had in many Places, would not be able so easily to obtain their Right, or find Means to be indemnified, as the Members of the same Civil Society amongst themselves. Besides, the Benefit arising from this Obligation being common to all People, they that find themselves aggrieved by it at one Time, may be relieved by it at another.

3. That this has passed into a Custom, appears not only from 4 compleat Wars between Nation and Nation, (for what is practised in such Wars the very Words of the Denunciation declare). 5 Against the antient Latin People, and the Men of old Latium, I denounced and made War, says the Herald in Livy. So when the People's Consent was demanded, 6 Is it your Will and Pleasure that War should be proclaimed against King Philip, and the Macedonians, and all under his Dominion? And in the Decree itself, The Roman People do denounce War against the Hermundulian People, and the Men of Hermunduli. Which is out of Cincinnus, in his Res Militaris. Also, in another Place, Let him be an Enemy, and all that are under his Protection. But also from what is practised where no perfect War is absolutely denounced; yet where a certain violent Prosecution of our Right is necessary, which is, as it were, an imperfect War. Aquilus formerly told Pharnabazus, a Subject to the King of Persepolis, 9 'This is my Kingdom, I will do and say what I please,' etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., etc., 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friendly to all that belonged to him; but now being his Enemies, we shall use them all as Enemies; and therefore, since you resolve to continue one of his, we shall endeavour to hurt him through you.

III. 1. A Branch of the Execution of this Right is, what the Athenians called Ἀριστοκρατεῖν, Taking of Men Prisoners: Concerning which the Attic Law was this, ἤν τις βιωνθεὶς θεαμάως τοιαίως ταῖς προτεινθέν τις τοις ἀνδρεῖς, ἦν αὐτῷ ἀκούειν τὰ πικρὰ καθαρὰ, ἄρα τὸν του πολιτικὰς πρὸς τὸν ἀνεμβαίνων, ὅ ἐκ τῶν κακοκαλομένων ἐκδύσας: ὅ ἀνδρεῖς ὅμως μάρκοι τεμών πλην ὃ μὲν. If any Man was found murdered, the next of Kin had a Right to take any three Men, and no more, and detain them till the Murderer were either punished or delivered up in Order to it. Hence we may fee, that there is a Kind of incorporeal Right of Subjects, (that is, a Liberty to live where they please, and to do what they please) engaged for the Debts of every Society, which ought to punish such of their own Body, who shall injure those of another Society; so that the Members thereof may be held in Bondage until the Society do which it is bound to do, that is, punish the Offenders. For tho' the Egyptians (as we learn out of Diodore) did maintain, that it was not just to imprison a Man for Debt, yet there is nothing in it contrary to Nature; and the contrary Pratice prevailed, not only amongst the Greeks, but also amongst other Nations.

2. Arisocrates, who was Contemporary with Demosthenes, propounded that a Decree might pass, that whoever should kill Charidemus, might be taken wherever he was met with; and whoever made Refistance ought to be held as an Enemy. In which Demosthenes finds these Faults. First, That Arisocrates did not distinguish the killing Charidemus justly or unjustly, since it was possible to have been justly. Next, That he did not put in this Clause, that in case Charidemus happened to be killed, Judgment should first be demanded against the Murderer, before the Permission of seizing him was made use of. And thirdly, That not they among whom he should be killed, but they that protected the Murderer, should be reputed as Enemies. The Words of Demosthenes are these, ὁ μὲν νυότι, ἀν μὴ δίκαιος ἄρχομεν ἀφ᾽ ὧν τι παθόμεν, χρῆ τὸν διόνυσον τοῦ τιμῆσαι, χρῆ τὸν τίμων, ἵνα ἔσθω ἀνθρώπων, ἵνα ἔσθω προσκεκλησθήναι, τίς ἀκούειν δεών, τίνα τὴν τίνα κατεστησά. If a Murder be committed among any People, and they refuse either to punish, or deliver up the Murderer, the Law allows us to seize on three Men; but he (Arisocrates) leaves these Men untouched, and does not so much as mention them, but would have those prosecuted as Enemies, who have, according to the common Right of Nations concerning Suppliants, received him that has fled to them for Protection, (for if I put the Cape) unless they deliver him up. The fourth Thing that he finds Fault with, is, That Arisocrates would immediately bring it to an open and compleat War, whereas the Law only demands the taking up of three Men.

3. Of these four Exceptions, the first, second, and fourth are reasonable, but the third, unless confined to the sole Event of the Murder done, either accidentally, or in Self-Defence, I cannot help thinking, that Demosthenes reasons here rather like an Orator, or one that seeks for every Thing that may serve to favour his Cause, than according to Truth and Right; for (as we said before) that Right of Nations to receive and defend Suppliants, does only concern them whom Fortune, not their own Crime, has made miserable.

4. Otherwise there is no Difference between those among whom the Crime was committed, and them who refuse either to punish or to deliver up the Offender. And therefore the Law itself, cited by Demosthenes, has been thus interpreted.


Our Author reads ἱερεῖς instead of ἐλευθ., in the End of this Parre?, which Correction I find in the last Edition of Wolfius that I use. But there are some other Places, where he restores the Text, without taking Notice of it, in a Manner which seems to me to be well founded. He might have only added, ὡς ἢ ὡς ἢ ὡς, instead of ἡ ψω ἢ ἡ ἡ, as good Manuscripts, and some Editions have it.

6 Y either
either by Custom, or by some express Clause, added afterwards to prevent the like Cavi: No Body will deny the Truth of one of them, who has read that of

Of the Rights of Bodies. Book III.

Julius Pollux, and Sanec., i. e. 3 what is the advantage of marrying when you may

The Rights of Men is then

be in a Woman of Murderers who have fled to others for Refuge, cannot receive them, for the Right of apprehending three Men, is against those that refuse to deliver up the Deliquents. And for 4 Harpsion, and Sanec., i. e. 3 what is the advantage of marrying when you may, may not account as a Woman the Right of taking Prisoners, it is to the State. So Men from same

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by the Judge, yet by the Law of Nature still continues a Debtor; and when by an unjust Sentence, a Creditor had taken away something from the right Owner, that had not been the Debtor's; as if engaged to him2 the Question being put, whether the Debt being paid, that Thing should be restored to the Debtor; the Scevola maintained that it should. Here is the Difference; Subjects are bound up by the Sentence of the Judge, tho' it be unjust, so as they cannot oppose the Execution of it lawfully, nor by Force recover their own Right, for the Efficacy of that Power under which they live: But Strangers have a coercive Power, tho' it be not lawful to use it, whilst they may recover their Right in a judicial Way.

2. Therefore in such a Case, that both the Persons and Moveables of his Subjects, that refuses to render Justice, may, be it justified, is not indeed authorized by Nature, but generally received by Custom. We have a very old Example of this in Homer's Iliad, where Necfor is said to drive away the Cattle of the Eleans, because they had before plundered his Father's Horses, taking them by way of Reprisal; where po^ia is expounded by Eufrathius; τα αυτου των Lawyer there declares clearly enough, that if the Person who is actually Debtor, paid his Debts during the Course of the Suit, before the Sentence of the Lawyer is given, he cannot after-wards redeem as not due what he has so paid; and he proves it by this Argument, a majored ad minus, that if the Debtor had paid after final Judgment, he could not even then redeem any Thing, that the Court was at the time adverse to him: Quia nec aliquibus, nec condamnatione, repetere posset: For this cannot be understood, as simply intended to mean, that the Debtor, who has paid before Judgment, cannot redeem any Thing after it, because as soon as he has satisfied the Plaintiff, the Suit is at an End. There is in the same Title a Law of the Civilian Paulus, the same who recites and approves JULIAN's Opinion in this Case, wherein he says, that if, after Sentence pass, the Debtor pays of his own free Will (that is to say, without Composition, but thro' Error, which must always be suppos'd on this Subject) even tho' he has call'd his Adversary, he loses thereby the Right of redeeming his Money: Which is founded upon the Principles established by JULIAN in a general manner, I mean, that a Debtor continues in the Right of the Debtor under the Law of Nature, whether the Judge condemns or discharges him: Judex, et male aliquibus, & aliquibus suo jussce fraudulenter, repetere non posset, Leg. XXVIII. Our German Lawyer however goes so far as to maintain, that by the Office of the Authority, which the civil Law gives to the Sentence of the Judge, the natural Obligation of the Debtor, discharged without Reason, is entirely extinguished, so that he may in Confidence dispense with paying his Debt, or demand what he has paid thro' Ignorance. But this is a very evident Example of the Extremes into which People run when they are for reconciling, at any Rate, the Decisions of the ancient Götiuns, well or ill understood, with the Principles of natural Equity. The Debtor, in the present Question, either opposes the Right of each before the Sentence, or was not convinced of the Debt, till after he was unjustly discharged. In the first Case, he ought not to have pleased, and is as culpable in so doing, as the Perfon, with whom any Thing is deposited, is in denying a True. In the other, he is very excusable for having refused to pay what he did not believe he owed; but the Moment he discovered himself to be a Debtor, the Obligation of paying begins to display its whole Force. The Judge's Sentence does not diminish to prove, that a Debtor unjustly discharged continues a Debtor by the Law of Nature, we shall conclude, I believe, that it was very difficult to understand that modern Lawyer's Meaning, without acknowledging, that the ancient Lawyers in this as well as many other Things, were of a different Opinion: A Confeffion, which it would have been as hard to have excepted from Mr. COCCECIUS, as to have made him own that their Principles were sometimes incoherent, and inconsistent with the Law of Nature. The Reader need only see the extravagant Encomiums he makes upon them in the beginning of that Differtation.

2 Et quum, per injuriam judicis, &c. Digest. De Dissertation. P人工. & Hypoth. Leg. XII. § 1. 3 There is an Example of this in AMMianus MARCELLINUS, where we find that Julian the Emperor seized some Franks, till their King had restored all the Prisoners, as he had engaged to do by a Treaty of Peace: Quatuor centes. juxta (Regis Hosterii) jura param et soli, &c. Lic. XVII. (Cap. XII. p. 189,Edit. Fals. Gans.) See LkO after, where he speaks of the Mountain Beni Gualid, (Lib. Ill. p. 211, of the old French Translation.) GROTTIUS. They were not Franks, but Alemanni, whom Julian seized. Besides, they were kept for Hostages; so that this Example belongs to another Subject.

4 Tho' Horaces were feized by Augustus King of Ells, and were sent by Nefer's Father to some Games that were celebrated there:

 Kai γας τα χειρα, &c.

HIAD, (Lib. XI. Ver. 697, & seqq.) Hypereuthus reigned at that Time in Ells; Nefer killed his Son Hypereuthus, who opposed his taking away the Harts of Oxe.

—Οτι ειπω αυτοις τιμωριανη, &c.

IBID. (Ver. 761, & seqq.) POLYBIUS says the Word πορα in the same Sense as EUSTATHIUS, speaking of the Achaenians, who used Reprisals against the Boeotians, with Philomelons Permission. Excerpt. legat. XXXIII. See also Excerpt, CXIII. I find also ποραζων used in DIOGIUS SCULUS to express, to make Reproaches. Excerpt Pierios. But Ποραζων ειν αϕιεσις is an Exposition used in War, upon a Subject very like this, as we shall see in the following Chapter, § 7. GROTTIUS.
Another Example we have in the Roman History, where Arístodemus, Tarquin’s Heir, feized the Roman Ships at Caume, \(^5\) for the Goods of the Tarquins detained at Rome. \(^6\) Dionysius Halicarnænsis says he took the Servants, Cattle, and Money, and in Arístotlē\(^7\) in his second Book of Oeconomicks, we find a Decree of the Carthaginians to seize foreign Ships, \(\text{er, } \text{er,}\) if any had a Right of Reprijal.

VI. It has also been believed among some People, that the Lives of innocent Subjects stand engaged on the like account, and that perhaps upon this Presumption, that every Man has an absolute Power over his own Life, and that it may be transferred to the State; which we have said elsewhere, \(^8\) is without Foundation, and not consistent with sound Divinity. Yet it may happen, that Subjects may be kill’d, tho’ not design’d, but accidentally; \(^9\) namely, while they attempt by Force to hinder the Execution of this Right. But if such a Thing may be foreseen, we are obliged by the Law of Charity \(^10\) to forbear the Prosecution of our Right, (as we have shew’d in another Place) since by that Law we Chritians especially should fet a greater Value upon the Life of a Man, than upon our Goods, as has been also shew’d elsewhere.

VII. 1. Moreover in this, as in several other Cases, we must take heed, that we disinguish between those Things that are properly due by the Law of Nations, and those that are due by the Civil Law, or by particular Agreements between some People.

2. By the Law of Nations \(^11\) all the Subjects of the Sovereign from whom one has received an Injury, who are such from a permanent Caufe (i.e. settled in the Country) are liable to this Law of Reprijals, whether they be Natives or Foreigners; but not if they be only Travellers, or f乔urn there but for a little Time. For these Reprijals are much of the fame Nature with Taxes, which are introduced for the paying of publick Debts. Wherefore they are exempted from them, who only for a Time are Subjects to the Law of the Place. Amongst perpetual Subjects, Arrears they were not able to discharge. In order to pay off their Debts, they thought of this Expedient. They put out a Proclamation, that such Citizens and Inhabitants, as had a Right of Reprijals in regard to any State or Perfon, and were willing to claim it, should declare it. A great number of People professed themselves upon this Proclamation, and Ships, trading in the Euxine Sea under some mislaid Pretend, were feized: After which a Time was fixed for judging what was a lawful Prize. By this Means a great Sum of Money was raised, and they were enabled to pay off the Troops, which they disbanded. The State out of its Revenues made Retribution to those who had been feized unjustly. Oeconomic. Lib. II. p. 503. C.

VI. (1) See an Example of this in the Paffage of Homer, cited in the foregoing Paragraph, Note 5.

2 But see what I have said upon the Place referred to in the Margin. Certainly, if our Author’s Opinion took Place, the Right of Reprijals would be very widelake a Civilian, when those, against whom he would use it, knew him to be in that Difposi; for they would not fail to defend themselves, till there should be a Necessity of killing them, if he did not let them go.
the Law of Nations excepts only from Repriphals, the Perfons of Ambassadoros and their Baggage, when they are not lent to our Enemies.

3. But by the Civil Law of Nations, the Perfons of Women and Children use to be privileged, and even the Goods of Scholars and such as go to Fairs. By the Law of Nations every Person is permitted to use the Right of Repriphals, as at Athens, ēx áδερφείᾳ, in the seizure of Perfons. By the Civil Law of many Nations this Right must first be defired of the Sovereign, in other Places from the Judges: By the Law of Nations the Propriety of Things taken, is immediately acquired to the Value of the Debt and Charges, the remainder to be restored: By the Civil Law, the Perfons concerned therein use to be cited, and the Goods by publick Authority fold, and delivered to the Creditors. But in these and the like Cases one may consult the Civilians, and especially Bartolus, who has written concerning Repriphals.

4. I shall add this because it helps somewhat to qualify the Severity of this Right, in itself too rigid, viz. that they who either by not paying what they owe, or not doing Justice to injured Perfons, have occasioned these Repriphals, are bound by the Laws of GOD and Nature, to make Satisfaction for those Losses, which others have suffered upon this account.

VII. (1) But according to our Author himself, the Privileges of Embassadors take Place only with Relation to the Powers to whom they are sent, and not with regard to thoes; tho' whole Dominions they pass: And he requires also, their having been acknowledged and received as Embassadors. See above, B. II. Chap. XVIII. § 5. Wherefore then should they not be liable to Repriphals, on the Part of thoes, to whom they are not sent; especially as Repriphals oppoffe certain Difficulties, which approach the State of Holilty? 2. The Law of Nations grants this Right to all thoes, who cannot obtain Justice from the Sovereign of a Country, without considering whether they are Members of some other civil Society or not. So that for Instance, at the first Institution of civil Societies, when there were still many Individuals, who continued in the Independence of the State of Nature, those Individuals might with doubt use the Right of Repriphals, with regard to thoes who were Subjects. Besides, those who being Subjects, use the Right of Repriphals, have not that Right, properly speaking, as Members of a civil Society; because they would have had it Independently of that Relation, by Virtue of the Law of Nations, or rather the Law of Nature itself, according to what we have laid down above. Thus far therefore our Author's Opinion may be admitted. But it is true on the other Hand that Repriphals, being a kind of Act of Holilty, and an Introduction to a War; the End of civil Society requires, that private Persons should not make use of this Right, but with the Permission, either express or tacit, of the Sovereign; as the Commentators upon our Author have observed, who does not explain himself sufficiently in this Place. And in the Example, he alleges of this kind of Repriphals, which was pratticed by the Athenians, the Power, which the Relations of the Deceased had to seize three Persons of the State, that protected the Murtherer, was founded, as we find, upon a formal Law.

3. This must be understood in the same manner, as what we have just said in the preceding Note. The Refusal which has been made of restoring what was due, excusses the injured Person from keeping as a Pledge, the Things he has seized by Way of Repriphals and authorizes him to appropriate them to himself. See Pufendorf, Law of Nature and Nations, B. V. Chap. XIII. § 10. or 1st. But in a civil Society, the good of Order, and the fear of Consequences, require that the injured Person be not Judges, and absolute Makers of the Reparation, which they may make to amount too high; and that we should even wait some Time to know whether Foreigners will not come to themselves, and pay what they owe, with the Charges, Damages and Interest. 4. The Venetians followed this Rule of Equity, having taken the Genoese Ships in Galata. But they did not in the least diminish any Thing of the Goods in the Ships taken; their Lading was Wheat and Barley, and salt Fish, taken in the Lakes of Capaïs and Messoni and the River Tanais; but thefts they carefully preferred, and when they had received their Debt, they restored them entire. Nick. Phor. Gregor. Lib. IX. Grøtius

5. Thus Plutarch (in the life of Gims) of the Scyrians: Many of them would not contribute Money, but commanded those, who either had taken in Piftis, or had taken away Men's Goods, to repair the Lefs., (p. 483. C. Vol. I. Edit. Whet.) Grøtius.

CHAP. III.

Of a just or solemn War, according to the Right of Nations, and of its Denunciation.

I. WE have already mentioned, that according to the Opinion of the best Authors, a War is often said to be just, not from the Causè whence it arizes,
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arises, nor, as elsewhere, from the great Actions done in it, but from some peculiar Effects of Right. But what manner of War this is, is best understood from the Definition which the Roman Lawyers give of an Enemy. Pomponius says, 

They are Enemies, who publickly denounced War against us, or we against them; the rest are but Pirates, or Robbers. So says Ulpian, They are Enemies against whom the People of Rome have publickly declared War, or they against the Romans; the rest are called pilfering Thieves, or Robbers. Wherefore be that is taken by Robbers, is not a Slave to those that take him, neither does he want the Right of Pajliminy. But one taken by the Enemy, supposing by the Germans, or Parthians, is the Enemies Slave, and may recover: his former Condition by the Right of Pajliminy. And Paulus the Lawyer says, They that are taken by Pirates, or Robbers, continue free. To which we may add that of Ulpian, In civil Distinctions, tho' by them the State be often wounded, yet the Ruin of the State is not intended; they that embrace either Party, are not such Enemies as they who have the Right of taking Prisoners, and of Pajliminy; therefore they who are taken and hold, and afterwards recover their Liberty, have no Occasion to petition the Prince for their Freedom, having never left it.

II. Neither does a State immediately cease to be a State, tho' it commits some Acts of Injustice, even by publick Deliberation; nor is a Company of Pirates and Robbers to be reputed a State, tho' perhaps they may observe some kind of Equity among themselves, without which no Body can long subsist. For these latter are associated on the account of their Crimes; but the other, tho' sometimes not wholly guiltles, do associate for the peaceable Enjoyment of their own Rights, and to do Right to Foreigners, if not in all Things according to the Law of Nature, which (as I have elsewhere shewed) among many Nations, is in part forgotten, at least according to the Agreements which they have made, and the Customs that are established. Thus the Commentator upon Thucydides observes, that whilst the Greeks allowed Piracy they abdained from Murders, from robbing in the Night and from healing plowing Oxen. And Strabo informs us, that other Nations,

II. (1) See Puffendorf, Lib. VIII. Chap. VI. § 5. Of the Law of Nature and Nations. 2. Conflit what our Author says in his preliminary Discourse, § 24. 3. Procopius describes them thus: A Multitude assembled and united not according to the Laws, but by the Crimes. Pandect. Lib. II. (Cap. XV.) Grotius. These Words are in the Oration of Belisarius, upon the Revolt of the Roman Soldiers in Africa. 4. In Lib. I. (§ 1.) Ed. Oxon. 5. Geograph. Lib. XI. The Grammarian Saxo relates the same Thing of another People, Lib. XIV. (p. 234, where, however, there is nothing that has any Relation to this Subject.) Plutarch, speaking of the Inhabitants of the Isle of Sye, says, that formerly they were contended with Piracy; but at Length they had arrived at such a Degree of Noscience, as to rob the Strangers, who came to traffic with them. Vit. Comn. p. 483. C. Vol. I. Edit. Wech. Grotius.

The People SYRADO speaks of are the AECRAS, the Zagrius, and the Hiperbrians, all Inhabitants of one Corner of the Barbarous, which makes a Part of Mount Causac. The Pacific is Συραδος ἡ ἔρημη, &c. p. 758. A. 759. A. Edit. Amstel. Jacobus THOMASIUS, who refers us to this Passage in his Differention intitul. Historia de locisca gentis in gentem, § 22. criticises our Author, as if there, he did not understand all the Minute those People made, whereas the Geographer speaks only

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1 R. 2. ch. 15. § 5. n. 2. and ch. 20. § 43.
2. But in Morals, the principal Part gives form to the Whole: And as Cicero well observed in his 6th Book De Finibus, because it contains the greatest Parts, and spreads furthefl, the Whole is named from it; to which agrees that of Galen, aut $\tau\alpha\pi\epsilon\mu\nu\iota\varphi\xi\tau\mu\delta\iota\omicron\upsilon\vartheta$, the whole from that which is the greatest Portion. The same Author often calls them inmagna viae et paradigminis, named from the most powerful. Wherefore 9 Cicero was too bold in his Expression, in saying, when a King is unjust, the Nobles unjust, or the People, it is not properly a corrupt State, but none at all. Which St. Augustine 3 so corrects, Neither can I therefore say that a People is no People, or the State no State, as long as there remains a Multitude of reasonable Creatures, to acknowledge the Defence of the Things that they love. A sick Body is yet a Body. And a State, however diftempered, is still a State, as long as it has Laws and Judgments, and other Means necessary for Natives, and Strangers, to preserve, or recover their just Rights. 10 Dion Chrysostome is more in the right, who says that the Law (especially that of Nations) is in a State, as the Soul in a human Body, 11 for that being taken away it ceases to be a State. 12 Aristides in his Exhortation to the Rhodians unto Peace, fays that many good Laws may be confentient even with Tyranny.

donts, tho' they lived by Piracy, upon their return Home, would send to the Owners, that if they would they might redeem their Goods at a moderate Price; to which we may refer that of Homer Odysse. 6, 14.

6 Kae $\delta\nu$ $\beta\zeta\mu\nu\mu\iota\omicron\upsilon$, &c.

In search of Prey to foreign Coasts they fail, And if successful, then do with full Gale Return unto their Country, fearing still The Gods, that do regard both Good and Ill.
Tyranny. And Aristotle says, that th'o' in an Aristocracy, or Democracy, the Nobles or People govern ill, yet that does not immediately destroy the Civil Government, but only renders it vitiuous. Let us illustrate this by Examples.

3. We have already declared the Opinion of Ulpian, 14 that they who are taken by Robbers do not become their Slaves; but he says, those taken by the Germans lost their Freedom. Yet among the Germans, whatever Robberies were committed without the Bounds of any State, were not blamed; they are 15 Cesar's own Words. And Tacitus tells us, that the Veneti 16 robbed in the Woods and Mountains between the Peucini and Fenni. He also observes, that the Catti, 17 a noble People of Germany, practised Robberies. And again the Garamantes, 18 a Nation abounding in Robbers, and yet a Nation. The Illyrians, 19 without Diffraction, used to rob by Sea, yet a Triumph was granted to their Conqueror, th'o' it was denied to Pompey 20 over the Pirates. So great a Difference is there between a Nation, however wicked, and those who, not making a Body of People, are confederated only to do Mischief.

III. Yet sometimes there may happen a Change, not only in particular Persons, as in 17 Jeptha, 2 Aracaces, 3 Pirius, who from Captains of Thieves, became lawful Commanders; 4 but in Companies, as when a Company of Robbers leaving their wicked Practices, and following an honest Course of Life, become a civil Society. St. Augustine says thus of Robberies. 3 If this Mischief by a great concourse of desperate Men should grow so great, that they should seize on certain Places, little by little in them, take Cities, and subdue Nations, it then assumes the Title of a Kingdom.

IV. We have already 5 shewed who are they that have Sovereign Power, whence we may also gather, that he that hath it but in part, may for that Part make a just War; 6 much more they who are not Subjects, 7 but unequally Confederates: As between the Romans and their Allies, (th'o' unequal Terms) the Volcteani, Latins, Spaniards and Carthaginians, every Thing that a War in form requires was observed, as we may learn from History.

V. But that War may be called just in the Senec under Consideration, it is not enough that it is made between Sovereigns, but (as we have heard before) it must be undertaken by publick Deliberation, and so 1 that one of the Parties declare it to the

its Liberty in that manner, than to be torn in pieces by Sedition and Civil Wars, and he alludes this amongst other Reasons, that some Legislators themselves have believed it necessary to make Laws under a Tyrant or an Unipper, whereas Nobody ever imagined, that a Government could ever be formed or obnubil during a Sedition. terre. De Concordia, and Rhodius, Vol. III. p. 385. A. B. Ed. Paul. Steph.


14 See Paragraph I. of this Chapter, Note 3.

15 Latercinia nulam habent infamiam, &c. De Bell. Gall. Lib. VI. Chap. XXIII.

16 Nam qui quidem inter Pecucinos, &c. German. Cap. LXIV. Num. 2.

17 Iisdem temporibus, &c. Annal. Lib. XII. Cap. XXVII. Num. 3.


19 A Triumph was decreed to Augustus Cesar, as we learn from Appianus Alexandrinus, Bell. Illyric. p. 1208. Ed. Angil. (766. Ed. H. Steph.) and not to Caesar Fabius Centuretus, as Gronovius says here, who confounds the Times and Persons. For that Conul's Expedition was followed by a Peace.

20 He triumphed on their account, but at the same Time he triumphed for having conquered Mithridates. See Appianus Alexandrinus, De Bell. Mithridatic. p. 416, 417. Edid. Amftel. (252. Ed. H. Steph.) Pliny has preferred the Inscription of this Triumph, at the Head of which are these Words: Quam eam maritimam in praebens

libertatem, &c. Hist. Nat. Lib. VII. Cap. XXVI. Pompey was not the only Person who had the Honour of a Triumph, for having conquered Pirates. See the Note of the learned Gronovius.

III. (1) It is fixed in the Book of Judges, Cap. XII. Ver. 2. that Jepbes went to settle in the Land of Tob, and there were gathered again Men to Jeptha, and went out with him. This was against the Enemies of Israfel, that harassed and pillaged them often. See Mr. Le Clerc's Commentary upon the Place. So that he only rendered like for like.

2 He became a famous King of Partbua from being 3 a Captain of Robbers: Erat eo tempore Artes in, &c. first inseris originis, its virtutis extrema, %c. Justin. Lib. XI. Cap. IV. Num. 6. 7.

3 Ceterum Luifianos. VITRICLEUS civiti, &c. Florius, Lib. II. Cap. XVII. Num. 15.

4 The ancient Amenitories are an Example of this Kind. See Didorus Siculi, in Fragment. (Lib. XII. XXII.) Grotius.

5 He made them in ianum, &c. De Civil. Del. Lib. IV. Cap. IV.


V. (1) Josephus, the Jewish Historian, says, that it is unjust to make War without having first declared it. Antiq. fud. Lib. XV. See Examples of Declarations of War, in Cranzus, Saxen.
the other: Whence Ennius calls it published Battles. Cicero in his first Book of Offices observes, Thas is lawful War but what is made after redeeming what was due, or after a Declaration in form. The antient Writer quoted by Isidore is not so clear, That War is just which is made in confequenc of a Declaration, either for the recovering our own, or for repulsing the Enemy. Livy says, a just War is that which is openly made, and by publick Deliberation. And having first declared, that the Acarnonians had wafted the Atenberian Lands, says, That was the beginning of the Disputes, but that afterwards they came to a War in form, decreed and declared by the States.

VI. 1. For the better understanding of these and other Passages that treat of the denouncing of War, we must carefully distinguish what Things are due by the Law of Nature, and what are not by the Law of Nature, and yet are honest; and also what Things are required by the Law of Nations to obtain the proper Effects of the Right of Nations; and lastly, what Things do arise from the peculiar Customs of some People.

By the Law of Nature, where either Force is repelled by Force, or Punishment demanded of him who is the Offender, there no denouncing of War is required.

And this is what Stibendumides the Ephorus pleads in Thucydides, and in some other of his own Words, in Theophrastus, and elsewhere, Lib. V. (Cap. IV.) Nomina, a Prince of the Servians, for having acted in a different manner.

Grotius.

The promulgata præfis is not Ennius’s but Cicero’s, who uses this Expiration of his own Head in citing some Words from that antient Poet: Etenim ut uit ingenuus Petus & Author videbo hunc præmis præcipitans, Politur e Medis non simul ifa vealura veroaufa fanaclis prudentiam, sed etiam ifa ifa domini verum Sapientiae: Vi geritur Res. Quae, O Flav. Cap. XIV. See also Grotius Lib. XX. Cap. IX, where he recites the Verfes, from whence this is taken. Our Author fell into this small Mistake from having followed Albéricus Gentilis, De Jure Belli, Lib. II. Cap. I. p. 217.

In the Passages of Josephus, it is Homer who is quoted for this Reason, that in attacking him, Surprize, and without having declared War, he had committed a second Injustice, Cap. VIII. p. 354. D.


I do not find that Isidore gives this Definition as from an antient Author: Grotius cites the Passages here, as he found it recited in the Canon Law, Annotation. Cap. II. Can. I. But according to Dennis Godefroy’s Edition, which I use, it is: Sylvam bellum ejf, quod ex prœdicta geritur, de rebus repetitis, aut prœsentandam oblivion causam. The Correector of the Roman Edition main¬tains also, that this is the better reading, as it is confirmed by all the Manuscripts, as well as Editions. The Sense is much the fame, according to our Author, who understands by editio the fame Thing as is meant by ex prœdicta: which appears, from what he says a little lower, § 7. Num. 4. So that the Definition of the other, is defective, in not expressing the other Condition, or publick Deliberation, which the Declaration however supposes.

Albéricus Gentilis, De Jure Belli, Lib. II. Cap. I. p. 216, 217. pretends that ex editio should be read; founding his Opinion solely upon the Pas¬sage in Livy, which will be recited in the follow¬ing Note.

3 Bellum palam & ex editio genera, says our Au¬thor. He does not direct us to the Passages, where their Words are, 'tis he might easily have done it after Albéricus Gentilis, (qui supra) from whom he has taken them. It is in the first Book, where the Historian, speaking of the War of the Fidenates and Veientes against the Romans, says, that Metius Paffius, Dictator of Asia, had easily encouraged them to undertake it, upon promise to assist them by betraying the Romans: Quia fuerit civilitatis animorum. &c. Cap. XXVII. Num. 2.

4 His exercitus (Acarnanum) prins, &c. Lib. XXXI. Cap. XIV. Num. 10.

VI. (1) Cap. LXXXVI. Ed. Oxon. The same Author makes the Plataean Deputy say, that by the Laws of all Nations, it was allowable for a People to defend themselves against an Invader, Lib. III. Cap. LVI. For this Reason Flamininus, as Diocles Scillus tells us, called the Gods and Men to witness, that he was not the aggressor, but King Philip, or Epaminondas. Perrot. p. 287. See Mariana XIX. 13. and Dextippus, in Excerpt. Legat. Grotius.

The Passages, quoted in this Note, speak only of the Justice of Defence against an unjust Aggressor; but have nothing in them that relates to Declarations of War.


3 It is in his Tàddict or Treaty upon the manner of drawing up an Army in order of Battle, a Work believed to be done by an Author more ancient than him, whole War, History, and History, Animal are known to all the World. Obrecht directs us to the Place of that Work, where this Passage is found, and that of Plato quoted there. But he should have added, that neither the one nor the other are to the Purpoze. Alain to prove the Use of the military Art, says, that all Men ought to provide for War, for the Reason contained in the Passage of Plato, which, as we shall see in the following Note, signifies something different from what our Author finds in it. The Words of him who cites the antient Philosopher are: "τόθο εὶς ἅμα μακάμας, &c. Cap. I. p. 12. Edit. Arcot. 1648."

7 A
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out of Plato, * That War made to beat away an Invader needs no other Herald but Nature itself. Hence Dion Chrysostome observes, "πέμπει ὁ θεὸς ἐντολὴν, καὶ θέασαί ταύτα, Μany Wars are made without denouncing. Neither does Cicero blame Mecipus, Antiochus's General, for any Thing; but that he had killed certain Romans, when no War had been denounced, and when they had heard nothing of the drawing of a Sword, or any Bloodshed; thereby implying, that if either of thefe had been done, it might have juftified the Fact. Neither does the Law of Nature require, that the right Owner, * being to recover his own, should declare War.

2. But as often as one Thing is to be taken for another, or the Goods of a Debtor to be feized for a Debt, a Demand is requisite; much more when the Goods of Subjects are to be feized for the Debt of the Prince, whereby it may appear we have no other way to recover our own, or our Debt (but by War). For the Right which we have in those Things is not principal, but fecondary, and subjunctive, as we have declared elsewhere. So a Sovereign ought not to be attacked, either for the Debts or Offences of his Subjects, till Satisfaction has been demanded, the Denial of which puts him in the Wrong, so that he may be deemed to be the Cause of the Damage done to Foreigners, or to render himself culpable towards them, according to what we have b treated of before.

But where the Law of Nature does not require such a Demand to be made, e yet it may be done honestly s and commendably, to the End that the Offender may forbear, if he will, to give Offence, or that already given may be atoned for by Repentance and Satisfaction; according to those Rules which I have already set down, for the preventing the Calamities of War; to which we may apply,

* Extrema prima nemo tentavit loco.

No one at firft will fly unto Extremes.

And the Command which * GOD gave the e Hebrews, to offer Peace to a City be-
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fore they fought against it, was peculiarly given to that People; and therefore by some ill confounded with the Law 11 of Nations. Nor was that Peace offered as absolute, but upon Condition of Submission and Tribute. When Cyrus had marched into Armenia, he forbore Acts of Hoftility, till he had sent Embassadors to the King, to demand the Tribute and Troops he owed, by Vertue of a Treaty, nemio factu, and having in one instance, on the right of the Father of the Nation, ordering it more humane to deal thus, than to go on without any Declaration, as Xenophon 12 speaks in his History of that Action. But by the Law of Nations, a publick Denunciation is required in all 11 Cases, as to those peculiar Effects of a just War, if not on both Sides, yet on one.  

VII. 1. But this Denunciation is either conditional or absolute. Conditional, when Retititution is demanded at the same Time; but the Pecial (or Herald) Law 1 under the Notion of Things demanded, comprehends not only a Vindicacion of due by Right of Property, but also the Prosecution of it, whether due upon a civil or criminal Account, as 2 Servius well expounds it. Hence we meet in the form 3 of it these Words, to be restored, to be repaired, to be delivered up; where to be delivered up (as we have said 4 in another Place) is to be understood, unless they from whom they are demanded, should chuse rather to punish the Offenders themselves. Pinty declares, that this renehning of Things was called 5 Clarigation (because the Demand was made clearly and with a loud Voice.) A conditional denouncing of War is thus in 6 Livy, They are refreshed, with all their Power to revenge that Injury, unless redressed by the Offender. And in 7 Tacitus, Unless they punish the Maflesiders, they will put to Death without Diffinction. And of this Kind we have an old Precedent in Euripides, where Theseus orders his Heralds to tell Oenon the Thesban,

11 In the Original it is omn juris Gentium. But our Author intended no doubt to say, Juris Gentium, or Juris Gentium communis; taking thus the Law of Nations in the same Sense as the Roman Civilians, and not as his arbitrary Law of Nations, of which he does not yet speak.  


13 But if one of the Enemies has attacked the other without declaring War, and has reduced him to the Neckfhip of defending himself without giving him Time to make a Declaration in form, shall not this War have the same Effect, as if it had been declared on one Side? And wherefore should the Attracted, who could not declare War, suffer, because the Aggressor, who could, did not declare it? Besides, we shall shew in the following Chapter, that the Effects meant by our Author, which are Impunity, and the Right of appropriating to our-felves what we take from the Enemy; that these Effects, I say, do no arise from the Declaration of War, nor from a pretended arbitrary Law of Nations, and that they are not particular to Wars declared in form. As to our Author's Division of Declarations of War into conditional and pure or simple; some Writers pretend, that it has no solid Foundation, and that every Declaration of War, in whatsoever Manner it be made, is conditional, either expressly or tacitly. For, by they, we ought always to be disposed to accept a reasonable Satisfaction, and the Moment an Enemy offers that, we cannot continue the War against him without great Injurious, even tho' the Declaration, which proceeded in, was pure and simple. But, besides, that our Author here treats of the Law of Nations, which according to him, often import no more than impudence; the Manner, in which he explains his Divi- sion, implies, that he, against whom War is declared purely and simply, has already sufficiently thew; that he had no Design to spare us the Neckship of taking up Arms against him. So far therefore the Declaration of War may well be pure and simple, without Prejudice to the Dispositions, wherein we ought always to be, with regard to the future, if the Enemy will hearken to Reston; which relates to the Conclusion, rather than commencement of a War; to the latter of which the Diffinction of pure and conditional Declarations belongs.  


3 This will be given in Not. 8. upon the Paragaph.  

4 Clarigation. Et Legatis, quae ad leges clarigata- tumque mitentur, id est, res rapatas clari repetimus, quam velius Verborum vocatur. Hist. Nat. Lib. XXII. Cap. II. See also Servius in Xenoni. XI. (Ver. 53.) and x. (Ver. 14.) The Naturalist in the Palse here cited, says, that one of the He- ralds, who went to make the Summons, was called Vernarius, because he carried Verum to the Enemy: As is said elsewhere: Nofiri Veri—vacant: Hec est quam Legatis ferre ad leges indicatius, Lib. XXV. Cap. IX. Grotsius.  

5 Eam fo centumlibrata insaniemus, ni feli ad illi qui fieri decernent, damnari, ipsi enim sit aliud reparatur. Gib. Lib. VIII. Cap. XXIII. Notum. 7.  

6 Præmissiti [Germanicus] libris ad Cæsarem, utres se validum nunc, ac in Nullipellit in multis praem- sunt, uferum transnlati cæde. Annal. Lib. I. Cap. XLVII. num. 1. He speaks there of the Revolt of Legion: So that it was a threatening of Chaldaom, and not a Declaration of War.
Polybius calls this ἕσιν κακαγάλλους, The old Romans, condicio. A pure (or absolute) Denunciation, is what is especially called an Indiction (or Proclamation) when either the other Party has begun the War (and this ἰδιορ b calls a War to repel an Enemy) or he himself has done something that deserves c to be punished.

2. Sometimes a pure (and absolute) Denunciation follows a conditional one, tho' not necessarily, but over and above. Hence comes the usuall Form, I call the Gods to Witness that Nation is unjust, and will not render what is right. And another of which Things, Differences and Causes, the Declaration has been made by the King at Arms of the People of Rome, to the King at Arms of the ancient Latins, and to the People of the ancient Latium, they have neither paid, given, nor done those Things they ought to have paid, given, or done; wherefore I judge, agree and declare, that Satisfaction be sought by a fair and just War. To which we will add a third Form, Because the ancient Latin People have injured the People of Rome, and failed in their Duty, and because the People of Rome have commanded to make War against the ancient Latins, and the Senate of the People of Rome have judged, agreed and referred to declare War against the ancient Latins; therefore I and the People of Rome do pronounce and make War against the ancient Latins. And that in this Cafe, a Declaration of War was not thought absolutely necessary, does appear from hence

Principis ut illi adversarios, &c.

(Act I. Scen. I. Ver. 48. & seq.) See also Cromer, De rebus Polin. Lib. XXI. Grotius.

In the Passages of Polybius, to which the learned Gronovius refers us here, I cannot tell whether any Thing is meant, but the Right of Repri-

Sulpici. Ver. 383. & seq. There is a Declaration of War of the like Kind in the Battle of the Frogs and Mice, attributed to Homer, (Hercynomachia. Ver. 135. & seq.) in Plautus's Amphitryon we see, that General lends forth the principal Officers of his Army to the Telethons, to tell them, that if without coming to Blows, they would agree to re-

Supplic. Ver. 383. & seq. There is a Declaration of War of the like Kind in the Battle of the Frogs and Mice, attributed to Homer, (Hercynomachia, Ver. 135. & seq.) in Plautus's Amphitryon we see, that General lends forth the principal Officers of his Army to the Telethons, to tell them, that if without coming to Blows, they would agree to re-

...
hence, that it was sufficient, if it was but proclaimed at the next Gariion. As the Heralds in the Caeof Philip of Macedon, and afterwards of Antiochus, 1ο gave their Opinion; whereas the first Time it was necessary to declare War to the Perion himself, against whom it was intended to take up Arms. Nay, the War against Pyrrhus was denounced only to one of his Soldiers; and that in the Elamian Circum, where that Soldier was ordered to purchase a Place, for Form sake, as Servius observes on the 9th of the Aeneid.

3. Another Thing which shews that a pure and simple Declaration after a conditional one is needless, is that a Denunciation of War is often made by both Parties, as the Peloponnesian War by the Corecyrons and Coretibians, when the denounced of it by one would have been sufficient.

VIII. We must not confound with the Rules which properly belong to the Law of Nations, the Use of the Codicium, established amongst the Greeks, that

in a long Note upon this Paffage, has pretended, that our Author was deceived in believing after Turenne, that the Word Condixit, used here in the Declaration upon the War, signifies the preceding Summons, or the conditional Declaration of War. But I confefs, the Reasons of that learned Man do not sufficiently strong to make me subservient to his Criticism. He says that neither in Livy nor elsewhere is it found, that the King at Arms (Pater patratus) was employed to make that Summons or Demand; that it was always attributed to the Heralds, without mentioning their Chief, and that Livy in Chapter XXIV. of the same Book says very expressly, that the Pater patratus only took the Oath, and recited the Conditions in Treaties of Alliance. But it suffices, that this Chief did not go alone, and that he was attended by some other Heralds, in order to his being consulted under the general Name of Feciales. Now this is what Servius says in so many Words, upon Ver. 14. of B. X. of the Aeneid, that he speaks elsewhere of the Feciales in general, without mentioning the Pater patratus. Unlesse therefore it be clearly proved, that in this Paffage of Livy, the Summons (clarigature) is not meant, his Authority is of Use to explain, what other Authors and himself have had in a general manner, in Places, where the Question was not to describe more particular, as it was supposed sufficiently known. The Grammarians Servius, in one and the same Paffage, (one Part of which I shall cite presently, and the other in Note 11) after having said, that the Chief of the Heralds was the Perion who declared War, affirms that Declaration a little lower to the Feciales in general. As to the twenty fourth Chapter of Livy, I find there indeed, that the Pater patratus is employed to treat of Alliances, but I find nothing which intimates that this was his sole Business. And on the contrary, the Pallages, cited also from Servius, say, that the Heralds, and their Chief without Distinction, made Alliances and declared War: Aqui Feciales & Pater patratus, per qua bella vel Federia confirmabantur, sumpsum uterbat populos Iunius — Qua [verba] superavit Feciales & Pater patratus ferendae factum, vel bellorum indicium. In Aeneid. XII. 120. Thus the Order of the Things are changed, that we may not think the one regards the Feciales, and the other the Pater patratus. But here is an expression of the same Grammarians: Quum eos omnem bellum indicare, Pater patratus, loc, 51, principis Fecialium, prorsusbat ad his victorias, & praefatus quodam felicibus, clara vero diecata, ex bellum indicare proprius certum causas: Atque hos Socios levesbat, atque hos non ultra annalibus, sed quibus redireserat, atque uberi Carataeo deiecitur a clarissimo voce. In Æneid. IX. 53. He will have it moreover, that the Word Condixit is only said of Things in regard to which the two Parties agree. But Festus tells us, that it signified in general to declare and make known: Condicere et dicendi euntur. In short the whole Connection of the Diffcource, and even the Terms of the Declaration upon the War, are repugnant to what is meant here by condixit, a Treaty lately made between the Latins, and the Romans, as he imagines who criticizes our Author in this Place. The Historian describes in general the manner in which Satisfaction was demanded, and the War afterwards declared. Whence it is that after the refusal of retoring what was due, mention is made of a People, whoove they were, Papulion ilium (quicunque esset nominat). The Latins are indeed named after: But that is because the Terms of Forms require their being determined to some particular People. And in the Form in Question, the first Words, Quorum res, Bism, confor- farum plainly denote every Kind of Complaint in general, and all Affairs, about which they might have any Controversy with each other: So that they do not seem to me compatible with the Determination of the Sense of condixit, to the Ceremony of concluding a Treaty. But farther: The Historian says clearly, that the Reason, why Satisfaction was demanded of the Latins was their having made Incurations into the Territories of the Romans: Et quam incurrusum in agrum Romanum sejus, representative Romanae gentis rurum redisse. No other. He was not therefore speaking of the Violation of a Treaty: Of which it is probable he would not have omitted to say something. I infer this Note, as I composed it several Years ago at Lausanne. I have since seen with Pleasure, that Mr. J. F. was in a good Difertation, De Fecialibus Populi Romani, (which is Part of his Ferculum Literarium published 1717.) is exactly of the same Opinion with me, and tacitly refutes the late Mr. Gronovius almost by the same Reasons. It may be seen, by what there is of more or less in the one and the other, and by the different manner in which our Arguments are turned; that as that learned Gentleman could not take from me, I have not robbed him. All the rest of his Difertation is well worth reading.


VIII. (i) It was a Staff, or Kind of Scepter, wrapped up in a Figure of Serpents twisted together. Pliny says, that the Use of this Figure came from a Sort of Eggs, formed by a Heap of Serpents twined and glued in a Manner to each other; so that this Staff was intended to be an Emblem of Peace between two Enemies, who re-
that of Vereine, and the Spear made of Cornil, amongst the Romans, who took it from the Aequities; the solemn Renunciation * of all Friendship and Alliance, if ever there had been any, with him against whom War was declared; a Renunciation made after the Term of thirty Days, in which he was allowed to restore what had been demanded; and the Ceremony of throwing once more a Spear into the Enemy's Ground; and such other Things which proceed merely from the peculiar Customs of some Nations. For * Aerobius tells us, that many of these Formalities were left off in his Time, and some disused, even in Varro's Days, The

ciprocally fond Heralds with the Caduceus in their Hands, Anguis inanieris, aste convolvati, &c. Hist. Nat. Lib. XXIX. Cap. III. See also SERVIVS upon the Aenid. Lib. IV. (ver. 242.) and Lib. VIII. (ver. 178.) GROTIOUS.

It appears by the Pagfage of Pliny, which our Author only quotes, and still better by those of Servius, to which he refers us; that the Caduceus was a Token of Peace rather than of War, and therefore, that the proper Design of its Institution was not to declare War. The Commentator upon Virgil says expressly, that those who carried the Caduceus were Embassadors of Peace, as the Fe- cilias were employed in declaring War. Unde, fœtus FIOVIVS, legit Quinque Caduceatorum dictator, in quibus institutum per Feclias, a fæder [i.e. thesis should be added here] belli indiciaverunt; & paæ per Caduceos factae. In Aenid. IV. 242. See also ISIDORUS, Orig. Lib. VIII. Cap. XI. Col. 1027.Edit. Gotha. Suidas calls the Caduceus Zewtoris Qvines, a Symbol of Friendship, (vsee Footnote) which he has taken from POLYBIUS, Hist. Lib. III. Cap. LII. And AULUS GELLIUS informs us, upon the Authority of some ancient Historians, that the General Quintus Fabius, intending to give the Carthaginians their Choice of War or Peace, lent them the Spear from the Roman People, a Pike and a Caduceus, as two Signs, the one of War and the other of Peace. Quod Q. Fabius, Imperator Romanus, deduct ad Carthaginemn epgitam, lib. scriptum fuit Populum Romanum miffije ad eos hostem & caduceum, fignum, bellis et paœ factae, &c. Note. Hist. Lib. X. Cap. XXVII. But I find in THUCYDIDES, two Pagfages which prove clearly, that the Ufe of the Caduceus suppressed the War already declared. The firft is in the Place where he relates the Sea-Fight between the Corinthians, and the Caduceus was the Signal for Peace; the latter being victorious, the others thought of retiring, but as they apprehended that the Athenians, who were come to the Aid of the People of Corfu, with a considerable Reinforcement, would look upon the Fight as a Rupture of the Alliance, and consequently, upon them as Enemies; they lent some Parfons to them in a Sign, without the Caduceus, to found their Sentiments, says the Historian; which manifestly implies, they intended to fhew on their Side, that they did not miftrust them, nor consider them as declared Enemies. Hist. Lib. I. Cap. LII. Edit. Osnem. But the other Pagfage is at the End of the fame Book, where the Historian says, that notwithstanding all the Differences which he had related, the People of Peloponnesius had not discontinued their Commerce with each other, and went freely into each other's Country, without the Caduceus, but not without some Mitruff. Cap. CXLV. The Historian says also, in the Beginning of the following Book that after the Peloponnesian War broke out, they had no longer any Communication with the Caduceus. See the Greek Text, for the two left Pagfages of Curtus. See the Pagfages of PLINTH, which are cited above, § 7. Note 2. and FESTUS, on the Word SAGANOS. LIVY, however, mentions the Ufe of this Herb only in the Ceremony of Treaties of Alliance, for which the chief Herald at Arims was sent. Lib. I. Cap. XXIV. Num. 4. 5. and lib. XXX. Cap. XLIIII. Num. 9. He says not a Word of it in the Place where he relates the Manner of demanding Satisfaction, and declaring War, tho' every Thing there seems well circumfcribed. Might not the Circumstances of those two Cem- monies have been confounded? We may be induced to believe fo, from a Pagfage in Varro, where that learned Roman tells, that Vereine was to the Romans what the Caduceus was among the Greeks; namely, a Token of Peace; Caduceus, pacis fignum. De notis Populi Romanis. Lib. II. Verbenatus fered verbenam id erat Caduceus, pacis fignum, nam Mercuri viirgam pollium autem. And p. 528. Edit. Pufch. 1614.

3 That Javelin was burnt at the End, as LIVY says, who puts also the Alternative of a Javelin, headed with Iron. See the Pagfage cited in Note 9. upon the preceding Paragraph.

4 This is what LIVY tells us the College of Heralds were confounded upon, in the War against Antiochus and the Efeidians. Et num plin faciarit ex [AEtolis] & accipit, renuntianos effe, quam bellum indiciem. Lib. XXXVI. Cap. III. Num. 10.

5 See SERVIVS upon the ninth Book of the Aenid, (ver. 5.) and AMMIANUS MARCELLI- NUS, Lib. XXX. (Cap. II.) as the Author of the following Page, with the Note of the learned Liden- brog upon that Pagfage. GROTIOUS.

Our Author supposes in this Place, that the He- ralds threw a Javelin twice into the Enemy's Lands, Hylae mihi iterum. But he was mistaken, through a misapprehension of the Sense of the Difcurso, in the Pagfage of SERVIVS which he cites; as it would be easy for me to prove.

6 It is in the Place where, to retort the Re- procuh of Novelty thrown on the Chriftians, he thews that the Romans themselves had in many Things abandoned the Customs of their Ancestors. Amongst others he gives for an Example, that the College of the Feclias, or Heralds at Arms, were no longer confulted in Regard to War, nor fent to demand Satisfaction in Form, before the Declara- tion of War; and that the Time for beginning a War was no longer signified by a Flag displayed upon the Capitol. Quum paratis belli, fignum manifetât ex Aere? Aut Fecilias juraré tradetis? Per claritatem reperiet vos rapita? Ad Ferius Gene, Lib. II. p. 91. Edit. Ludew. brother 1615.

7 I shall fet down the Pagfage wherein he in- forms us, that in his Time the Fecilias were still employed in making publick Treaties, but not in declaring War. Feciles, quod fidei publice inter Populis praebatur: Nam popi libitabit, us justum concivitbbum bellum, (et indu deffmt) etus fidei belli pacis circumfribatur. Ex his mittentiis, au- quam concivitbbum, qui res terent: & per eis au- quam nas fit fidius, & de Ling. Lat. Lib. IV. p. 23.
Chap. III. \War and Peace.\ 555

The third \Punic War\ was both denounced, and commenced at the same Time. And \Macenas, in Dion,\ will have some of those Ceremonies to be peculiar to popular States only.

IX. War denounced against a Sovereign, is presumed at the same Time to be denounced, not only against all his Subjects, but also others who shall join him, and who ought to be considered, in Regard to him, only as an Accipitory. And this our modern Lawyers mean, when they say, 'An Prince being defied, all his Adherents are defied.' For to denounce War they call dijfidare, to bid Defiance, which is to be understood of that very War which is made upon him against whom it is proclaimed. Wherefore, when the \Romans\ had declared War against \Antiochus,\ they would not do it separately against the \Etoilians,\ because they openly sided with him. \The Heralds replied, \The \Etoilians have voluntarily proclaimed the War against themselves.\"

But that War being ended, if we are to attack any other Prince, or People, for having affifted in the War, we ought to denounce War anew, to obtain the Effects of a just War by the Law of Nations. For they are not then looked on as Accipitories, but as Principals; \wherefore it is well observable, that the War of \Manlius against the \Gallo-Greeks,\ and of \Caesar against \Ariovistus,\ were not\]

23. Edit. H. Steph. As for these Words, \&c. unde diftum, I am inclined to believe that the Author wrote \fed unde diftum.\ The Change of \sed\ into \&c. might very easily happen. Mr. Jenjs, in his Differtation cited above, p. 64. subjects that there is another Word corrupted in this Place; consertorut for confeferor.

\8 It is from Appianus Alexandrinus, that our Author has taken this Circumstance. De bell. Po- nic. p. 69. Edit. Angl. (45. H. Steph.)\n
\5 Our Author has probably in his Eye the long Discourse made by \Macenas to \Augustus,\ when the latter asked his Advice with Regard to his Design of abdicating the Government of the Republick. But I find nothing, either in this Discourse or that of \Agrippa,\ that relates to the Forms used in Declarations of War. The Origin of the false Citation is this, \Albicrius Gentilius, De \nure \Bell.\ Lib. II. Cap. I. in fin. p. 418. remarks, that \Macenas, (apud Dion. Lib. LII.)\ seems to fancy, that only Democratick States observe the Formularies with which Declarations of War are attended. What gave the Italian Civilian Occasion to form this Conjecture, was the Paffage where \Macenas\ says, that in advising \Augustus to retain the Government of the State, he does not pretend to per fume him to act as a Tyrant, but only to regulate, in Concert with the chief Men of \Rome, all the Affairs of the State, in a just Manner, and considerably to the Good of the Publick. He repre fents at the same Time, that the State would be much better governed, and in Consequence more happy, than if the supreme Authority were put into the Hands of the People. When it shall be necessary (fays he, amongst other Things) to under take a War, you will do it secretly, and by making good Ufe of favourables Occurrences. p. 542. E. Edit. H. Stephens. The War here meant is not one made rashly, and without being declared; but \Augustus' Courtier, as appears from the Sequel of his Discourse, opposes \War under taken wilfully to dangerous Wars, in which the \Romans\ had been engaged by the treacherous Deliverations of the People; Secretly not being observed in them, and the ambitious Great Men finding Means to win the Populace, and to make them content to take Arms under their Conduct. This is the true Sense of the following Place, without any Hesitation, that which \Gentilius\ spoke with some Doubt.

IX. (1) \Difflratio Principis, difflato ejus adhe- rentes.\ See BALDUS, Ad Leg. II. Code, De Servi, Num. 70. For in their barbarous Phrases \Dif- fidare signifies to declare War.

\Pacius \refuderunt, \Etoaios utri \fabi, etc. Livy, Lib. XXXVI. Cap. III. Num. 13.\ X. (1) See what is said above, B. I. Chap. III. Num. 4.

2 Mr. Буддеус, in his Differtation intituled \Jurisprudentiae Historiae Specim. \p. 110. subscribes here to our Author's Quaestions, which is also that of the Generality, even of his Commentators, except \Oberheit.\ The latter, speaking of the \Cafe in Question, upon the Paffage cited in the preceding Note, which however relates to another Thing, contents himself with referring to Chap. XXXV. of B. I. of \Caesar's own Commentary upon the War in Gaul. \Caesar there, alluding his Reasons for undertaking the War with \Ariovistus, says,amongst other Things, that in the Consulship of \Messala and \Pisius, the Senate had decreed, that whoever should be Proconfual of \Caesar, should defend the \Edums, and the other Friends of the \Roman People, as much as he could, without Preja dice to the Welfare of the Republick. \Quir. M. \Messala, M. \Pisius, Cofl. E. \Bonclerius, in his Differtation \De \Etilis cburtesius, Vol. I. p. 187. approves this Reason, and confirms it by the Example of \Ciceron, who, when \Proconfual of \Ciliciæ, believed himself authorized to act something like it, by \Vertue of a like Decree of the Senate, as appears from what he says himself. Lib. XV. Epig. Ad Famil. II. \Florus\ also speaks of \Caesar's Expedition against \Ariovistus, as of a very just War. Sed prima contra \Germanos illius pag- na, jurifijjimque quidem ex causis: Hecth mihi de incontinentiis rerum quoruminut. Quis \Ariovistus\ ju- perius \? etc. Lib. III. Cap. X. Num. 10. And \Dion Cassius makes \Caesar\ say, that the extraordinary Command decreed him by the Senate and People of \Rome, included a Permission to under take \War against whomsoever he should think fit. Lib. XXXVII. p. 96. B. Edit. H. Steph. So that the \Quellen only is to know whether \Caesar had good Reasons for making \Ufe of this Permission. It is not denied but that this Conqueror might have been prompted by his Ambition, which made him seek and embrace every little \Occasion for taking up Arms: But as the Thing itself, and not the secret Motives, is the Matter in \Quellen,
XI. The Reason why Demnation is requisite to some Effects of War.

When a Prince has writ Deceit, and the Right of the Subject, all may be pretended by some Person, and might be found as true. If this pretended Right should continue against those two Kings, and their Adherents. XI. The Reason why a solemn Proclamation was required unto such a War as by the Law of Nations is called just, was not (as some imagine) to give them authority, but that they should do nothing in Secret, or by Deceit; for this Motive would not tend so much to establish any Right as to distress them by an extraordinary Valour and Generosity. As some Nations (as we read) have appointed both the Time and Place of Battle. But that it might manifeftly appear, that the War is not made by a private Authority, but by the Consent of both Nations, or of their Sovereigns. For hence arise certain peculiar Effects, which in a War against Robbers, or a War

it suffices that Ariminus had given him just Occasion to attack him. Now this is what the late Mr. Cellarius proves very well in a good Difertation, De C. julii Caesaris adversari Ariminium Regem, aliquae Germani Bello, which is the first of the Collection, published MDCCXLII. Ariminus, says he, had no Right to appropriate a Place of Gaul to himself. That Prince pretended in vain, that he had made himself Master of it by Right of Conquest. Admitting that he had Reason for putting the Rhine, and for joining the Sequani against the Hecata, why did he not return home after the War was ended? Why did he oppress both his conquered Enemies, and the Conquerors his Friends, by loading the former with Impolls, and depriving the latter of the better Part of their Lands. It was besides the Interest of the Romans, not only to protect the Hecata, their Allies, but also to hinder Ariminus from continuing too long in Gaul. The Example of the Cimbri and Teutons gave them just Reason to apprehend left the Fance should take him to enter their Province, and settle in it. And in the same Clafs may be placed the War made by Ulysses, and his Companions, against the Grecians, who, during the Siege of Troy, had lent Aid to Priam, under the Command of Mentes. See Homer, Odyss. Lib. VIII. and the Scholia of Augustine. 

4 Patris regnitionem ad Populum, &c. Livy, Lib. XXXVI. Cap. I. Num. 5. 


XI. (1) As the Romans did to Persarm, as Plutarch relates, in the Life of Publicola. The Turks two Days before a Battle make Fires in several Places. 

Chalcocondylas, Lib.II. Grotius. 

See what is said, Chal. I. of this Book, § 20. The Turks were no more affurred of it, that when a Herald comes to declare War with certain Ceremonies, they would be when they see an Army upon their Frontiers, commanded by some principal Perfon of the State, and ready to enter the Country? On the contrary, might it not more easily happen, that a Person, or a few Persons, should assume the Character of Heroldian, that then one Man should rale an Army by his own Authority, and march at the Head of it to the Frontiers, without the Sovereign's Privy? And the Thing could still be more easily happen on both sides. The Truth is, that the principal End of Declarations of War, or at least what occasioned the Culfon of them to be established, was, as some Commentators upon our Author obferv, to make known to all the World, that there was just Cause for taking up Arms, and to signify to the Enemy himself, that it had been, and is, his Fault, if he did not make his Peace with the Nation. Varro, a Paffege of Varro, part of which our Author has cited elsewhere, (Preliminary Diff. § 37.) from whence it appears clearly, that this was the Opinion of the ancient Romans. They undertook no War hastily, fays he, or without just Cause; from whence it was that they declared it beforehand, and eftablih'd, for that Purpofe, some Heralds at Arms, whom they fet, to the Number of four, to demand Satisfaction of them from whom they believed they had a Right to exact it. This is visibly the Sense of the following Words, tho' not very carefly in some Places, Inquse bella & tardus & magna licentia, [Mercer tells us it is writ so in all the Manuscripts, instead of nullus licentia, which was in the other Editions. Might not mean ofנטות be read, and which Grammarians cites an Example, p. 253. from Cicero? for the Explanation Mercer gives us here, utque licet, appears too falfe.] Jufiophiaks: 

Quid bellum nullum, nifi pium, patefacta geri operter, prius indicentur, (indicentur probably should be read, a Word, which having been changed by the Copists into indicentur, has occasioned the foling in quam after prius in the preceding Editions) bellum is, a quibus injustas suatas fiefant: Iustas leges ex repellit, mitemus mutandus guatus, quae Orat. 

Vocare vacant. In Voce Feciales, p. 529. Edit. Mercer. Dionysius Halicarnassensis refers alfo to the extreme Regard the Romans had to Justice in their Wars, the Establishment of the College of the Feciales, and in particular, the Function of declaring War, in which they were charged. Antiq. Rom. Lib. II. Cap. LXXII. The Grammarians SERVUS is of the fame Opinion, in a Paffege which our Author has quoted several Times: He fays, that Ancus Marcius seeing the Roman People too fond of War, and that they often engaged in it without just Cause, borrowed from the Aesopica the Fecial Law. Soc Ancus Marcius, quam siceret Populum Romanum ardentem amore bellarum, &c. In Remid. X. 14. It does not appear, that in all this they thought of the Effects of which our Author speaks.

made
made by a Prince against his own Subjects, will not be allowed. Therefore 3 Semeca distinguished Wars denounced against Neighbours from Civil Wars.

XII. Now, as a some observe, and by Examples teach, that even in such Wars as these, whatever is taken becomes the Captors',* it is true but only on one Side, and that too by the Law of Nature; and not by the voluntary Law of Nations, which only provides for the Interests of Nations, not of those who are either no Nation, or but Part of one. They are also mistaken that think a War, under-taken in Defence of our Persons or Goods, needs no Denunciation. 2 For it is absolutely necessary, indeed not simply, but to obtain the Effects proper to a just War, as we have already mentioned, and shall more fully explain by and by.

XIII. Neither is that true, that War cannot justly be made as soon as it is proclaimed, which Cyrus did against the Armenians, and the Romans against the Cartahunis, as I said 4 before. For by the Law of Nations, a Denunciation requires no Time to be allowed after it; but it may happen, that by a natural Right some Time may be required from the Quality of the Befines, as if Restitution be demanded, or Punishment required against an Offender, and not yet denied; for then convenient Time is to be granted for the performing it.

XIV. Nay, tho' the Rights of Embassadors should be violated, it will not thence follow, that there is no Need of Denunciation to obtain those Effects proper to a just War; but it will be sufficient if it be done the safest Way it can, that is, by Letters: As it is usual, in Law, to give a Summons or Intimation, in Places that are not safe.

3 Ad arma praecox, &c. De Ih, Lib. III. Cat.
XII. (1) See what I shall say, Chap. VI. of this Book.
2 But see what I have already said in Note 13, upon Paragraph 6. of this Chapter.
XIII. (1) This is required even by the Law of Nature itself, as often as it can be done without Prejudice to ourselves, even tho' there is not much Hope that he, against whom War is declared, should be inclined to prevent it, by giving us Satisfaction. For we ought to neglect no Means of letting all the World know, and even the enemy himself, that we do not take Arms to obtain or defend our just Rights, till reduced to the last Extremity, and after having tried all other Methods, and given the Enemy full Time to come to himself.

CHAP. IV.

The Right of killing Enemies in a solemn War; and of other Hostilities committed against the Person of the Enemy.

I. SERVIUS upon this Verse of Virgil's,

1 Tum cortere euid, tum res rapuifte licebit.

Then is your Time for F action and Debate,
For partial Pavour, and permitted Hate. Dryden.

Deriving the Ficial (or Herald) Law from Ancus Marcius, who had borrowed it himself from the Equiscolor, says thus, 5 When Men or Cattle were taken from the Romans by any other Nations, the Pater Pratus (King at Arms) with some other Heralds, whose Office it was also to make Treaties of Alliance, went to the Borders of that Nation, and standing there, with a loud Voice proclaimed the Cause of the War; and if they would not restore the Things taken, or deliver up the Offender, (within thirty Days) he threw a Javelin into their Territories, which was the Be-

I. (1) Æneis. Lib. X. ver. 11. & seqq.

7 C
gamin of Officiilities, and then it was lawful to plunder, as is usual in War. But he had before said, that The Antients by plundering, (Res rapere) underfood the damaging what belonged to the Enemy, the' nothing be taken from him: And by re- storing what was redeemed (Res reddere) they meant all Manner of Satisfaction for the Injury done, Whence we learn, that a War solemnly denounced between two Nations, or their Sovereigns, has some peculiar Effects, which do not follow from the Nature of the War itself: Which is very agreeable to what we have already quoted from the Roman Lawyers.

II. 1. But we must observe, that this Word Lexebit, will be lawful, in Virgil, is capable of a double Meaning. For sometimes that is said to be lawful which is altogether just and honest, tho' perhaps, some other Thing may be more commen- dably done, as that of the Apostle St. Paul, πάσας μοι ἐξέστησεν, ἀλλ' ἡ σφαίρα (πολυμέρῳ αὐτοῦ), All Things of the same Nature with those he had begun to speak of, and of which he was going to speak further) are lawful for me, but all Things are not expedient, 1 Cor. vi. 12. Also to marry is lawful, but to abtain from Marriage a pious Intent is more lawful, as S. Augufite argues to Pollentius, out of the same Apostle. To marry a second Time is likewise lawful, but to marry but once is more lawful, as Clemens Alexandrinus rightly decides the Question. A Christian Husband may lawfully put away a Heathen Wife, as Saint Augustine allows (which, with what Circumstances it may be proved, is not our Business here to dispute) but yet he may keep her. Therefore he adds, Both are equally lawful by the Rules of justice, which our Saviour hath given us, for he hath prohibited neither of them, but both are not equally expedient. Upham says of a Trader, who was permitted, by the Roman Law to pour out the Wine, if the Buyer did not come to fetch it at the Time appointed, 'The be may do it, yet if he did it not be is more to be commended.

2. This

3 Thote Words have already been cited, upon Paragraph 7. of the preceding Chapter, Not 4.

4 I do not see how our Author can deduce this Consequence from the Paffage of Servius. It is plain, in my Opinion, that all the Grammarians mean, is, that before War was declared, in the Manner which he informs us was usual, it was al- lowed to plunder; because, before that, the People of whom there was Room to complain, were not yet considered as Enemies; in a Word they were not yet at War. II. (1) He speaks of Things indifferent in them- selves, as is the Use of all Kind of Meats without Distinction, from which, however, we ought to ab- train, when eating them is not expedient; that is to say, when some bad Effect, either in Relation to others, or ourselves, may result from it. But then those Things become skipryatory; and consequently, the Paffage makes nothing to the Subject. See what our Author himself says, in his Notes upon the New Testament.

2 Tertullian against Marcian, I. Affiniwine from Marriage would be no Matter of Commanda- tion, if Licence (to marry) were taken away. See the same Author, B. I. Ad L. v. upon this Sub- ject, and concerning Flight in Times of Perfeu- tion; and St. Jerome against Herodians, A Virgin deserves the greater Honour, while the dyalms that, which to do more no Sin. And against Texans, Therefore does CHRIST love Virginity the more, be- cause they freely give what was not commanded them: And to Pommachius, Difficult and heretical Attenus are always left to the Choice of those who have Courage to undertake them, that, as they are free, they may be worthy of Resumption. And Saint Chrysostom, upon 1 Cor. vii. declares Conscience to be the better; and upon Rom. vii. 6. If we keep not the Commandments, we are threatened with Hell, thereby showing that Things positively commanded, are not like those that are left to the free Choice of the Combatants, (such are Virginity, and the renun- ciation of our Possessions) but the other most of Necessi- ty be performed: And in his second Oration, con- cerning Fafling, He left Virginity without the Law, he left it above what we are commanded to strive for, if they that do keep it may show the Greatness of their Soul, and they who do not may enjoy the Fa- vor of GOD. Which he afterwards applies to δαμασκενοσ, The Renouncing of Possessions. To which we may add what Gratian gathers out of St. Austin, and others. Can. XV. Quæst. I. Grotius.

This Distinction between Consules and Precepts, and the Application of it to the Examples here gi- ven by our Author, have been sufficiently refuted, B. I. Chap. II. § 9. Note 19.

3 Stromat. IV. where, among other Things, he speaks of one married a second Time, He does not indeed find against the divine Covenant, for there is no Law that forbids it; but he does not hold that most excellent Perfection of an evangelical Life.

Grotius.

The Father speaks here indeed of second Mar- riages, but in the Words immediately going before he seems to speak of Polygamy in general, as nicely contrary to evangelical Perfection, whether a Man has several Wives one after another, or at the same Time. He says, that GOD not only permitted, but required, under the Law, that Men should marry in that Manner, for the Multiplication of Mankind. 'ΑΝΔ οὐδὲν ἀρτί, &c.

4 Hic autem ubi de damasceni, &c, Ad Pollent. De adulter. congr. L. I. Cap. XIX. See Can- non Law, Can. XXVIII. Ques. I. (Cap. VIII. IX.) where many Things have been copied from Chap. XIV. and XVIII. Grotius.

5 Sibamen quoniam possit spondere, Dig. Lib. XVIII. Tit. VI. De periculo & commendo rei exci- diente, Leg. I. § 5. This Example is ill applied. See what I have laid upon Pufendorf, Law of Nature.
Chap. IV.  
WAR and PEACE.

2. This 6 Word Licere, to be lawful, may be taken for that which is not pun-
ifiable by human Laws, and yet is not confituent with Piety, or the Rules of
Morality. Thus, in many Countries, Fornication is allowed. Among the 7 Laced-
emontians and Egyptians, Theft was lawful. We read in Quintilian, 8 There are
some Things not commendable in their own Nature, yet tolerated by the Law, as by
that of the Twelve Tables, the Body of the Debtor might be divided amongst the Cre-
ditors. Indeed this Acceptation of the Word Licere, to be lawful, is not very
proper, 9 as Cicero observes in the fifth of his Tusculan Questions. Speaking of
Cinna, On the contrary I think him miserable, not only because he did such Things,
but because he so managed, that he might lawfully do them, 10 but it is not lawful for
any Man to do ill, but we are misled by the Error of Speech, when we say that is
lawful which is only allowed. But yet it is very common, as when the same Cicero,
in Behalf of Rabrinius Pothinus thus addresseth the Judges, 10 Ye ought to consider
what is suitable to be done, not what you may do by Strifes of Law, for if you re-
gard what is violently lawful, you may put to Death whom you please. Thus it is said,
11 it is lawful for Kings to do what they please, because they are divinities, ex-
empted from Punishment amongst Men, as we have said elsewhere. But Claudian
well advieth a Prince or Emperor, when he says,

11 Nec tibi quid licet, sed quid fecísse deecbit,
Occurrat mentemque domet respectus Honesti.

10 See Fifteenth, in his Exhortation to Chaffi-
y, Permissum often expose one to the Temptation of
violating the Rules of the Gospel; And, again, all
Things are lawful, but we cannot do every Thing
that is lawful without Prejudice to Salvation. And
Columella, in his Preface to B. VII. Neither
must you take Advantage of whatsoever is lawful, for
the Antiquus reputed Summum ius, the Rigour of the
Law, to be the greatest Torment. And St. Jerom,
The Rigour of Law is the highest Witchcraft. Ep.
Ad Innocent. Grotius.

2. This is what S. Chrysostom says, where
he speaks of St. John the Baptist, who, notwithstanding
that, presumed to say to King Philip He-
rod, and with Authority: It is not lawful for you
to have this Wife. De Paenit. VIII. Grot-
Tius.

3. Store-leus has preferred this Saying. The
Philosopher added, that the Princes who use such
Language to their Subjects, do not long retain their
Dignity. Florileg. Tt. XLVI. (or XLVIII.)
14 He gives, for Instance, the Permissam of go-
ing into Bawdy-Houses. Poth, inquit, Hac enim
Lus, quod opus est, quod vitare, sive, quod Licet.
Licet et libenter. Lib. IV. Contr. XXV. p. 308.
15 Difficultas esse, quod sunt aliqua, que fieri
non opus est, etiam Licet. Lib. XXX. (Cap. VIII.
16 Opus est quilum, que sint ubuesque, non qua-
si illos qui, sed quod etiam, licet. Lib. V. (Ep.
XIV. Num. 9. Edit. Cellar.)
17 Est enim aliqual, quod non opus est, etiam
Licet. (Cap. III.)
18 Videm nihil delisertat, quod aut, quod nare-
rum ex effi, aut per leges Licet. Cap. XVI.

10 Hei jani, judices, ego in consilio suis, &c.
Orat. pro C. Rabrini Poth. Cap. V.
11 Nature and Nations, B. V. Chap. V. § 5. Note
8. of Edition II.
6 Tertullian, in his Exhortation to Chaffi-
y, Permissum often expose one to the Temptation of
violating the Rules of the Gospel; And, again, all
Things are lawful, but we cannot do every Thing
that is lawful without Prejudice to Salvation. And
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the Antiquus reputed Summum ius, the Rigour of the
Law, to be the greatest Torment. And St. Jerom,
The Rigour of Law is the highest Witchcraft. Ep.
Ad Innocent. Grotius.

4. So
Of the Rights of
Book III.

Chapter I

The father, in one of his Declarations tells us: It is one Thing to have a regard to the Laws, and another to consider what Justice demands.

Chapter II

Therefore in this Sense it is lawful for one Enemy to hurt another, both in Perfon and Goods, not only for him that makes War on a just Account, and does it within those Bounds which are precribed by the Law of Nature, as we have said in the beginning of this Book, but on both Sides, and without Difficion; so that he cannot be punished as a Murderer, or a Thief, tho' he be taken in another Prince's Dominion, neither can any other make War upon him barely upon this Account. And in this Sense we are to take Sallust, 1 By the Laws of War all Things are lawful to the Conqueror.

Chapter III

The Reason why this was established by Nations, is because when two States are engaged in War, it would be dangerous for any other to pronounce on the Justice of their Cause, for that Means that State might quickly be involved in a War with other People; as the Inhabitants of Marselles argued in the Cause of

Chapter IV

19 Ego parvi non habe interpretationem siuis verbi video ut jura speculandae sint, sed illud aliquid, ut judicia spectet. Declam. CCLI. (See also Declam. CCCLXVI, in f.)

The Reader, upon this Subject, may see my two Discourses, De Legem permit., & Benefic, which are annexed to the fourth Edition of Pufendorf's De offic. Homin. & Civis.


405. (2) Seneca makes Pyrrhus say the fame Thing in one of his Tragedies:

Quaedamque luxit facere Vitii, liet. Troad. (Ver. 335.)

(1) It is not necessary to suppose here a tace Contest of Mankind, or an arbitrary Law of Nations, of which the Reality cannot be proved. We can produce very good Reasons, founded on the Law of Nature itself, and which take Place with regard to other Wars, besides those that are publick and declared in form, to which our Author without Reason confines the Impunity he speaks of. Let us suppose, that in the Independence of the State of Nature, thirty Heads of Families, inhabiting the same Country, but having no other Tye amongst them, than that of Neighbourhood or Friendship, which Neighbourhood might occasion; should form a League, and themselves to attack or repel a Body composed of other Heads of Families: I say, that neither during that War, nor after its being termined, those of the same Country, or elsewhere, who had not joined in the League of either Side, ought or could punish as Murthers or Robbers, any of the two Parties who should happen to fall into their Hands. They could not do it during the War: For that would be expouning the Quarrel of one of the Parties, and as they continued Neuter at first, they had evidently renounced the Right of intermeddling in what should pass in the War. And much less could they do it after the Conclusion of the War; because as the War could not be concluded without some Sort of Accommodation or Treaty of Peace, the Parties concerned were reciprocally discharged from all the Evils they had done to each other. This the Interest of human Society also required. For if tho' those, who continued Neuter, had however been authorized to take Cognizance of the Acts of Hothrift, exercised in a War of others, and to punith such as they believed to have committed unjust Offences, or to take up Arms on that account, instead of one War, two or more might have arisen, and proved a Source of Quarrels and Troubles. The more Wars became frequent amongst Mankind, the more it was necessary for their Tranquility, as well to avoid expouning rashly other People's Quarrels, as, when it was not judged proper to take Part in a War, to consider all that should pass in such a War, as authorized by the Right of Arms.

335. (2) The Establishment of civil Societies only rendered this Impunity the more necessary; because Wars then became, if not more frequent, at least more extensive, and attended with a greater number of Evils. There is nothing then here, which either requires the general Consent of Nations, or is peculiar to Wars made between two Sovereigms, and declared in form. The Effect in Qfrellion, is founded on one of the clearest and most general Laws of natural Right, and the Custom of most Nations, conformable to it, only renders the Practise of it more indispensible, since, as I have observed several Times, we are, and ought to be, deemed to conform to a known Custom, when we do not declare at a proper Time that we intend not to follow it. Our Author excepts the Wars against Robbers and Pirates: But he probably makes the Exception only with respect to them, as he has done above, in regard to the Right of appropriating to ourselves Things taken in War, § 12. of the preceding Chapter. Now, if those Robbers have not the Privilege of Impunity, it is because they are Robbers (as Demoffenes and the others, who called themselves Princes) and consequently People, whose Acts of Hostility are all manfully unjust, the declared Enemies of Mankind: Whereas in other Wars, it is often very difficult to determine which Side is in the Right; so that the Affairs of the modern States, in which the ancient Princes was, in our Time, by the Treaties and Customs of Nations, engaged in, are far more extraordinary than the preceding, and the Princes themselves, at this Day, are far moreo

2 Aequum ex aliocrate [legati Maffemlanius] haec, &c. CÆSAR, De Bellè civiis, Lib. I. Cap. XXXV.
War and Peace.

Cæsar and Pompey; that it did not belong to them, nor did their Forces permit them to determine, which had the juster Cause. Besides, even in a just War it is very hard by any outward Tokens to judge, which is the just Measure of defending ourselves, of recovering our own, or of exacting Punishment, so that it is far better to leave it to the Conscience of the Persons engaged in War to determine these Things among themselves, than to appeal to the Arbitration of others. The 

The Blood of an Enemy doth not stain
The Man who kills him.

Therefore the Custom of the old Greeks was, not to wash, drink, much lefs to perform any Acts of a religious Worship with him that was a Homicide (that is, 

bad killed a Man out of War) but it was lawful to do it with him that in War 

had slain his Enemy; and frequently to kill is called the Right of War. And 

Marcellus declares in Livy, Whatsoever I did among the Enemies, the Right of 

War defends. So does Alcian to the Saguntines in the same Author; But I think 

this is rather to be endured, than that you should be all put to the Sword; and 

suffer your Wives and Children to be dragged about before your Faces, by the Right of War. And the same Livy in another Place, relating the general Mafacre of the Alpens, adds, that it was done by the Right of War. And Cicero pleads thus for 

Deiotarus, But love could be suspected as your Enemy, who cannot but remember, 

that when you might have adjudged him to die by the Law of Arms, you made both 

him and his Son Kings. And for Marcellus, For when by the Right of that Victory 

we might have been all put to Death, we were preferred by your Clemency. And 

Cæsar tells the Heedus, That he bad out of his Mercy preferred them, whom by the 

Right of War he might have slain. And Josephus \(^{9}\) in his Jewish War, καὶ τὸν 

υἱὸν τὴν στέφανον, ἀλλὰ τὴν στέφανον φρίτι, τὰὶ ἐν ἐξέρχεσαι, calls it honorablie to 

die in War, but by the Right of the Conqueror, that is by the Hands of the 

Conqueror. And so Statius \(^{10}\).
And in his Epistles, 14 Those Things, which would be punished with Death, had they been done in secret and by private Authority, are commended, when done by Generals of Armies. And St. Cyprian, 15 It is a Crime when a private Person is guilty of Homicide, but when it is done by publick Authority it is called a Vertue; Crimes acquire the Right of War, because they do but little hurt, but because the Cruelty of them is carried to a great Excess. And a little farther, the Laws connive at Sin, and that is esteemed lawful, which is authorized by the State. Thus Laen- tius says, 16 that the Romans did lawfully injure others; and in the same Senten- cian, 17 Crimes were authorized.

VI. But this Right of Licence is of a large Extent, for it reaches not only those who are actually in Arms, and the Subjects of the Prince engaged in War, but also all those who reside within his Territories; as may appear from that form in Livy. "Let him, and all that live within his Country, be our Enemies. And no wonder, since we may apprehend Damage from them, which in a general and uninterrupted War is enough to justify the Right here spoken of, otherwise than in Reprials, which, as I have said, were first introduced after the manner of Taxes laid for the Payment of publick Debts. Wherefore we are not to be surprized, if, as Balbus observes, this Licence in War be much greater, than that in Reprials. And without doubt Strangers, that come into an Enemy's Country after a War is proclaimed, and begun, are liable to be treated as Enemies.

VII. But they who went thither before the War, are by the Law of Nations allowed a reasonable Time to depart, if they do not make 18 evil use, non de morte. Quis Jure Belli Polycen Pyr- rhus ocedet: Sed cur auxilia post petra? In Ancil. II. (Ver. 138.) SPARTANUS speaking of the Peripans, whom the Emperor Severus had caused to be put to Death, distinguishes those who had been killed by the Law of Arms: Multos pratera officii lici homine interveni, prater eos qui jus praelati absumit. In Vit. Sever. (Cap. XIV.) GROTIUS.

12 Nam in pace caufas & meritae spesleri, &c. Annu. Lib. I. Cap. XLVIII. Num. 3.
14 Jam primum omnium fatis cauflas, Trajae cauflas, in ceteras autem off Tragianos, dohini Enea Amoenoreque, & verseur juris heptis, & quos pacta, reddendoque Helena, jumpt autres fucrant, sone JUS BELLi Achinos abfinitiffes, Lib. I. Cap. I. Num. 3.
17 Jufque datum fecleri canimus— Phrafel. Lib. I. Ver. 2.
18 VII. (1) See BEmo, Hift. Lib. I. Cicero juftitates Ligurias for this Reason, that being in Africa before the Civil War, it was not in his Power to leave it when it broke out suddenly: [fertiam effe tempus, qua poft adventum Varii in Africa refulit Ligurias] quod eff criminum, necef- sitarum crimen 56, non voluntatis. An ille, ibi pariiffi illius aliis modo couderi, Ulicae patris, quam Romae, sun
Chap. IV.  WAR and PEACE.

1 Use of they are accounted Enemies. For thus the Corycians, before they laid Siege to Epidamnus, gave Notice to all 5 Strangers to depart, or else they should be reputed Enemies.

VIII. 1. But such as are really Subjects of the Enemy, that is, 3 from a permanent Caufe, if we repect only their Perfons, may in all Places be assaulted; be- cause when War is proclaimed against a Nation, it is at the same Time proclaimed against all of that Nation, as we have shewn above, in the Form of Denunciation. So in the Decree against King Philip, They did will and command, that War should be denounced against him, and the Macedonians under his Dominion. And he that is an Enemy may by the Law of Nations, be assaulted every where; according to Euripides 2.

Assault your Enemy where'er you find him.

And in Marcian the Lawyer, 3 Defersors, where-ever they are found, may be killed as Enemies.

2. They may then lawfully be killed in their own Country, in the Enemies Country, in a Country that belongs to no Body, or on the Sea. But that we may not kill or hurt them in a neutral Country, proceeds not from any Privilege attached to their Perfons, 4 but from the Right of that Prince in whose Country they are. For all civil Societies may ordain, that no Violence be offered to any in their Territories, but by proceeding in a judicial Way, as we have proved 5 out of Euripides 2.

If you can charge these Guells with an Offence, Do it by Law; forbear all Violence.

But 5 in Courts of Justice, the Merit of the Perfons is considered, and this promis- cious Licence of hurting each other cœdes, which I have said was granted among Enemies in Time of War. 6 Litoy relates that seven Carthaginian Gallies 4 rode in

To the late Mr. Coccetius, in a Diʃferation which I have already cited, De jure Belli in amico, § 23. rejects this Diʃferation, and is of Opinion, that even Strangers, to whom some small Time to retire has not been given, shou'd be deemed of the Enemy's Party, and thereby liable to juft Acts of Hostility. He himfelf afterwards distinguishes, to supply this pretended Defect, between Strangers, who continue in a country, and thofe, who only pass thro' it; or if they make any fta'y, are obliged to do fo either by Noficc, or the Necciffity of their Affairs. But even this, that Mr. Coccetius here, as well as in many other Places, has cenfured our Author without understanding him. In the following Paragraph, Grotius evidently distinguishes, from the Strangers he speaks of juft before, thofe, who are the Enemy's Subjects from a permanent Cauſe; by which without doubt he means, as the learned Gronovius explains it, thofe who are fet- tled in the Country. Our Author explains himfelf upon this Head, in Chap. II. of this Book, § 7. Num. 2. where he speaks of Repriſals, which he even grants against this kind of Strangers; whereas he does not admit them against thofe who only pafs there, or stay a few fhort Days in the Country. So that here is the precise Diʃference, which the Critic gives for new,
a Port belonging to Syphax, who at that Time was in Peace both with the Carthaginians and Romans, and that Scipio came that way with two & Gallies; these might have been feiz'd by the Carthaginians before they had entered the Port, but being forced by a strong Wind into the Harbour, before the Carthaginians could anchor, they durst not assail them in the King's Haven.

IX. 1. But to return to the Point in Hand, how far this Licence extends itself, will hence appear, in that the Slaughter of Infants and Women is allowed, and included by the Right of War. I will not to this refer the slaying of the Women and Children of Hejdon by the Hebrews, Deut. ii. 34. nor that they were commanded to do the like to the Cauaantiæ, Deut. xx. 16. and other Nations who were in the same Cafe with them. It was the special Act of GOD, whose Right over Men is far greater, than that of Men over Beasts, as we have proved elsewhere. That which is more proper to testify the common Custom of Nations, is that of the Pamlifi, Pful. cxxvii. 9. Blefed shall be be, that taketh and dafeth thy little ones against the Stones. Like to that of Homer.

When bloody Wars a wretched Land infects, The barren Infant suffers with the refl.

IX. (1) Quin commox cum Cananæis avt enoiffa, fays our Author: That is to fie, whom the Divine Vengeance had condemned to be utterly extirpated, as well as the seven Nations of the Cananities. Such were the Midianites, Numbers xx. 2, the Amalekites, Exodus xvii. 14.

2. Josephus speaking of the Amalekites fays, that King Saul caused them all to be put to the Sword, without sparing either Women or Children of Numantia. See 1 Samuel xv. 5: not believing, adds he, that he acted too cruelly in that respect; first because they were Enemies whom he treated in that manner, and next because what he did was by the Order of GOD, which he could not disobey without Danger.

When bloody Wars a wretched Land infects, The barren Infant suffers with the refl.

[1 Lib. 7. c. 20.
2 De Exod. Alexander 1. 1. c. 8. in fin.

Ⅲ. 3. I find nothing in Josephus, from whence it can be so much as inferred that Titus made the Jewish Women and Children encounter wild Beasts. On the contrary, that Historia fays, after the taking of Jerusalem, Titus caused all those to be fed, that were under seventeen Years of Age. De Bell. Jud. Lib. VII. Cap. XVI. in Lat. (XLV. in Graece). p. 968. C. Our Author has copied this from ALBÉRICH GENTILIS, De fure Belli, Lib. II. Cap. XXI. p. 425. But the latter alleges no Authority except Cardan's, a very inaccurate Author, who declaims on that Head against Titus in his Encomium Nervis. The Words of the latter are Perunmus ergo ad illas hominum generis delicias, Titus, Neronique comparantur, qui usque postulat uti aequus quisque natus, et multis, fersi dilectioris expolit. Altor auctor amicus IOSEPHUS: Ne quiaquam ex fide decedere credas. Vol. I. p. 205. Opp. Edit. Lond. 1663. 2

Custom.
Chap. IV.  War and Peace.

Custom. No wonder then if old Men were also killed, as Priam by Pyrrhus. _Æneid. ii._ 550. & seq.

X. 1. Neither were Prisoners exempted from this Licence; _Pyrrhus in Seneca,_ according to the Custom at that Time, pleads thus:

> Lex nulla capio parcit, aut parum impedit.

No Law commands to spare the captive Slave, Or does forbid to punish him.

In the _Ciris of Virgil,_ this Licence is called the Law of War, and that even with respect to captive Women; for thus argues Scylla:

> At bello fatem captivam hege necelles.

By Law of Arms your Captive you might kill.

The Paffage of _Seneca_ just mentioned speaks of a Woman, namely Polyxene, who was to be killed. Horace advices,

> Vendere cum possis captivum, occidere noni.

Forbear to kill the Captive, thou canst fell. Creech.

For he supposes it lawful to kill him. And Donatus derives the Word _Servus_ (a Slave) from a Verb that signifies to preferre, _because_ says he, a Slave is a Person whose Life is preferred, which by the Right of War ought to have been taken away. Ought, is an improper Expression, for it was lawful: So the Prisoners taken at Epidamnum were killed by the Corcyreans, as Thucydides relates, and 5000 Prisoners by _Hannibal_. And in Hirtius, a Cæsarian Captain in the _African War_ thus addreftes Scipio, _I_ return you Thanks, that you have been pleased to engage your Word for my Life and Safety, being _Prisoner_ by the Right of War.

2. Nor is this Licence of Killing our Captives confined to any Time, by the Right of Nations, but it is restrained more or lefs in some Places, by the particular Laws of each State.

XI. We meet also with many Examples of Supplicants that have been slain, as by _Achilles_ in _Homer, of Mago,_ and _Turnus_ in _Virgil;_ which are not only recorded, but also justified by the Right of _Turnus._ St. Augustine commending the _Goths,_ for sparing Supplicants, and those that had fled for Refuge to Churches, acknowledges, That which by the Right of War they might do, they thought unlawful for them to do. Neither are they always received to Mercy, that beg it; witness

> Per patriam manes, per focem fortes illi,
> Te pecus, hunc animam, inanes matris patrique
> By young Iules, by thy Father’s Shade,
> O spare my Life, and send me back to see
> My lingering Sons, and tender Progeny! _Dryd._

(Ænud. Lib. X. Ver. 524, 525.) The Emperor _Otto_ caused 70,000 _Scythians_ to be put to Death, whom he had taken Prisoners, as _WITHE_ Informes us. _Anal. Lib. II._ _Grotius._

2 _Trito._ Ver. 333.

> Ver. 446.
> 4 Lib. I. Epist. 69.
> 5 Servi [ _sic_ ] etiam, statim etiam vita, summa, et uti socii, spectat, uti huic. In _Tert._ _Adelphi._
> 6 Et a M. Brutus non pauci. And _M. Brutus_ also put many to Death. Thefe Words, which were in the _first_ have disappeared, I know not bow, in all the Subsequent Editions; nor the Citation from _Dion Casius._ _Lib. XLVII._ where the _fact_ is, _p._ 405. _D._ is continued in the Margin. They could not have been struck out deliberately by our Author, who had no Reason to retract a Fact well applied.

7 Pro tua inquit, famnones beneficis, _Scipio._ 6cc. _De bell._ _Afric._ Cap. _XLV._

XI. (1) See the _T.L._ _Ad._ _Lib. XX._ 465. & seqq. _Lib. XXIII._ Ver. 73. & seqq.

2 The Paftage, that regards _Adag._ has been given in _Note_ i. on the foregoing Paragraph. That in Relation to _Turnus_ is in _Ænud._ _XII._ 930. & seqq.

3 Quod abit juris bello licet, _Scip._ _De Civ._ _Dei,_ _Lib. I._ Cap. _I._

7 E
Of the Rights of the Greeks, who served the Persians at the Battle of the Granicus. And the Upenence in Tacitus begging Quarter, which (he says) the Conqueror's denied, but let them die by the Law of Arms. Observe here also the Right of War conferred by that Author.

XII. Neither do they always find Mercy, that surrender without any Condition, but are often slain, as the Princes of Pemetia by the Romans, the Sammites by Sylla, the Numidians, and the Tuscigenitoxir by Caesar. Nay, it was almost the constant Custom of the Roman on the Days of their Triumph to put to Death the Commanders of the Enemies, as Cicero tells us in his fifth Oration against Verres. Livy in his 28th Book, and elsewhere. Tacitus in his 12th Annual, and many others. And the same Tacitus informs us, that Galba called the tenth Man to be killed of those, whom upon Submission he had received to Mercy; and Cestius upon the Surrender of Aventicum, called Juliani Alpinus to be slain, as the chief Promoter of the War; he left the reit to either the Mercy, or Cruelty of Vitellius.

XIII. 1. Historians sometimes set down the Reason of this Cruelty, of the Enemies, especially to Captives, and Suppliants, as either by way of Retaliation, or because of an obstinate Defence. But these are rather Motives, than justifying Causes, as I have distinguished in another Place. For just Retaliation (properly so called) is to be executed only upon the Person of the Offender (as has been already said, when we treated of the Communication of Punishment.) But on the contrary, in War this Right of Retaliation is often exercised upon the Innocent. This Custom is thus described by Diodorus Siculus, The Chance of War being equal on both Sides, neither Party can be ignorant, that if they be vanquished, they must suffer the same themselves, which they intend to their Enemies. And in the same Author, Philostratus the Phycian General, Diverted the Enemies from an Infelent and cruel Revenge, by treating in the same manner fieb of them as fell into his Hands.

2. But there is no Man will judge an obstinate Adherence to our Party punishable, as the Neoplatonists alleged to Beltrarius in Procopius; especially if we were engaged therein either by a natural Obligation, or by an honest and deliberate Choice. It is so far from being a Crime, that on the contrary it is reckoned one if

4. Our Author cites Nobody here, and would I believe, have found it very difficult to have alleged any Authority for this Fact, with which his Memory supplied him. Alexander the Great's Historians say nothing like it. That Conqueror sent the Greeks that were taken at the Battle of the Granicus into Macedonia to work as Galley-Slaves. See Arrian, De expedit. Alexander. Lib. I. Cap. XVII. and at the End of this Book.


XII. (1) Of rather the principal Perfoms of the Aureus, to whose Party this Latin Colony had gone over. Livy, who relates this Action, con- demns it at the same Time: Ceterum nihil minus quin delitos fam, quin captus foret. Aunantinus provinflis principes ferici procibus; ob coram venientem calo dii, &c. Lib. II. Cap. XVII. Num. 6.

2. I find nothing of this Kind in Relation to the Sammites, either in Putharch or APOLLANUS ALEXANDRINUS. Our Author has followed ALBERICUS GENTILIS in this Place, without examining his Authority, De Jure Belli. Lib. II. Cap. XVII. p. 364. This appears from his citing, as he does. DON. Lib. XLV. instead of XLIII. A Citation that relates to the Example of the Numi- dian, and not as our Author thought, to that of the Sammites, for which the Civilian, whom he copies, quotes no Writer. The latter probably had in this Thought, what Sylla did to the People of Antennae, a City of the Sabines, but not without notorious Perjury, since he had promised them their Lives. PLUTARCH, in Vit. Syl. p. 473. D. Pol. I. Edit. Wechal. So that the Example is misap- plied.

3. See Cicero, Lib. V. in Verr. (Cap. XXX.) LIBY, Lib. XXVI. (Cap. XIII. Num. 14.) and Cicenius in Tacitus, Annal. Lib. XII. (Cap. XIX. Num. 3.) There is an Example of the same Kind in the Chronicle of REGINUS, upon the Year 905.

4. Galba upon making his Entrance into Rome, ordered those who had surrendered to him to be de- comed: Hierov autem magno, quibus rector rerum, frumentum introiit, &c. Both Galba, victoriam, quum in oculis Urbis decimari delitos jurore, quos decrepantem in fellam accepit. TACIT. Hist. Lib. I. (Cap. XXXVII. Num. 3.) Syrsatis, decratis omnibus, Aventicinum, gentes capti, &c. Ibid. (Cap. LXVII. Num. 5. 6.)

XIII. (1) Lib. XIV. Cap. XLVII. p. 421. Edit. H. Steph. The other Paraflage is in Lib. XVI. Cap. XXXI. p. 525. See also what the fame Histo- rian says in the Epitome of Mr. Peirescius, in regard to Spoudiae, and Amicul Boreas, (p. 277.)

2. It was not the Neoplatonists, who made this Anfver to Beltrarius, but two Advocates, PAGUS and Achelopanther, facts thus to the Gods and Neu- politians, Lib. I. Costei. Cap. VIII. Our Author has again in this Place relied upon ALBERICUS GENTILIS, who expreffes himself preficely in these Terms, Lib. II. De jure Belli. Cap. XVI. p. 345. 346.

A Man
Chap. IV.

War and Peace.

A man quits his post, especially by the law of the ancient Roman discipline; for in this case they rarely allowed any excuse, were the fear or danger never so great. 1 Livy says, to deport a post was capital among the Romans. Every one therefore may use this rigour to his own advantage, and this rigour is justified before men, by that right of nations, which we now treat of.

XIV. This right also reaches to hostages, not to them only, who freely give themselves as pledges by a sort of agreement, but also those who are delivered up by others. 250 hostages were slain by the Thessalians, and 300 of the Volsci, Aurunci by the Romans. And we must observe, that sometimes children were given as hostages, as we may learn from the Partibus, and from Simon Macrobius, and sometimes women, as by the Romans in the time of Torquato, and by the Germans in Tacitus.

XV. As the law of nations permits many things, in the sense we have explained, which are forbidden by the law of nature, so it prohibits some things allowed by this law of nature. For if we respect the law of nature, when it is permitted to kill a man, it signifies not much, whether we do it by the sword or poison. I say the law of nature, for indeed, it is more generous to attempt another man's life in such a manner, as to give him an opportunity of defending himself, but we are under no obligation to use such generosity towards those who desire to die. But the law of nations, if not of all, yet of the more civilized, allows not the taking the life of an enemy, by poison; which Cutilon 2 was established for a general benefit, lest dangers should be increased too much, since wars were become so frequent. And it is probable, that it was first introduced by kings. For if their life be more secure, than that of others, when attacked only by arms; it is, on the other hand, more in danger of poison, unless protected by a regard to some sort of law, 2 and the fear of disgrace and infamy.

3 Praefidis decedere, apud Romanos, capital est. Liv. I. Lib. XXVIII. (Cap. XXXVII. Num. 9.)
See also Polibius, Lib. I. (Cap. XVIII.) and Lib. IV. (Cap. XXXV.) Grotius.

XIV. (1) Tacitus, whom our author cites here in the margin, speaks only of the children of kings in general, without saying whether young or old: 1 Lib. Regum libros libris dare [Parthis] &c. Annal. Lib. XII. Cap. X. Num. 5. He says else where, portum pridem, Lib. II. Cap. I. Num. 2. In the itaage of the Magi, there is only icta. However as the term is general, nothing hinders its including young children, whom their tender age and innocence are more dear to their parents, and thereby more proper to serve as Sureties to thowe, who demanded or received them for hostages. This may be inferred almost with certainty from a passage in Strabo, quoted by Justus Lipsius: For we find there, that Parthian King of Parthia gives Titus, Governor of Syria for the Romans, four of his legitimate sons as hostages, with two of their wives, and four of their sons. Geograph. Lib. XVI. p. 1035, 1036. Edit. Amst. (1748. Edit Caius. Par.) For in this number them must have been some children very young. But the following are express authorities. Struclius informs us, that Caligula in one of his ridiculous diversions, placed himself upon a chariot in the habit of a coachman, and set an infant, named Dorius, before him, who was an hostage of the Parthenians; Polibius quadragesimo, curriculoque ingestum famulos equorum, praefos faceret Darium Puerum, ex Parthorum obdubius, &c. Vit. Calig. Cap. XIX. The same historian speaks elsewhere of certain hostages, probably given by some People of Germany, whom Caligula ordered to be taken from School: Rexibus obidibus quadraginta et iterum laudes, &c. Cap. XLIV. But it is also known that the famous Gellia, having the choice amongst all his hostages, chose the Roman, obtained Liberty for those, who were not arrived at the years of puberty: Produttori umebus eligisse Impuberes dicturus, &c. LIVY, Lib. II. Cap. XIII. Num. 10.

3 Our Author cites here the fourth book of Tacitus's History in the margin, where I find nothing to this effect. The Passage is in the Description of Germany, where the Historian says, that those people believed themselves more strongly obliged, when they gave Mius of illustrious birth as hostages: Alter ut efficacius obligaret animi Civitatum, quibus inter obidibus paucio quoque nobilis imperaverat, Cap. VIII. Num. 2. He adds, that the Germans imagined most women to have a spirit of Prophecy: And he speaks else of this in the fourth book of his History, Cap. LXXI. Num. 4. that probably made our author confound the two Passages in his memory.

XV. (1) Without this general Confiance, which it is more easy to suppose, than prove; it suffices to say, that, it being the custom among nations at variance with us, not to make use of poison against an enemy, we are supposed to comply with it, when on beginning a war, we do not declare, that we are at liberty to act otherwise, and leave it to the enemy's option to do the same. This tacit and particular Convention is too much the more real, as Humanity, and the interest of both parties, equally require it; since wars are so frequent, and often undertaken upon false pretences, especially since the Mind of Man, ingenious in inventing Means to do harm, has so much multiplied those, which are authorized by custom, and considered as honest. See upon this Head Mr. Griner, Professor at Wittenberg, in his Princpia Jurisprudentiae Naturalis, Lib. III. Cap. IX. § 3.

The Senators, or rather the Consuls, C. Frabricius, and C. Emelius, in the letter they wrote to inform Pyrbus, that one of his People had offered to poison him, say, that it was not for his sake they gave that information, but that they might not incur the Infamy of having caused him to be destroyed in that manner. [Plutar. Ch. in Vit. Pyrb. p. 396. C. Vol. I. Edit. Weber.] Grotius.
2. Livy speaking of Porfius, 3 calls it a clandestine Villany. Claudian of the Offer of Pyrrhus's Phycian to poison him rejected by Fabricius, 4 calls it an abominable Action; and Cicero 5 hinting at the same Story terms it a Crime. It concerns the common Interest of Nations, that no such Examples be given, 6 say the Roman Consuls, in their Letter to Pyrrhus, which Gallius recites out of Cl. Quadragirius; and Val. Maximus 7 observes, Wars should be waged by Arms, not by Poison. And Tacitus 8 relates, that when the Prince of the Catti offered to poison Arminius, Tiberius refuted it, imitating by that glorious Action the Conduct of antient Generals. Wherefore 9 they that hold it lawful to poison an Enemy (as Bals tus 9 did upon the Authority of Vegetius) do regard the mere Law of Nature, but over-look that Law which is established by the Consent of Nations.

XVI. Somewhat different from this manner of poisoning (as having something of open Force in it) is to poison the Heads of Darts, and thereby force Death a double way, which Ovid lays 1 was much practis'd by the Greeks, 2 Lucae by the Partihians, and Silius by some of the 3 Africans, and Claudian particularly by the 4 Ethiopians. But this also is 5 contrary to the Law of Nations, tho' not of all, yet of the European, and others civilized like them, which is rightly observed by Jo-annes Salisberiensis, 6 whose Words are these: Neither do I find the Use of Poison allowed by the Law, tho' sometimes practis'd among Infauls. Therefore Silius calls it, 7 to render Arms infamous by Poison.

2. So also the empoisnong of Springs (which cannot be concealed, or at least not long) Florus declares to be contrary not only to the Cuthon of the antient Romans, but also to 8 the Laws of the Gods; for the Antients frequently ascrib'd to the Divinity the Rules of the Law of Nations, as I have elsewhere observ'd; neither should it seem strange, that there are such tacit Agreement's among Nations, in order to lefien the Dangers that attend Wars, when of old it was agreed between the

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3. Haec ad ea, qua ab Eumene delata avunt, acceptisse, qua maturus fuitis Priscus judicaretur. Quippe, quem non jutum modo adparare bellum regis animis, sed per omnia CLANDESTINA graffari SCLEPRAI latriciniamus ut VENEFICIORUM coram habant. Lib. XLLI. Cap. XVIII. Num. 1.

4. ——— Bellumque negavit [Fabricius]
Per famuli patruar Nefas.


8. The Paflege has been recited above, Chap. I. § 20. Note 31.

9. That Lawyer would, I believe, have found it very difficult to point out the Paflege of Vegetius, where he pretend to have read this: As ALB RICUS GENTILIS has already observ'd, De Iure Bell. Lib. II. Cap. p. 256.

XVI. (1) They made use of the Gall of Vipers. Ovid, who tells us this, calls it giving Death two Ways with one Wound:

Quo mixtus faveo gemenium ut valuerit caussas,
Omnia viperum specula felle fiant.


2. Spicula nec solius fargunt [Parchii] fidentia fero
Stridula sed multo fortare tur telo ueneno.
Pharus. Lib. VIII. Ver. 303, 304.

3. The Nations:

Tempora multiplici nos off[Nubis] defendere longin
Et lina munere laxis, feteraque factis
Spicula diriger & ferum infanum venenum.

SILIUS ITALIC. Lib. III. Ver. 271. & seq. NICHOLAS HEINISIUS reads infanum venenum.

4. Sed didicit non Ethiopum geminata venenis
Vulnera——


5. Therefore Ius Meromerides denies Poison to

Uffes for his Darts.

'Empi a fabrique venenum et inaequale.'

He judg'd the immortal Gods.


7. In the Veres quoted above, Note 3. upon this Paragraph.

Where he speaks of a Roman General, who had poisoned the Springs, to oblige some Cities to surrender: AQUILIANI habere reliquias conferuit, mixtis (nempe) venenum fustibus ad deliberatam qua-rundam urbiam. Quae res, ut maturum, lice infin-mem faci vel victoriam: Quippe quem contra FAS DEUM, MONEQRE MAJORUM, miscremibus imperat, in id tentum, in sequentem Romanorum arma vinnifi.

Lib. II. Cap. XX. Num. 9. See ut.

4. Chalcidians
Chalcedians and Eretrians during the War, πολέμοι τάξις, Not to make use of Dory.

XVII. But it is not the same, when Waters are (without Poison) so corrupted, that they cannot be drunk, which Selden, and the Amblydytiones approved against the Barbarians. Oppianus, of Fithing, declares it was commonly done in his Time; it being, in Effect, the same Thing as if the Current of a River were turned, or "The Vein of a Spring cut off", which, by the Law of Nature, and the general Consent of Nations, are allowed.

XVIII. 1. But it is frequently disputed, whether the Law of Nations permits the lending one privately to kill an Enemy. But to explain this, we must distinguish between the Perpons sent; whether they violate their Faith, given expressly or tacitly; as Subjects to their Prince, Vassals to their Lord, Soldiers to their General, Suppliants, Strangers, or Defectors to them that have entertained them; or whether the Perpons sent owe no Faith to him against whom they are employed. Thus Pepin Father of Charlemagne, attended with only one of his Guard, paused the Rhine, and killed his Enemy in his own Chamber. Which Polybius relates was attempted by Theodotus, an Etruscan, against Prokom, King of Egypt, in the same Manner, calling it, οὐκ ἄνωτερον τολμᾶτιν. An Act of Bravery. Such was that famous Enterprise of Q. Matius Scævola, which he himself thus defends, I being an Enemy would have killed an Enemy. Porfena himself acknowledged this to be an Act of great Valour. Valerius Maximus calls it, A commendable and gallant Resolution; and Cicero praises it in his Oration for P. Sextius.

2. For to kill an Enemy any where is allowed, both by the Law of Nature and of Nations (as I have said already) neither is it of any Concern, how many or how few they be who kill or are killed. 600 Laelcdemonians with Leonidas b and Trojan, marched through the Enemy's Camp to the King's (Xerxes) Pavilion; The same might have been done by fewer. There were but a few that circumvented Marcellus e the Confud, and flew him; but a few had almost killed Petillus Cerialis d in his Bed. St. Ambrose commends Etasaff, that affaulted a mighty Elephant, higher

9 This the Geographer proves from a Column, upon which in his Time remained the Articles of the Conventions, lto People had made with each other in Relation to Hostility. Lib. x. p. 688. B. (44th. Edit. Parif.)

XVII. (1) By dead Bodies or Lime; as Belisarius did during the Siege of Antioch according to Procopius, Guttus. Lib. II. (Cap. XXVII.)

Grotius.

2. The Turks did the same at Dinávola, as Nicetas tells us in the History of Alexis, Brother of Ifnac, Lib. I. (Cap. IX.) See other Examples in Òtheo Eringenus, and the Poet Guntner, in Ligurian. Grotius.

3. During the Siege of Cirhra or Crisra, a City of Phoci, Sclav advised the Amblydytiones to turn off the River Pithis, which ran through the City; after which he caused the Roots of Hel-lebore to be thrown into it, and then ordered the Waters to be brought into their ancient Channel. The People of Cirhra, having drank of them, were seized immediately with a Diarrhœa, which obliged them to leave their Walls undestroyed, so that the Place was taken. This Psautias relates, whom our Author quotes in the Margin, Lib. X. or Philae. Cap. XXXVII. p. 355. Edit. Soc. Wecht. See also Pouthain, Strategem. Lib. VI. Cap. XIII. Our Author quotes also in the Margin, besides Frontius, Strateg. Lib. III. Cap. VII. Num. 6, the O-rator Achaeines, Orat. de male uti Legat. The Passages he had in his Thoughts, was probably the Article of the Oath of the Greeks, by which they engaged not to destroy any City, that fent Members to the Council of the Amblydytiones, and not to deprive them of the Use of any running Water, either in Time of Peace or War; which implies, that otherwise it might be done against an Enemy. p. 262. A. Edit. Bath. 1572.

XVIII. (1) This is related after Albericus Gentiles, De Juris Belli. Lib. II. Cap. VIII. p. 274, who cites Bonfianus, Rerum Hungar. I. 8. in the Margin.

2. Lib. V. Cap. LXXXI.

3. He wished to have such brave Men on his Side, uxorum esse virtute offere, et pro mea patria vsus virtutis illustr. Lib. II. Cap. XII. Num. 14.


* The Emperor Valens promised a Reward to whoever brought him the Head of a Scythian, upon which they made Peace with him; as Zosimus tells us, Lib. IV. (Cap. XXII. Edit. Colar.)

Grotius.

This is not very exactly related. See the Passages in Zosimus.

6. Ofle Lib. I. Cap. XL. And Josephus, Antiq. Hist. XV. There is a like Action of Theodosius against Eugenius, in Zosimus, B. IV. of the Goths against the King of Persia, in Ammianus, of ten Perions against Julian, in Ammianus, XXIV. and Zosimus, III. of Alexius Comnenus against Torius, in Nicetas Chronicatas, B. IV.,
higher than all the Rest, supposing the King had fat upon it. Neither are they only that make these Attempts, but also they that employ them, excusable by the Law of Nations. * Those antient Roman Senators, such religious Observers of the Laws of War, were esteemed the Authors of that gallant Attempt of Scipio.

3. It is to no Purpose to object, that such Men, being taken, are commonly put to exquisite Torments; for that is not because they violate the Law of Nations, but because, by the same Law of Nations, any Thing done against an Enemy is lawful, and every one is more or less severe as he judges it proper for his Interest. For so are Spies used, yet it is held lawful, by the general Consent of Men, to send such, as Mofes did, and such was * Jofuba himself. (καί τὸς καταρακτὸς Σπέις, *It is the Custom to kill Spies, said ? Appian) and that justly sometimes, by such as have manifestly a lawful Cause to make War, by others with Impunity, which the Law of Arms grants. But if there be any * that will not make Use of such Service when offered, that is rather to be attributed to Magnanimity, and the Confidence of one's own Strength, than to an Opinion of its being unjust.

4. But the Case is otherwise of those Aflaffins who act treacherously, for they not only transgress the Law of Nations, but also those that employ them. For tho' in other Things, they that make Use of wicked Instrumants against an Enemy, may be reputed guilty before God, yet not before Men, that is, they have not offended against the Law of Nations; because,

* See Cramer. Rev. Polem. 1. 5
* p. 113, Edit. Buhl.

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De Magnud; of the Bulgarians against the Em-
peror Nicæphorus, in Zonaras, (Vol. III. in ni-
cephor.) Grotius.

It is not Alexius Comnenus, but Andronicus, that
Nicetas Choniates speaks of. The Fact is in
Chapter IV. of the Book referred to.

Steph.)

8. This is a Verfe from Plautus's Trinumm.
Act. IV. Scen. III. ver. 36.

9. Upon a different Subject; for he speaks of
those that by Sale Hopes deceive an avaricious
Person, who wanted to get their Estates. * Alii con-
tra hanc iuram laudabili formant, quod fæc. frugifruit impre-
bare fæpum boniunum; quos fæ decipier, pro moribus tem-
porum, præterea of. Epit. VIII. Num 3.

10. Ziegler accuses our Author here of con-
tradicking himself, and what he had advanced a-
bove; at the End of the first Chapter of this Book,
§ 21. 22. And it must be confidcred from the Manner
in which our Author expresses himself in this Place, that he seems to give Room to think, ei-
ther that it is always unlawful by natural Right to
make Use of a Traitor, for obtaining some Advantage,
or committing some Act of Hostility against an
Enemy; which is contrary to the Distinction he
makes in the Place referred to; or that the Law of
Nations, of which he speaks, as forbidding the
Aflillation of an Enemy by the Hand of a Trai-
tor, regards only those who have fallicited him to
Traitorion, and not those who have taken the Ad-
vantage of the Traitor's Disposition, who volont-
tarily offered himself, which would be unwarrant-
able; for those Nations who have held the former
unlawful, have also condemned the latter. How-
ever I do not think our Author has either changed
his Opinion, in regard to his Distinction, upon
which he reasons again elsewhere; or that he in-
tended to refrain the Rule of his arbitrary Law of
Nations. But here an Inaccuracy of Expression has
lipt from him, which he has overlooked, I
know not how, even in his Revisals of this Work.
Wherefore when he says in this Place, that * It's for
against GOD, and violate the Law of Nature,
when we make Use of wicked Instrumants against an
Enemy, and employ the Arm of a Traitor to dispa-
thb him; this should be understood according to the
Distinction I have mentioned, of those only who
themselves seek for such Means, and solicith Per-
fons to commit Traitorion; that, perhaps, would
never have entertained such a Design, without the
Allurement of the Rewards promised, or even given
them beforehand. As to the Thing itself, this in
my Opinion may be said, I. There are two Points
to be distinguished: The one, whether the Enemy
himself be wronged, against whom the Traitors are
used: The other, whether, tho' he be not wronged,
something bad however be committed. It seems
to me, that admitting the War to be just, no
Wrong is done the Enemy, whether we take Ad-
vantage of the Opportunity of a Traitor, who freely
offers himself, or whether we seek for it, and
bring it about ourselves. The State of War into
which the Enemy has put himself, and which it
was in his own Power to prevent, permits of itself
all Methods to be used against him; so that he has
no Room to complain, whatever is done. Besides,
we are no more obliged to regard the Right he
has over his Subjects, and the Fidelity they owe
him as such, than their Lives and Fortunes, of
which we may deprive them by the Right of War.
II. I believe, however, that a Sovereign who has
the least Tenderness of Confidence, and is con-
vincenl of the Justice of his Cause, will not ende-
vour to find out treasonable Methods, in order to
fofbuce his Enemy, nor eagerly embrace such as
may
Nature, but also of Nations. This is plain from what Alexander 11 wrote to Darius, 'To wage impious Wars, and that you carry Arms, you set a Price upon your Enemies Heads.' And again, 'You do not observe towards me 12 the Law of Arms. And in another Place, I ought to pervert him to Death, 13 not as a just Enemy, but as a Poisoner, and an Assassin.' And to this we may refer that of Livy, 14 concerning Perseus, He does not wage a just War like a Prince, but uses all base and clandestine Villainies, like Thievess and Poisonders. And Marcus Philippus, of the same Perseus, 15 All which, how bateful they were to the Gods, he would find by Experience. And also Valerius Maximus, The Murder of Viriatus, 16 had a double Perfidiously, the one in his Friends, who killed him; the other in Q. Servilus Capio, the Conful, who was the Author of it, by promising Impunity, and who thus bought the Victor, instead of gaining it by open Force.

5. Now the Reason why this is not allowed, as in other Cases, is what we gave before in the Case of Poison, to lessen the Dangers attending those who are at War, may offer of themselves to him. The just Confidence which he may have in the Protection of Heaven, his Hopes of Perfidy, the Fear of making himself an Accomplice of it, and of getting a bad Example, which may fall again upon himself and others, who have not deferved it; will make him either despise, or not accept without Regret, every Advantage he might propose to hinder the Safety of a Man. III. This Means cannot even be considered as a Thing of which the Life is always innocen, in regard to the Person who employs it. The State of Holiility, which dispenses with the Commerce of good Offices, and authorizes to hurt, does not therefore disable all Ties of Humanity, nor remove our Obligation to avoid as much as possible, the giving Room for some bad Action of the Enemy, or his People, especially those who of themselves have had no Part in the Occasion of the War. Now every Traitor undeniably commits an Action equally infamous and criminal. For it is absurd to think, as the late Mr. Titius has ventured to do, (Observ. in Puffendorf, DCCli) with a periphrasis; that admitting the War to be just on the other Side, he who betrays his Prince, does not commit a real Act of Perfidy; because, for Instance, the Party in whose Favour he affinates him, had a Right to kill him. This, I say, is unwarrantable; for a Subject indeed ought not to forse his Prince in a Way manifestly injurious; but he is not therefore authorized to side with the Enemy; and the Injurioue of a Prince towards Strangers, does not discharge his Subjects from the Fidelity they owe him. So that I believe, with our Author, we can never, in Conscience, believe, or folcying, the Subjects of an Enemy to commit Trespass, because that is actually and directly inciting them to commit an abominable Crime, to which, otherwise, they might never have proceeded of themselves. IV. The Cause is different when we only take Advantage of the Occasion, and the Difpositions we see in a Perfon, who did not want solicitious to commit Trespass. Here the Infamy of the Treachery does not re-bound upon him who finds it entirely formed in the Heart of the Traitor. This Traitor, from the Moment he conceives within himself the Design of committing Trespass, may be deemed to be as criminal as when he has actually committed it.

Num fecit intra se tacitum qui cognitum album, Facit crimine habet —

This Maxim would not be well applied in other Respects, I confess; but that is because, excepting these Cases between Enemies, there is none, in my Opinion, where the Thing, in regard to which we make our Advantage of the bad Dispositions of others, can be of such a Nature, that we may lawfully and innocently do it ourselves. Upon the Whole, after the Reason alleged, we are not to take Advantage of a Trespass which offers itself, unless it be to obtain some considerable Advantage, or to avoid some greater Danger; in a Word, from a Kind of Necelilly. V. What I have said, regards the Law of Nature, in Respect to the Law of Nations, of which our Author speaks, and which, at Bottom, is no more than the Cautious of several Nations, tho' that Caution has nothing obligatory of itself, yet, if the People with whom we are at War, look upon the very Acceptance of the Offers of a certain Sort of Perfidy as unavailing, as to affiliate, for Instance, one's Prince or General, we tacitly submit to it, in the Manner, and for the Reasons, mentioned above, § 15. Note 1.


12 Utpote qui ne bellis quidem in me juris fueraverint. Ibid. Num. 13.

13 Ferum enim, quam modo militibus mexit literis ad priditionem, modo amicis, &c. Lib. IV. Cap. XI. Num. 18.

14 The Passage has been quoted before, § 15. Note 3.

15 Ex amico quam Dii insipius efficit, inlorum in eum rectum juvarum. LIVE, Lib. XLIV. Cap. I. Num. 11.

16 VIARIUS citius cedat, &c. Lib. IX. Cap. VI. Num. 4. The Author De Viris illustribus, [who is believed to be Aurelius Victor] says, that the Senate did not approve this Victory, because it had been bought, Vix victoria, quia emita erat, a Susanu non probo. Cap. I.XXI. in fin. According to Eutropius, the Murderers of Viriatus having demanded a Reward of the Conful, he answered them, that the Romans had never approved the Conduct of Soldiers who killed their General. Quam interfectores quia praemium a Capite Condiute peterent, responsum habet, numquam Romanis placuisse, Imperaturum a suis militibus interfecerint. (Lib. IV. Cap. VIII. Edit. Cellar.) There seems to be Reason for supposing a Word in this Passage, a Capitale Condiute promissum. AMMANNUS MARCELLINUS disapproves also the Affiliation of Sertorius, committed at a Feast by Pamphina, his Lieutenant. Lib. XXX. (Cap. I. in fin.) GROTIUS.

It does not appear from other Authors, that the Conful Capio had promised a Reward to those who killed Viriatus. So that the Text of Eutropius is not faulty. especially
especially Perions of the 17 most distinguished Rank. Eumenes (in Justin) said, He could not believe, 18 that any Commander would fo defire to conquer, (viz. by hiring to kill his Enemy) as to set fo bad an Example against himself. And in the fame Author, when Bessus had affalinated Daricus, it is said, It was not to be endured for Example’s Sake, and that it was the common Coufe of all Kings. And OEdipus, to justify the Killing of King Laius, says, in Sophocles,

20 Κίνη τ' ἐργασαίνειν καὶ ἀμανίνων ὀφθαλμοῦ.

Affrighting him, I also help myself.

And in Seneca, on the fame Subject,

53 Regi tuenda est maximè Regum fatus.
Kings should, in Honour, for their fellow Kings.

And the Roman Confuls, in their Letter to Pyrrhus, It concerns the common Interes of Nations, that we endeavour your Safety.

6. In a folemn War then, and among Kings that have a Right to denounce a folemn War, it is not allowed: But where there is no folemn War it is accounted lawful, by the fame Law of Nations. So Tacitus 33 declares the Plot againft the Life of Gannafius, was not difhonour, because he was a Traitor. Curtius faid, the Treachery of Spianemes 24 to Bessus was the lefs odious, because no Perfidiances feemed unjust againft a Murderer of his Prince. Thus Treachery towards Robbers and Pirates, tho’ it be not altogether blameless, yet is not punifhed amongst Nations, in Deteftation of those againft whom it is committed.

XIX. 1. The Raising of Women is fometimes permitted in War, and fometimes not. They that permit it, regard only the Injury done to the Body of an Enemy, which by the Law of Arms they think fhou’d be Subject to all Acts of Hoftility. But others, with more Reason, look not to that Injury alone, but also to the Act of Brutality, which being neither necceffary for the Security of those who commit it, nor proper for the Punifhment of those againft whom it is committed, should be as much punifhed in War as in Peace; and this laft is the Law of Nations, if not all, yet of the moft civilized. So Marcellus, before he took Syracuse, is recorded to have taken particular Care to preserve the Chriftians, even of his Enemies. Scipio (in Livy) faid it concerned his own Honour, and that of the People of Rome, 2 that nothing reputed faced, by

17 And indeed Traitors feldom offer their Service, or are applied to, but to affallinate Persons of a high Rank, as Princes or Generals.
19 Our Author cites Justin again here, Lib. XII. Apud eumdem, fays he in the Text, tho’ he had mentioned him before only in the Margin. In the first Edition he had faid, Apud Curtium. This was from his finding afterwards in Justin the following Words, Reportus [Alexander] non tam haftam fuum profe Darium, quam amicum ejus, a qua eft scilicet. Cap. I. Num. 11. But he had Reafoon to cite Quintus Curtius, who has something more express upon this Subject. Quum quidem [Biffus] erat adhuc videre felfis, omnibus regibus Gentihique fide, quam coniunxit, meritus fanea fidentem. Lib. VI. Cap. III. Num. 14.
20 Cidip. ver. 139.
21 Cidip. ver. 242.
22 This Paffage has been quoted above, § 15. of this Chapter, Note 6.
23 Nec irrita, aut defignata, infidiae faure adverfas tranfjugant & volatam fide. Annal. Lib. XI. Cap. XIX. Num. 2. AMMANUS MARCEL-LINUS, speaking of Florentius and Barchulba, who

had fetted and brought the Rebel Procopius to the Emperor Faion, and were killed at the fame Time, obferves upon it, that if they had betrayed a lawful Prince, Juftice ihelf would have paffed Sentence of Death upon them; but that having betrayed a Rebel, and a Difterber of the piblick Tranquillity, as Procopius was according to the general Opinion, fo memorable an Action ought to have been amply rewarded. Parique indignationis impetus Florentius, &c. (Lib. XXVI. Cap. I. in fin. p. 513. Edit. Valer. Grau.) The Historian Procopius, for the fame Reafon praiseth Artabas- nus for having killed Gontbarides, Vandalic. Lib. II. in fin. (Cap. XXVIII.) See also CROMER, Rel. Polon. Lib. XXVIII. concerning the Murder of Subodinarius, (p. 604. Edit. Bas.) GROTIUS.
26 Mac, Populique Romanu, discipline caufa, &c. LIVY, Lib. XXVI. Cap. XIX. Num. 14. the
the more civilized Nations, should be profaned by them (his Soldiers). Dio-DOCUlus complains of Agathocles's Soldiers, "εκ του ευρακεις ευπορων, εν ευςωλαις επιγρος, They did not abstain from that detestable Crime of violating the Chastity of Women. Aelian speaking of the victorious Sicilians ravishing the Wives and Vir-"gins of the Pellenæans, exclaims, "Αξιωσαν ταυτα δ’ ους εκλαμεν, εκ ευςωλαςε βασιλεως κακα καλατε ή ευς ρωτος, These, (O ye Gods of Greece!) are Αθιο ρε τρι νεκρεων, and abominable, as were never practised among the Barbarians, as far as I can remember.

2. And certainly, this should be 5 observed among Christians, not only as a Part of military Discipline, but as a Part of the Law of Nations, viz. that whatsoever ravishes a Woman, tho' in Time of War, deferves to be punished in every Coun-
try. For by the Hebrew Law none did it without Punishment, as we 6 may gather from that Part which treats of a captive Woman, Deut. xxi. 10. That the Mafter might marry her, but upon Diligence might not fell her. Thou shalt not take Money for her, because thou hast blemishe her. Upon which Beccai, one of the Hebrew Doctors, thus comments, GOD would have the Camp of Israel to be holy, not defiled with Whoredoms, and other Abominations, like the Camp of the Gentiles. Arrian, speaking of Alexander's falling in love with Roxana, says, oui ἑκτίς inov iginex κατηφθα αιξιολογης, αλλα γηρυς γας ης επαξιολογης. He would not ravish her, as a Captive, but honourably married her. Which he highly 7 commends.

And 4 Plutarch, of the fame, ouv ικεννεν, αλλ’ ιπνε φιλοξεφος, He formed to debase her, but married her; which was an Action worthy of a Philosopher. Plut-
arch also mentions one Torquatius, Banished, by the 9 Romans, into the Island of Corfu, for ravishing his Prisoner.

3 Lib. XIX. Cap. VIII. p. 674. Edit. H. Steph. APPIANUS ALEXANDRINUS treats this as the Act of Barbarians, in speaking of the People of Cibia, who were exposed to it by the Troops of Mithridates. (Bell. Mithridatic. p. 340. Edit. Angl. (201. H. Steph.) GROTIUS.

4 Var. Hist. Lib. VI. Cap. I. BELLARIUS; always observed it, and so did Titus, at the taking of Comm and Rome. PROCOP-
PIUS, Hist. III. GROTIUS.

What our Author says here of the usual Conduct of the Roman General, is related in Chap. I. of the Book referred to, and in the twentieth Chapter we see the Care which the King of the Goths took, to prevent any Violence being done to the Wives, Maids, or Widows, when he made himself Master of Rome. As to what regards the taking of Comm, I find nothing upon it; and it is likely, that our Author, citing by Memory, has put Comm for Naples, for it was after taking of the latter, that Titus condemned one of his Guards to die, for having ravished the Daughter of a Roman, a Native of Callabria; upon which that Prince made a fine Speech to those who came to intercede for the Criminal. Chap. VIII.

6 PHILUS much commends that Law, in his Book, παλά, παλαντιαζεις: And JOSPHUS again.

AUSONIUS. The Law also takes Care of Pri-

Ons of War, to preserve them from Reproach, especially Women. Lib. II. p. 1075. D. GRO-

4 TUS.


Grun.


9 Ceyes, King of Persia, crucified one for ra-

vishing a Virgin at Aemona, PROCOPUS, Per.

fas. Lib. II. Chap. XI. GROTIUS.

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C H A P. V.

Of Spoil and Rapine in War.

I. CETERA, in the third of his Offices, declares, 1 It is not against the Law of Nature to spoil or plunder him whom it is lawful to kill. No wonder then if the Law of Nations allows to spoil and waste an Enemy's Lands and Goods, since

I. (1) Neque est contra naturam, &c. (Cap. VI.) Suetonius relates, that Nero having received Ad-

vice of some Commissions in Gaul, was thought to

be very well pleased with the News, because he

had an Occasion of plundering those rich Provin-

ces by Right of War. Mesque lents ae secus tyrto, 

gaudens

I. The Gods of an Enemy may be spoilt, or taken away.
since it permits him to be killed. Polybius tells us in the fifth of his History, by the Right of War it is lawful to take away, or destroy, the Forts, Havens, Cities, Men, Ships, Fruits of the Earth, and such like Things of an Enemy. And we read in Livy, [3] There are certain Rights of War, which, as we may do, so we may suffer, as the burning of Corn, the pulling down of Houses, the taking away of Men and Cattle. We may find in Histories, almost in every Page, the dismal Calamities of War, whole Cities destroyed, or their Walls thrown down to the Ground, Lands ravaged, and every Thing set on fire. And we may observe, these Things are lawful to be done, even to those that surrender themselves. The Townsmen, says Tacitus, [4] freely let open their Gates, and yielded themselves, and all they bad, to the Romans, whereby they only forced their Lives: Artaxata was burnt by the Romans.

II. 1. Neither does the [5] mere Law of Nations excepted Things, that are consecrated, either to the true GOD, or to fake Divinities, setting aside the Consideration of other Duties, (of which we will treat hereafter) from these Infults of War. Pontoppidus, the Citizen, tells us, When Places are taken from the Enemy, all Things therein cease to be sacred. Cicero, in his fourth Oration against Verres, observes, [6] The Victory made all the sacred Things of Syracuite profane. The Reason of which is this, because those Things that are called sacred, are not of such a Nature, that the Moment they are consecrated to Religion, Men [7] cannot more dispo- se of them, and make them serve to the Uses of Life, but they [8] belong to the

gaudients etiam sacrificium praebet, tamquam occas
dium nota spoliatorum ejus Belli atque sacrificiorum
provinciarum. Vi. Neron. Cap. XL. St. Cyprian says, that when a City is taken by an Ene-
my, all those who are within it, are liable to be plundered. Sic quam irruptione hostili ciusus ali-
quaque profita est, annus funt capitisque sotatis. De mortibus (p. 159, Edit. Brem.) Groton.

2 He says, that in taking or destroying these Kinds of Things, the Enemy is weakened, and our own Affairs advanced. Cap. XI. p. 501, 502. Edit. Angilci.

3 It is the Deputies of Athens who speak thus in the Assembly of the Athenians, and say that is not the Subject of their Complaint. Nen mills, s quod hostilia et offert profita font, dicit enim quodam Belli jure, quia ut facere, sua potest, fit sui: Suta est, quasi, viri, praebet hominum percursum ut; etiam magnum num indigna, patientes att: Lib. XXXI. Cap. XXX. Num. 2.

4 Sed sapientiis, partis fonte pasto, &, Annal. Lib. XIII. Cap. XLII. Num. 3.

II. (1) Jas Gaiutum surum, says our Author, that is to say, that which not only grants Immunity, but even authorizes it to ad, so that we do nothing in Conscience but what is just and inno-
cent, whilst there is no other Consideration drawn from Duty, which engages us to abstain of our Right.

2 Deum hos copos font, &c. Digest. Lib. XI. Tit. VII. De religiosis, &junctibus honoribus, &c. Leg. XXXVI. It is upon this tertullian founds the Reproach he casts upon the Pagans, of paying Little Respect to their own Divinities: Wars, says he, generally occasion the Taking, and the Ruin of Cities; which cannot be done [9] without Offence to the Gods; for the Victor [10] spares the Temples no more than he does the [11] Walls of the Place; the Priests are expeled to [12] Slaughter as well as the Citizens; the sacred as [13] well as the profane Goods are plundered: So that [14] the Gods are more crucified than they [15] make Conquests, as often as they triumph over [16] Men they triumph over the Gods; and the Sta-[17] tues of captive Divinities make Part of all the [18] Spoils of their conquered Enemies, which are [19] preferred to this Day: Horro bella & victoriae, &c. Apologetic. (Cap. XXV.) He says lower the same Thing of the destroying of Temples. Et bene, quod & quid adversum, &c. (Cap. XLI.) Gro-
tius.

3 He says Marcus did not touch those Things out of a Principle of Religion. Has tabulur [20] quius inter se templi Minerva priores vetebus-
En. In Verr. Lib. IV. Cap. LV.

4 Revera non eripiterum humanis semper. These are our Author's Terms, which I recite to defend him against a false Criticism, which, tho' it has no other Foundation than Want of due Attention, and a Defere to chance, is however proposed with great Considerance. The late Mr. Cocciius, in his Dissertation de consecration Sacrorum, Sec. II. § 24. blames our Author, as pretending that sacred Things, whatf though they remain such, are not entirely exempt from profane Uses. But the whole Sequel of that Discourse shews, he means only, that those Things do not acquire the Quality of holy and sac-
cred, as an inddible Character, of which they cannot be deprived, but that the Sovereign, who made them so, by devoting them to the Uses of Religion, may make them return into Commerce, and thereby become profane again. Gronovius, and Mr. Vandermerlen have very well explain-
ed this, in their Notes; and if the Author who made the Extract in the Bibliotheca Germanica, (Vol. I. p. 55.) had taken the Trouble to read the Paffage in the Original, he would have had Occasion to find Fault with the Inconsiderable Indeferen-
tcy and Railhefs of the German Citizen, who had made it his Business to criticise our Author al-
most every where; he would not at least have given Room to believe that he approves a Centure to Il founded.

5 See Thucydides, Lib. IV. (Cap. XVIII. Ed. Oxon.) And Tacitus, Annal. Lib. III. (Cap. LXXI. Num. 2.) This Cuffom appears also from Paffage of Polybius, which we shall cite be-
low, Chap. XII. § 7. See also Muralis Ps. Pata-
gius Bosius, Pratic. Criminal. De foro com-

Publick
Chap. V. W a r a n d P e a c e.

Publick, and are termed sacred on Account of the religious Use to which they were intended. For Injustice, when one People submit themselves to another Nation, or King, they then deliver up what is called divine, as appears from the Form which we have elsewhere quoted, out of Livy; to which agrees that in Plautus's Amphitryon, they deliver up their City, Fields, Altars, Houses, and themselves.

And again, they deliver up themselves, and all they have divine and human.

2. Ulpius infers therefore, that there is a publick Right, even in Things that are sacred. 7 Pausanias tells us, that it was a common Custom with the Greeks and Barbarians, that Things sacred should be at the Disposal of the Conqueror. So when Troy was taken, the Image of Jupiter Herceus fell to the Share of Sibylus: And he brings many other Examples of the like Custom. Tiberides, Lib. iv. It was a Law among the Grecians, that he who was Master of any Country, whether great or small, was also of the Temples. To which also that in Tacitus agrees. All the Ceremonies, Temples, and Images, in the Italian Towns, were at the Disposal, and under the Power of the Romans.

3. Wherefore the People themselves changing their Minds, may turn any Thing facred into profane, which the Civilians, 8 Paulus and 9 Fenelius, plainly intimate. And in Times of Neccesity, Sacred Things have been converted, even by

6 Publicum jus in facris, in faciendis, in magis, in strationibus, conjit. Digest. Lib. I. Tit. I. De jufitie et jure, Leg. I. § 2. See Mr. Nood's Comment upon this Title, p. 5, and upon Tit. VIII. De diviti, reum. &c. p. 27.

7 It is in a Place where he endeavours to shew that Augufus was not the first that facred, by Right of War, upon Things confequently to the Gods. In advac. Jus. Lib. VII. p. 275. Edit. Guic. Wech. Cap. XLVI. Edit. Kobn.

8 Quinquis facra profana fieri [pollutum]. Digest. Lib. XLVI. Tit. I. De verbis communibus, Leg. LXXXIII. § 5.

9 Where he speaks of the Nullity of conditional Stipulations, in which the Sale of Things facred, or of such other as do not enter into Commerce, is suppos'd; a Condition which is considered as imposible; though the Impofibility may afterwards confer, that it, as we fee, for Instance, that what is facred may become profane. Quam quis fub hac conditio fipulatus fit, fi rem facram aut religione Titus venderit, vel Forum aut Baflicum, & libantur, quae publice ufur in perpetuum recta facti, ubi ommes conditiones jure increuisn sit pa- vis, vel id faceret et non liceat: Nullus munere fum fipulalions, prono in eis conditio, quae invivide of fide rei effe. Nec ad rem pertinet, quod jus maius poferit, & id, quod nec impofibileifi gitz profanae fife: Non enim facerum faciam temporis jus, fed fcarum profanae, equmdam de- bit Stipulitionem. Ibid. Leg. CXXXVII. § 6.

10 As by the Syracufans, in Timothen's Time, which Plutarch informs us of, in the Life of that great Captain. 1. p. 247. E. Vol. I. Edit. Wech. The People of the Island of Chios, not having Money to pay the Fine laid on them by Mithridates, fold the Ornaments of their Temples. Ap- plian, Bell. Mithridatic. (p. 339. Edit. Angell. 201. H. Steph.) Sylla being in Want of Money, during his War against the fame Mithridates, took what was most valuable amongst the Things confequently to the Gods, in the Temples of O-
Of the Rights of

Book III.

by those who confequently, to the Uses of War, as by 11 Pericles, but with a Promise of full Reftitution, by 12 Magi, in Spain, the 13 Romans, in the Mithridatic War, by Sylla, Pompey, 14 Caesar, 15 and others. Tiberius Gracchus fays in Putearch, 16 etiam filaves in caelum accipit, &c. There is nothing so facred, fo inviolable, as Things confequently to the Gods, and yet no Body hinder the People from taking, changing or removing them at their Pleasure. Our Temples, fays Seneca 17 in the Controversies, are fcripts for the State, and we must the Paganfs confequently to the Gods to pay our Soldiers. And Trebatius 18 the Lawyer in Cefar's Time, That is profane, which from being Sacred, or Religions, is converted to the Use of Men and into Property. Thus Germanics used this Right of Nations againft the Moths, as Tacitus 19 relates, He defroyd all Things both Sacred and profane, and levelled with the Ground that now famous Temple among those Nations which they called the Temple of Tanfanes: To this we may add that of Virgil,

If my religious Hand
Your Plant has honoured, which your Foé profan'd. Dryden.

Pausianis 20 obferves, that Things confequently to the Gods used to be taken by the Conquerors; and Cicero 21 calls it the Law of Arms, speaking of P. Scipio, He took away, fays he, the Images, and the Ornaments of the Enemy's City, taken by those Trees entirely, not of depriving them of their Sanctuary, but only of keeping them in order to render them more beautiful and venerable. Lucem confcclare, Romano mare, fic sparet, &c. See the rest of the Paflage in the Book, De re .

11 II. Our Author took this without doubt from Thucydides, Lib. II. Cap. XII. and from Dio DoroS.S. Lib. XII. Cap. XL who both fay, that Pericles, intending to fwell the Athenians, that they had wherewithal to undertake War, reprefented to them, that besides the Money and Veffels of the Temple, they might take the Gold of Minos's Statue, to whom they might reftore as much after having made Ufe of it for the good of the Publick.

12 He plundered the Temples of the City of Codex, then in Alliance with Carthage. Non aratia modi eram, [Quadamuram] sed estam Tempis fpopiti, &c. Livy, Lib. XXVIII. Cap. XXXVI. Num. 3.

13 Our Author had undoubtedly in his Thoughts, what Appianus and Alexandrinus informs us, that the Senate, being in want of Money to defray the Expences of the War againft Mithridates, decreed, that the Things, confequently to Numa Pomfilius for the Sacrifices, fhou'd be sold. De bell. Mithridates. p. 317. Edit. Amftel. (188. H. Saph.)

14 I find nothing on that Head, in the Authors who have write the Life and Actions of Pompey, except what Dion Cassius fays, near the beginning of Lib. XI. of his Hiftory; which is, that Pompey got a Decree of the Senate, that the Money in the publick Treasury, and all the Prefets, offered to the Gods at Rome, fhould be carried with him into Campania. But, as the fame Historian adds a little lower, (p. 174. Edit. H. Sapl.) Nothing was touched of all that, for fear of Cefar, after the Return and Report of the Depuities, which were fent to him.

15 Our Author probably remembred what he had read in Suetonius; that Cefar when in Gaul, plundered the Temples, that were full of the Offerings, which had been made to the Gods: In Gallica fumtamque Domum templorum, captum. Cap. LIV. See alfo Dion Cassius, Lib. XII. and XIII. Cefar himself however, to juftify the Civil War in which he had engaged, complains among other Things, that the Money had been taken out of the Temple by the oppofite Party: Nume a municipio excitatus, & a focio taluntur: Omnia divina & humana juris perpetuam. De Bell. Civ. Lib. I. Cap. VI.


18 Ex accedit, qua TREBATIUS, & Apud MACROB. Saturnal. Lib. III. (Cap. III.) He Grammarian Serrinus, speaking of the Temple of Ceres, which vlood without the Gates of Troy, fays, that Amen, who appointed that Place for the Resident of his People, well knew, that it had been profan'd before: Non Amenis fit ante eft profanatum. In Ancitil. II. (Ver. 713.) He makes the fame Remark upon IX. and XII. Books. And he fays on Eclog. VII. that Prefets, offered to the Gods, are facred fo long as they have not been rendered profane: Denu autem olim nuna minucius, tamdui fcar faut, &c. Inter pret, (In Ver. 31.) Grotius.


20 In the Paflage cited above upon Paragraph II. of this Chapter, Note 7.

21 P. Servilias qui figna atque ornamenta ex urbe hofii um, & virenti capita, BELLUM LEOX atque imperatoris jure juftus, &c. In Var. Lib. I. (Cap. XXI.) VIRGIL mentions a Shield, which the Greeks had taken out of the Temple of Neptune, where it had been profan'd

Et clipeum efferi jufita, Dicymonis artes
Neptuni fores Danus de pie refuls.
Chap. V. W AR a ND PE A C E.

Force and Valour, by the Law of Arms, and Right of Conquest. So 22 Livy concerning the Ornaments taken out of the Temples at Syracuse by Marcellus, and brought to Rome, said they were got by the Right of War. And C. Flamininus in his Oration for M. Fulvius, The Images were carried away, which is commonly done at the taking of Cities. Alfo Fulvius 23 calls this very Thing the Right of War. And Cæsar 24 in Salutis relating the Miferies that ufually fall on the Conqu’d, mentions the robbing of the Temples.

4. It is true however that, if it be believed, that there is any Deity in this or that Image, then to break or spoil it, is to them that are of that Opinion, a great Impiety. And upon this Supposition they that commit fuch Things are fo often accuèd of Wickdnefs, and even of violating the Law of Nations; but if the Enemy be of another Opinion, then it is not fo. As it was not only permitted, but commanded the Jews, (Deut. vii. 5.) utterly to abolid the Idols of the Gentiles; for that they were forbid to take them to themselves, the Reafon was, to create in the Hebrews the greater Deteftation of their Superflitions, by fuppofing that the very Touch of them was polluting: And not that what was confecrated to Strange Gods should be fpared, as Josephus 25 expounds it; doublefts in Flattery to the Romans, as he does in the Exposition of another Precept, of not naming the Gods of the Heathen, which he explains by 27 not speaking reproachfully of them; whereas the true Sense is that they fhould not name them with any Honour and Reverence, or without teftifying an Abhorrence. For the Hebrews knew certainly, by the immediate Instructiôn of God himfelf, that there refted in thofe Image neither the Spirit of GOD, nor good Angels, or any Virtue of the Stars, as the deduced Gentiles imagined; but wicked Demons, and fuch as are destructive to Man-kind. Therefore Yacitus juftly faid, in describing the Rites and Ceremonies of the Jews, 28 All Things sacred to us, are profane to them. No wonder then if we read of fo many Idol-Temples burnt by the Maccabees. So alfo Xerxes, when he deftroyed the Images of the Grecians, did nothing againft the Law of Nations, tho’ the Grecian Writers 29 cry out upon it as a heinous Crime, to render their Enemy odious. For the Perjans 30 did not believe there was any Divinity in them; but they

22 Ornamenta orbis, figna, tabulafque, &c. Lib. XXV. Cap. XL. Num. 2.

23 Ambrian apographam & captam, &c. Idem, Lib. XXXVIII.

24 Fulvius, in the Speech he made to justify his Conduct, asks whether this was the only City exempt from the Rights of War: Nifi Syracusanum, &c. Idem, (Lib. XXXI. Cap. IV. Num. 12.) See alfo Polibius, Excerpt. Log. XXVI. Grat.


26 The two Laws ill explained, are in the fame Place of that Author: Let no one speak ill of the Gods, held by other States to be SUCH. Let no one plunder the Temples of Strangers, nor take away any Thing confecrated to any God. Antig. Jud. Lib. IV. Cap. VIII.

27 See the foregoing Note. He fays elsewhere, that their Law forbid them to fccaf it, or to speak ill of, thofe whom Strangers hold for Gods; becaufe of the Name of GOD, which they bear. Contra Apin. Lib. II. p. 1077. D. Others believe, and with more Reafon, that the Jews Historian in tended hereby to expound another Law, namely, that of Exodus xx. 29, where the Original fays in fo many Words, Thou fhalt not fpeak the Gods. By the Gods, the Legiflator manifeftly understands the Magiftrates, as appears from the following Words, which are a Comment upon thofe that go before: Nor urge the Rules of the Peple. But Josephus has taken the Word Gods in the literal Sense; and if he did fo fincerely, the Motive our Author mentions, no doubt contributed to his falling into that Error.


29 Trogus Pompeius, imitating without doubt the Language of the Greek Authors, from whom he compiled his History, fays, in Justice’s Abription, which we have, that Xerxes ftood to have been deigned to make War upon the Gods as well as men: Aut novelli profli camporum milia ferat Xerxes quatuor militia armaturam Delphos, ad templum Apollinis diripendam: Proflus quos aper nos cum Grecia tantum, fed & conus Diis immortalitatis bello gerereet. Lib. II. Cap. XII. Num. 8. 9. See the Paflage of Cicero cited in the following Note.

30 This is the Reafon given for it by Asconius Pedianus, whom our Author cites in the Margin. Cicero, to aggravate the Crime of Verres, who had plundered amongst others the Temple of Delos, fccaf to Apollo, fays that even the Perfians, who, when they carried the War into Greece, had declared it againft both the Gods and Men, (the Roman Orator here speaks the Language of the Greek Authors) being arrived at Delos, with a Fleec of a thoufand Sall, did not violate or touch the Temple in question. Tantaeque rep autoritas religiosis &a, & femper fact, ut ne Perfe quidem, &c. In Virr. Lib. I. Cap. XVIII. The antient Commentator observes upon that, that the Perfians made no Scruple to deftroy Temples and Statues, becaufe, according to the Ideas of their Nation, they believed, that no Temples ought to be built to the Gods; and the rather, becaufe the whole World would fcare forfuce for the Temple of the Sun alone, which those People adored: Dii hominibusque quin non fixere habets erant, ut que Barbari; vero etiam, more 7 H geniti.
they imagined the Sun was the only true G O D, 34 and Fire one of his Parts. By the Hebrew Law, as the fame Tacitus rightly observes, 35 none were allowed to enter the Temple but the Priests only.

5. But Pompey, 35 says the fame Author, entred the Temple by the Right of Conquest; or as St. Augustine relates it, 34 none with the Devotion of a Suppliant, but by the Right of a Conqueror. He did well to spare the Temple, and the Treasures of it, tho' as Cicero 35 expressly said, out of meer Shame, and to avoid Occasions of Reproach, not out of any Reverence; but he did ill to enter it again, as in Contempt of the true GOD, which the Prophets so highly blame the Chaldeans for; (Daniel v. 23.) for which Caufe some think it was so ordered by the Divine Providence, that the fame Pompey should be killed at Caphis, a Promontory of Egypt, as it were in fight of Judea; but if we consider the Opinion of the Romans, 35 there was nothing done by him against the Law of Nations. So Josephus mentioning the Deftruction of the fame Temple by Titus; adds that it was done, τω τε ακμαία νυμοι, by the Right of War.

III. What we have said of Things facred, may also be underflood of Things religious, (or Sepulchres) for these also do not belong to the Dead, but to the Living, whether a People, or a Family. Wherefore Pompomius obferves, in the abovementioned Place, that as facred Things, so likewise Sepulchres cæle to be such, when taken by the Enemy; and 5 Paulus the Lawyer fays, The Sepulchres of our Enemies are not religious to us, and therefore we may take the Stones thereof, and put them to any Ufe. Which yet is fo to be underflood, that no Violence be offered to the Bodies of the Dead, which 3 we have fhewed in another Place, to be contrary to the Rights of Burial eftablisht by the Law of Nations.

IV. This I thall also here repeat, that the Goods of our Enemies may be taken away from them, not only by plain Force, by the Law of Nations, but even by Fraud, fo it be without Treachery; may, in this Cafe, 1 we may solicite others to betray our Enemy. For, in regard to fuch Sort of Actions, left vicious and very common, the Law of Nations now ues a Kind of Conviinice, as the civil Laws do with repect to Profuitution and Utairy.

Of the Rights of

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IV. This I shall also here repeat, that the Goods of our Enemies may be taken away from them, not only by plain Force, by the Law of Nations, but even by Fraud, so it be without Treachery; may, in this Case, we may solicit others to betray our Enemy. For, in regard to such Sort of Actions, lest vicious and very common, the Law of Nations now uses a Kind of Conviction, as the civil Laws do with respect to Prostitution and Usury.
WAR and PEACE.

CHAP. VI.

Of the Right to the Things taken in War.

1. By the Impunity of some Acts allowed to be used against our Enemies, of which we have treated hitherto; there is also another Effect, which by the Law of Nations is proper to a just War. And indeed by the Law of Nature thefe Things may be acquired by a just War, which are either equivalent to that which the due to us, we cannot otherwise get, or which damnifies the Injurer, but within the Bounds of a just Punishment, as has been said elsewhere. By Virtue of his Right Abraham offered unto GOD the Tenth of his Spoil he took from the five Kings, Gen. xiv. as the Author to the Hebrews expounds it, Hcb. viii. 4. and thus did the Greeks, Carthaginians and Romans make the fame Offering to their Gods, as to Apollo, to Hercules, to Jupiter Feretrius. The Patriarch Jacob leaving an efpécial Legacy to Joseph above his Brethren, I give to thee (says he) one Part above thy Brethren which I took out of the Hand of the Amorite, with my Sword and with my Bow, Gen. xviii. 22. where the Word, I took, seems to be taken prophetically for I fould barely take, and this attributed to Jacob, which was done after by his Pottery, who were called by his Name, as if the Ancestor and his Children were but one and the fame Person. Which is much better than to wretch these Words, as the Jefus do, to that plundering of the Sichemites, which had been done before by the Sons of Jacob; for that, as being done treacherously, Jacob a just and religious Man did ever condemn, as we may see, Gen. xxxiv. 30. and xliv. 6.

2. Now that this Right to the Spoils taken in a just War, was approved of by GOD, within the natural Bounds preferred, (as I said) will appear, by other Places alfo of Scripture. GOD in his Law, Deut. xx. 14. concerning a City, which upon Refufl of Surrender was afterwards taken by the Sword, thus orders, Thou shalt take the Spoil of it to thy self, and shalt enjoy the Prey of thine Enemies, which the LORD hath given thee. Also the Renumbites and Godites, and half the Tribe of Manafeh are faid to have conquered the Ituraens and their Neighbours, and to have taken much Spoil from them, 1 Chron. v. 20, 21, 22. This being added as a Reafon, becaufe in the War they called upon GOD, and he was propitious to them. It is alfo faid of good King Afia, that having called upon GOD, he obtained the Victory over the Ethiopians that had unjustly warred against him, and carried away much Spoil, 2 Chron. xiv. 13. which is the more remarkable, becaufe those Wars had been undertaken not by the special Command of GOD, but by Virtue of the common Right of all Mankind.

1. (1) See what we fay upon the last Paragraph of this Chapter. 2. "We fhould add," (fays Mr. le Clerc in his Comment upon this Paffage) that the Effects of others become ours, when having raifed an Army at our own Expence, we carry off fuch Effects from thofe, who had taken them, whilst the Perfons, to whom they had belonged, remained in quiet. For it was noe of the Spools only of the Kings, that came from beyond the Euphrates, that Abraham offered the Tenh. But of the recovered Goods alfo of the People of Sodom, and other Neighbours; the remainder of which that Patriarch returned to their ancient "Proprietors, after having offered the Tenth." This is what the learned and judicious Commentator fays, and is agreeable to what our Author himfelf fays down below, § 7. where however he has forgot this Example. It appears alfo from the last Verse of the Chapter of Genesis, from which this Hiftory is taken, that the Patriarch kept out of the Booty recovered, besides the Provisions confirmed by his People, the Part which was due to his Allies, Hagar, Esfhol, and Mameh, as our Author observes in a small Note, where he refers to what Josephus fays on this Hiftory, Antiq. Jud. (Lib. I. Cap. XI.) and what he fays himfelf below, Chap. XVI. § 3. For the reafon, we muff fuppofe here, that thofe, who do not attempt to recover their Effects, have both an Opportunity and the Means of doing it. See what we fay below upon Chap. XVI. § 3. Note 2. 3. "See Selden's Difertation upon Tiber, Sect. III. translated into Latin by Mr. le Clerc, and infcructed at the End of his Commentary upon the Pentateuch. 4. Our Author, as Gronovius observes, confounds here the Tenth, with what the Romans called Spolia opima, which were dedicated to Jupiter Feretrius. 5. "The Clothis Paraphrafs expounds it done by his Prayers to GOD, who by his special Favour preferred Sichem for Jacob and his Pottery. Groitus. 6. Or rather over the Medinithi; for they are meant by the Cluffian. See Boharin's Phylag, Lib. IV. Cap. II. 7. "Sichem.
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3. "οφάνεα also blessing the Reubenites, Gadites, and half the Tribe of Manasseh before mentioned, said, 'Divide the Spoil of your Enemies with your Brethren,' Joel xxii. 8. And when David sent to the Elders of Israel the Spoil taken from the Amalekites, he gave it this honourable Title, a Spoil taken from the Enemies of the Lord, 1 Sam. xxx. 26. For, as Seneca says, 'Military Persons think it most honourable to enrich Men with the Spoils of their Enemies.' We have also divine Laws for dividing such Spoils, Num. xxxi. 27. And Piblo reckons among the Curies of the Law, that their Fields should be reap'd by their Enemies, whence must follow, Famine to their Friends, and Plenty to their Enemies.

II. 1. Moreover, by the Law of Nations, not only he that makes War for a just Cause, but every Man in a solemn War acquires the Property of what he takes from the Enemy, and that without Rule or Measure; so that both he and his Allies are to be defended in Possession of them by all Nations; which, as to the external Effects of it, may be called the Right of Property. Thus said Cyrus in Xenophon, 'It is an eternal Law with all Men, when a City is taken by Force, the Goods all belong to the Conqueror.' And so Plato, 'All that belonged to the Conqueror, now belong to the Conqueror.' And in other Places, several, as it were, Kinds of natural Acquisitions, he places πετριῶν, that got by War, which he also calls λαβών by plundering, and τραφείν by superior Force. To which agrees Xenophon, in whom Socrates brings Euthydemos by divers Interrogatories to this Confession, that it was not always unjust to spoil, when against an Enemy.

2. And in Aristotle, the Law, which is a Kind of general Agreement, has allowed, that the Goods and Effects of the Conquered should become the Conquerors. As also that of Antiphanes, 'ότι τίς πελεκύς, &c. We ought to weigh our Enemies abundance of Riches without Value, for in that Case they belong, not to the present Possessors, but their Conquerors.' And Plutarch observes in the Life of Alexander, that the Cafe is not the same in regard to Immovables. They are immovable in their Nature: And those, to whom a State, which has taken them from an Enemy, would relinqu, can hardly be ignorant of the manner, in which it spoileth them.

3. He speaks both of Things and Men. De Jus.

II. (1) See what we have said upon Chapter IV. of this Book, § 4. Note 1. It may be proper to relate here, what Mr. CARMICHAEL, Professor at Glasgow, says in his Notes upon the Abridgment of Pufendorf, De Officis Hom. & Civ. Lib. II. Cap. XVI. p. 393. § 90. He distinguishes between moveable and immovable Things. The Acquisition of the first ought to be regarded as valid and lawful, because if the ancient Proprietors could reclaim them from neutral People, where they are transported in consequence of Commerce, every State would set itself thereby exposed to enter into the War against its Will, as it would be uneasiness to examine, whether the Things reclaimed be good Prize, and consequently which Side has the best Cause. But as to Things immovable, I do not find (adds this Author) that it is established by the common Consent of Nations, that the ancient Owner ought to have left Right against the Third, who holds them of the Enemy, by what Title forever, than against the Enemy himself; unless that ancient Owner has declared, in some manner or other, that he abandons his Right. All that can be said is, if the neutral People owe any real Servitude to the Land, on which an Enemy has taken from his Enemy, they may disclaim it to the new Possessor, without the ancient Proprietors having just Room to complain. I approve this Distinction in the main. But as I do not acknowledge that common Consent of States, upon which he founds the Law of Nations after our Author, it suffices for me to say, that moveable Things, being easily transported by Commerce into the Hands of the Subjects of a neutral State, often without their knowing that they were taken in War, the Tranquility of Nations, and the State of Neutrality requires, that they should always be reputed lawful Prize. But
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War and Peace.

What did belong to the Vanquished, is and ought to be esteemed the Vanquishers. And in another Place, 9 The Goods of those overcome in War are the Reward of the Victor. Which are the Words of Xenophon, in his second Book of his Institution of Cyrus. And Philip in his Letter to the Athenians says, 10 All of us enjoy Cities, which were either left us by our Ancestors, or we became Masters of by the Right of War. Allo Ego Johannes, 11 If you fight with us, and take our City by Arms, you justly possess the Rule over it by the Law of War.

3. Marcellus 15 in Livy declares, that what he took from the Syracusians he did it by the Right of War. The Roman Embassadors told Philip, 13 concerning the Cities of Trachce, and some others, if he had taken them by War, he might enjoy them by the Right of War, as the Reward of his Victory. And Magnijsa 14 pleads, the Land which his Father conquered from the Carthaginians he held by the Law of Nations. So 15 Mitridates in Justin, he had not called his Son out of Cappadocia, which as a Conqueror he possess by the Law of Nations. Cicero 16 tells us, that Mitylene became the Romans by Right of War and Victory. He likewise says, 17 that some Things may become a private Property, either by Seizure, where they are without an Owner, or by War, when one Party proves victorious over the other. And Dian Caffius, 18 What was the Conquered's becomes the Conquerors. And Clemens Alexandrinus 19 informs us, that the Goods of Enemies are plundered and acquired by the Right of War.

4. What is taken from the Enemy, by the Law of Nations, immediately becomes the Captors, 20 is the Opinion of Caius the Lawyer. Theophilus the Greek Paraphrast on the Institutions, calls it Φυσική κρίσις, 21 a natural Acquisition, as 22 Aribotlis had called it, τηλεμακόν Φύσιν κρίνων; because the Right here acquired arises from the bare Fact, or taking Possession, without any other Title; as 23 Nerva the Son, by the Testimony of Paulus the Lawyer, declared the Property of Things begun from a natural Possession, and some Footsteps of it remain still in regard to those Animals that are taken; whether on the Earth, in the Sea, or in the Air; as also in regard to Things taken in War, all which are of the Right of those who are the first Possessors of them.

5. It must be observed here that those Things are supposed to be taken from an Enemy, which are taken from the Subjects of an Enemy. So Dercyllides argues in Xenophon, 24 since Pharnabazus was an Enemy to the Lacedemonians, and Mania a Subject to Pharnabazus, therefore the Goods of Mania were just Prize by the Law of Nations.

Sire, said the Courtier to him, say the Bath of Alexander, and not the Bath of Darius; for what belonged to the vanquished, &c. Vit. Alexander. (p. 676. A. Vol I. Edit. Web.) Alexander says himself upon another Occasion, that he had forgot that the Goods of the vanquished were the Victor's. [P. 684. A] Grotius.

9 Corp. Lib. II. (Cap. III. § 2. Edit. Oxon.) These Words which our Author gives us as taken by PLUTARCH from Xenophon, I do not find any where.

10 Epist. ad Athienien, apud Demosthen. p. 64. B. Edit. Boi1 1572.

11 Orat. de male obia legit. (p. 251. B.) Diodorus Siculus says, That we ought not to give up what we acquire by the Right of War, except Petreus. (p. 406.) See a Passage of Agathias, cited below, (p. Cap. VIII. § 1. Note 10.) Grotius.

12 The Passage has been already cited upon Chap. IV. of this Book, § 5. Note 3.

13 St. Philippius tells eipofit, &c. LIVY, Lib. XXXIX. Cap. XXIX. Num. 2.


15 Nor Cappadocia flisum, &c. LIVY, Lib. XXXIV. Cap. XVI. Num. 6.


17 Sent autem privata, &c. De Offic. Lib. I. Cap. VII.

18 This Passage is in Lib. XLI. towards the End.

19 It is upon the Occasion of the Sinaites carrying away the Veillets of Gold and Silver of the Egyptians, when they quitted Egypt. That Father says, they did so, either by way of Amend for what the Egyptians owed them, for the severe Labour they had forced them to undergo, or by Right of War, against a People, who had reduced them against their Will to a cruel Slavery. Strumen. Lib. I. Cap. XXIII. p. 416. Edit. Oxon. In which he only copies Philo the Jew, as appears by the Passage, which the learned Bishop of Oxford cites in his Notes, and our Author gives below at length upon Chap. VII. of this Book. § 6. Num. 8.

20 Item quae ex igitur capitum, Jure Gentium fltium capitum font. Digel, Lib. XLI. Tit. I. De acquiringe reorum dominii. Leg. V. § 7. See also the Institutions. Lib. II. Tit. I. De divinse re- rum, § 17.

21 Lib. II. Tit. I. § 17.


23 Dominis reorum ex naturali, &c. Digel, Lib. XLI. Tit. II. De acquir. vel amittendo potest. Leg. I. § 1.


7 I III. 1. Moreover
III. (1) It is where he speaks of Things taken away by some Beast; for in his Opinion, they are deemed lost to the Perfon from whom they are taken, when the Beast is secured from his pursuit: *In ex busis quae ne quis captaret a bottis marinis & terricribus, &c.* Dig. Lib. XLI. Tit. 1. Deaquip. return domin. Leg. XLIV. See above. B. II. Chap. IV. § 5. Num. 2. But there is a Difference between this and the Cafe, to which our Author compares it, that will not permit us to form the fame Judgment of it: because according to the Lawyer, it is presumed, that the Owner has abandoned his Goods, when he can pursue the Beast no longer that took them away; whereas between two Enemies there is no room for such a Premption. Every Enemy, as facing and whist he continues further, retains the Will to recover what the other has taken from him. His present Inability only reduces him to wait for a more favourable Opportunity, which he still seeks and desires. So that, in regard to him, the Thing ought no more to be deemed taken, when in a Place of Safety, than whilst he is still in a Condition to pursue it: All that can be said is, that in the latter Cafe the Possession of the Enemy is not so secure as in the former. The Truth is, this Difficult has been invented to establish the Rules of the Right of Possession, or the manner in which the Subjects of the State, from whom something has been taken, re-enter upon their Rights, rather than to determine the Time of the Acquisition of Things between Enemies. See Titi, Obser. in Compend. Lauterbach. Obs. 1446. and what we say below, upon Chap. IX. § 16.

2. *Ponitivius redilse editatur, quum, &c.* Dig. Lib. XLIX. Tit. XV. De Captivis & Poffitiviius, &c. Leg. XIX. § 3. Si id, quaed crop boves cernunt, ejus genera cfs, ut ponitivius redilse poffi, facilius retineat eos redimendi causim, propterea ab illebus, & inter fas imperii nisfet aelli cfs. ponitivius redilse editandum cfs. Ibid. Leg. XXX.

3. In bello [*Ponitivius jus competet*] quum hi, qui estis boves font, aliquem ex eos efficerent, & inter profula tuo perduxerant. — *Antiquam in proselio producitur hittison, monet civit.* Ibid. Leg. V. § 1.

4. In the fist of the two Laws cited above on this Paragraph, Note 2. See below, Chap. IX. § 5. and 16.

5. In the Law cited above, Note 3.

6. See the Law cited in Note 20, upon the foregoing Paragraph. *Ziegler* is for having the Word *Stata* in the Roman Lawyers taken literally. But *Obrecht* defends our Author's Explanation; and founds his Opinion upon this Example, chosen from many others, which, says he, might have been alleged. We call a Theft taken in the Fact, *(for manufis, or in advicajo, defrobibus)* not only him whom we seize the Moment he has stolen something, but even him whom we find carrying away the Thing stolen, before he arrives at Home, or where he designed to put it. See *Institut., Lib. IV. Tit. I.* § 7. The following is a more express Example. When a Perfon is adjudged to pay a certain Sum immediately, that, says the Lawyers, is to be understood with some Modification; for it is not meant that the Perfon must go that Moment with the Money, to his House to whom it is to be paid. *Quid dictas — debes Statm solvere, cum aliquis solutum temporis intelligentem dcf: Nc enim cum facere adsim dedet.* Dig. Lib. XLVI. Tit. III. De restitution. & liber. &c. Leg. XC.

7. This is observed by Land also, as appears from *Thuanus's History,* on the Year 1595, Lib. CXIII. where we find, that the Town of *Livre* in *Braabant,* having been taken and retained the fame Day, the Plunder taken from the Inhabitants was returned to them, because it had not been twenty-four Hours in the Enemy's Hands. This Custom is derived from the ancient Laws of *Germany,* and was established in imitation of the four and twenty Hours, which, not without Reason, was the limited Time, in Respect to the Permission of taking a Beast wounded by another. See *Lee Langband. Lib. I. Tit. XXII.* § 6. The same Thing is observed in *England,* and in the Kingdom of *Coffins,* as *Albucius Gentilis* informs us, *Hispanic, Adv. 1. 3. Grotius.*

It has been observed, that this Rule of twenty-four Hours was changed in Part, in Regard to the United Provinces, since the Publication of our Author's
IV. 1. But Lands are not fad to be taken as soon as they are feized on; for tho' it be true, that that Part of the Country, (as Cefius obcrves) which the Enemy with a strong Army has entered, is for that Time posfeffed by them; yet every Possession is not fufficient for the Effect which we are now treating of; but fuch a one as is durable only: Therefore the Romans were fo far from thinking that Part of Land without the Gate to be entirely loft, wherof Hannibd encamped, 2 that at that very Time they fold it as dear as before. That Land then is reputed loft, which is fo fecured with Fortifications, which without being forced cannot be repoffefed by the firft Owner.

2. And this Derivation of the Word Territory given by Siciulus Flaccus, "à terrendi Hoftius," from terrified the Enemy, seems as probable as that of Varro, V. à terrendo, from treading upon; or that of Frontinus, "à terrâ, from the Earth;" or that of Pomponius the Lawyer, "à terrendi jure," from that Power to terrify which the Magiftrates have. Thus Xenophon, in his Book concerning Tributes, fays, that the Possession of Lands is held in Time of War by Fortifications, which he himfelf calls 6 τεργο, τεργα, Walls and Retrenchments.

V. This is also plain, that before the Right of War can entitle us to any Thing taken, it is requisite that our Enemy had firft the true Propriety of it; for what Things may be within the Enemy's Towns, or other Places whereof he is Master, the Owners thereof being neither Subjects to our Enemy, nor animated with the fame Spirit as he againft us, cannot be acquired by the Right of War; as is proved,

IV. When Lands are fold to be acquired.

V. Things not our Enemy's, not to be acquired by War.
proved, among others, by the Saying of S. Ephesins, that Amphipolis being a City belonging to the Athenians, could not be appropriated by King Philip to himself, in a War which he made with the Amphipolitians. And indeed there is no Reason that authors us to take the Goods of those who are not of our Enemy's Party, under Pretence that they are found in his Country; and the Change of Master by Force, is too odious to admit any Extention.

VI. Wherefore the common Saying, that Goods found in our Enemies Ships are reputed theirs, is not so to be understood, as if it were a confant and invariable Law of the Right of Nations, but a Maxim, the Sense of which amounts only to this, that it is commonly presumed, in such a Case, the Whole belongs to one and the same Master: A Prudence however, which, by evident Proofs to the contrary, may be taken off. And so it was formerly adjudged in Holland, in a full Assembly of the sovereign Court, during the War with the Hanse Towns, in the Year 1338, and from thence hath passed into a Law.

VII. 1. But this is certain, if we only respect the Law of Nations, what we take from our Enemies, cannot be claimed by those from whom our Enemies before had taken them by Right of War; because the Law of Nations had made our Enemies Proprietors of them by an outward Right, and then us. By which Right, among others, Jeptha defends himself against the Ammonites, (Judges x. 23, 24, 27) because the Land in Dispute was taken from the Ammonites; as also another Part of the Land from the Moabites, by the Amorites, by the Right of War; and from them by the fame Right, by the Hebrews. So David challenges, and divides as his own, the Spoils which he had taken from the Amalekites, and they before from the Philistines. (1 Sam. xxx. 18 & seq.)

2. Titus Largius, (as Dionysius Halicarnassensis relates it) thus gave his Opinion in the Roman Senate, when the Poets laid Claim to some Lands which the Romans had won by the Right of War, because they had been formerly theirs, We Romans account the Poetessens won by the Sword most just and beneficial; neither can we be persuaded by a foolish Easyness, to destroy the Monuments of our Valour, can scarce take Place but in Relation to moveable Things, as the late Mr. Cocceius observes, in his Differenc, De jure belii in animis, § 36, that Civilian might have (pard himfelf) the Trouble of criticising our Authors, as not having distinguish'd in this Place between inmoveable and moveable Things. The Diftinction follows from the very Nature of the Thing which our Author lays down.

2. Great, de male oblit. Legat. p. 241, B.

3. A Commentator upon our Author opposes him here with an Argument ad hominem. If, according to your Opinion, says he, it is lawful to kill the Strangers we had upon an Enemy's Lands, there is much more Reafon to hold it lawful to fcel their Effects. And as he rightly forefaw, that he might be answer'd from what has been said above, (Chap. IV. of this Book, § 6.) that there is something to be feared from the Parfons, but no thing from the Effects, of Strangers, who are not in the Enemy's Country; he replies, that the Ef- fects of Strangers serve to encourage the Enemy, and confirm him in his Defigins. But fome have answer'd, that Effects being only the Accessory of Parfons, cannot be taken by the Right of War, unless when thofe they belong to, are, or may be, deemed our Enemies. So that the Ufe which the Enemy may make of the Effects of others in his Territories against us, authorifes us to repute them good Parfons, only when they have been fent thither on Purpofe to fuccour him, or when the Proprieters, tho' quickly moved, have omitted to with- draw them. See Henninges and Orecby.

VI. (1) Neither do the Ships of Friends become lawful Prizes, on the Account of the Enemies Goods, unless it is done by the Consent of the Owners of the Ship; L. Com. D. De publicans.

Rodericus Zuarius, Lib. De ufo Maris, Con- fil. II. Num. 6. And fo I take the Laws of France should be understood, which made Prize of the Ships on Account of the Goods, and of the Goods on Account of the Ships; such as that of Franc- ci I. made in the Year 1543. Cap. XLII. Het- ry III. in the Year 1584. in the Month of March, Cap. LIX. the Law of Portugal, B. I. Tit. XVIII. otherwise the Goods only are made Prize. Mornus Daci. B. II. So in the War between the Venetians and Genoese, the Ships of the Gre- cians were fearch'd, and the Enemies taken out, if any were there. Gregorius, B. IX. See also Cranfhius, Saxon. II. and Alberick Ger- tius, Alciati, Hispan. I. 20. Grotius.

VII. (1) See Nitz 2. upon Paragraph L of this Chapter.

2. So Reza, King of Syria, having taken the City Edab, which had belonged to the Idumæans, gave it to be inhabited, not by the Idumæans but the Syrians, according to the Reading of the Mar- joribus. 2 Kings xvi. 6. Grotius.

But that Reading is faulty. See Mr. Le Clerge's Commentary upon the Text.


4. Plutarck relating in what Manner the Vii had commenced Hostilities against the Romans, un- der Pretex that the latter had refused to refore the City of Fidone, to which they pretended to have a Right of Confinence, that this was both unjust and ridiculous, because the Vii had not defended Fidone, and had suffered the Romans to make a Conqueft of it. Vit. Romul. (p. 33. B. Vol. I. Ed. Mech.) Grotius.
by returning them to those that lost them. Nay, those very lands we ought not only to communicate to those citizens now alive, but to leave them to our posterity, instead of parting with what we love, and treating ourselves like enemies. This also is plain from the answer the Romans gave the Aurunci, 5 We Romans think it just, that what soveraign a man owns by his Valour from his enemies, he may leave to his children, as being his own by a very good title. In another place, the Romans answer the 6 Volsci thus, But we account those our best estates which we conquer from our enemies; since they are ours, not by our own laws, but a law derived rather from the gods than men; and allowed by the constant practice of all nations, both Greeks and Barbarians; we shall therefore yield up nothing cowardly of what we have purchased valiantly; for it would be a great disgrace to us, if either through fear or folly we should quit what we have won by bravery and valour. So in the answer of the Samnites, 7 We have gained this by war, which law of acquisition is the justest.

3. Livy, speaking of land near Luna, divided by the Romans, says, 8 That land had been taken from the Ligurians, and it had been the Helorians before it was the Ligurians. By this right the Romans held Syria, as 9 Appion observes, not referring it to Antiochus Pius, from whom Tigreane, an enemy to the Romans, had taken it; and Justin, out of Trogus, brings in Paephy returning this answer to the same Antiochus, 10 As he took not the kingdom from him whith, he was in Poffession of it, so neither would he, after he had yielded up his right to Tigreane, relive to him a kingdom which he could not keep. So those parts of Gallia, which the Cimbri had taken from the Gauls, 11 the Romans afterwards taking, held as their own.

VIII. But here is a more difficult question, to do the spoils taken from the enemy in a publick and solemn war belong, whether to the people in general, or to private persons, of and among the people? The modern expounders of the law here vary very much in their opinions; for most of them finding in the Roman law, 12 that the things taken become the captors; and in the canon law, 13 that the spoils are to be divided by publick determination, do say, one after another, (as is usual) that the principally, and by original right, the captor has the best title to them, yet they are not to be brought to the General, and he is to

5 Dionysius Halicarnassensis, Antiq. Rom. Lib. VI. Cap. XXXII. (p. 352. Ed. Osius. 366. Syll.) This example is not to the purpose. The Romans having overcome the Volsci Etruscans, and deprived them of their lands, the Volsci Antuanii demanded their being refurished to them.

6 Dionysius Halicarnassensis, Lib. VIII. Cap. X. p. 470. Ed. Osius. (488. Syll.) The Volsci demanded only the lands and towns which the Romans themselves had taken from them. So that this is also an example extra oian.

7 Exceptus, Legum. (Cap. II. p. 797.) Of all these examples there is not one which agrees with the Cafe in question. The Volsci demanded restitution of lands, which the Romans had taken from themselves. Dionysius Halicarnassensis, Lib. VI. Cap. XXXIV. Paephy was a city of the Volscians which had been taken and demolished by the Samnites. The Romans rebuilt it, and settled a Colony in it. See Livy, Lib. VIII. Cap. XXIII. Num. 6. This occasioned the complaint of the Samnites. The affair of Paephy is evidently foreign to the subject. We do not find in all these instances any thing taken from an enemy, who had before taken it from others by the Right of War. 8 Sir Lannion coloniam sedem anno, &c. Livy, Lib. XLI. Cap. XVII. Num. 4, 5, 6. 9 Bell. Afric. histor. (p. 454. Ed. Amphil. 244. Ed. H. Steph.) The same Hiftorian says in another place, that Paephy made this the pretext for depriving a Prince of his Dominions, of whom the Roman people had no reason to complain. Bell. Afric. (p. 199, 191. Ed. Amphil. 119. H. Steph.) Antiochus himself acknowledges in Polybius, that conquest is the right of acquisition. Exceptus, Legum. Cap. LXXII. Grotius.

Our author confounds here two Antiochus's, for he of whom he speaks in the latter Part of this Note, is not Antiochus Pius, but Antiochus, surnamed the Great. 10 Iying ut habebus regnum non ademini, &c. Lib. XL. Cap. II. Num. 4. 11 It was after Marius had defeated the Cimbri, that Apuleius, Tribune of the People, proposed the distribution of those conquered lands. Appian. Bell. Civil. p. 625. Ed. Amphil. (367. H. Steph.) 12 The ancient Franks did not relive to the Romans the lands in Italy, surrenderred to them by the Goths. Procopius, Gothic. Lib. IV. See also what the King of Sweden says, in relation to his dispute with the Poles about Livonia. Thuanus, Lib. LXXVI. upon the year 1582. Grotius.

VIII. (1.) As Strangers in the Service of the State.


3. The Canons on which this is founded, consist of two Puffages, the one from 111050, whom we shall cite below after our Author, § 17. Note 13, the other from St. Ambrose, who will be also cited, § 23. Num. 2. Note 8.

7 K distribute
distribute them among the Soldiers. Which Opinion, not less common than fallacious, I shall take the more Care to confute, that we may see how unsafe it is in such Controversies to rely upon the Authority of those Doctors. There is no Doubt, but the Content of Nations might have established the one or the other of these two Rules, either, that the Things taken should belong to the People that bear the Charge of the Wars, or to the first Capitor; but the Question is, what Nations really intended to establish in this Case? And I affirm, that their Intention was, that the Goods of one Enemy, with Respect to another, should be considered as Things without a Proprietor; as we have before explained, from the Words of Neveus the Son.

IX. 1. The Things that are Nobody’s, indeed become the Capitor’s; but they may be called Captors, who employ others to take them, as well as they who take them themselves. So they who are employed by others to catch Fowl, Fowl, Deer, or Pearls; as Slaves, Children not emancipated, and sometimes Freeman, take them for thofe who employ them. Modefinus the Lawyer said well, Whatever is naturally gained, as Possession is, we may gain by any one whom we will appoint to do it for us. And alfo Paulus, We acquire Possession by the Mind, and by the Body; the Mind, I mean our own, but the Body may be either our own or another’s. And in another Place, Possession may be taken by an Attorney, Guardian, or Trustee; provided it be done with the Design of doing it for us, and in our Name. So among the Greeks, they that overcame in the Olympic Games, gained the Prizes, not for themselves, but for them that sent them. The Reason is, because one Man may make Use of another, as his Infrument, if both are willing, as we have declared in another Place. (B. i. Chap. v. § 3.)

2. Wherefore the Difference put between Freeman and Slaves, in Respect to Acquisitions, regards only the Civil Law, and properly belongs to Civil Acquisitions, as appears from the above-quoted Place of Modefinus. And yet the Emperor Severus brought these afterwards nearer to the Pattern of natural ones;

4. Our Author confounds here different Things: The Question does not relate to the Law of Nations, properly so called; for in whatever Manner that Law is understood, and whatever it is founded on, it ought to regard the Affairs in Dispute between State and State. Now, whether the Booty belongs to the Sovereign who makes War, or the Generals of Armies, or the Troops, or other Perfons, that take any Thing from the Enemy, it signifies nothing either to the Enemy or other States. What is taken is taken; and if it be good Prize, it is of very small Consequence to those who have left it, in whose Hands it remains. As to neutral Persons, it suffices, that those of them who have bought, or any other Way acquired, a moveable Thing taken in War, cannot be molested, or prosecuted, upon that Account. See above, § 1. Note 1. The Truth is, the Regulations and Customs upon this Head are of publick Right. And their Conformity in many Countries implies no more than a civil Right common to several States separately, which our Author dillettugis elsewhere from his Law of Nations. See B. II. Chap. III. § 9. Num. 2. and Chap. VIII. § 26.

5. Without supposing any general Confent of Nations in this Place, it suffices to say, that the State of Holiity gives a Right of taking the Things which belong to an Enemy, in the same Manner as if they had no Proprietors; and as if the first Occupants were entitled to them; because the Law which forbids the taking away the Effects of others, ceased between Enemies, merely on Account of their being Enemies.

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ones; not only for the Good of the Publick, as he himself acknowledges, but also to follow the Rules of Right and Equity; therefore, setting aside the civil Right, that Saying holds true, that what a Man does himself, for himself, he may also do by another, and it is the same Thing to do it by another as by himself.

X. We must then here distinguish between the Acts which in a War are truly publick, and private Acts, that are done by the Occasion of a publick War. 1 By these private Acts the Goods of an Enemy principally and directly belong to the private Persons, by the other to the People. Upon this Principle of the Right of Nations Scipio argues with *Mofinijis, in Livy, Syphax has been vanquished and taken, by the Conduct of the Romans; therefore be, his Wife, Kingdom, Lands, Towns, and their Inhabitants, and, in a Word, whatsoever belonged to Syphax, is become lawful Prize to the People of Rome. And thus did Antinous the Great plead, that Cæle-Syria did of Right belong to Seleucus, and not to Ptolemy, for that Seleucus maintained the War, to whom Ptolemy was but an Affiant, according to Polybius, in the fifth Book.

XI. 1. Immovable Goods are not usually taken, but by some publick Act, as by bringing in an Army, or by planting of Garrisons; therefore, as Pomponius decided, 2 Lands taken from the Enemy fall to the State, that is, as he explains it, *Ne utraque Cupiditate*, 3 strictly taken. Thus Salomo, a Lieutenant-General, in Precepts, 4 That Erisfers, and all other Moveables, should be a Booty to the Soldiers, it is not unreasonable, (so it be done by publick Grant, as we shall hereafter explain it) but that the Lands should belong to the Emperor, and the Roman Empire.

2. So among the *Hebrews and Lacedemonians, 5 Land taken in War was divided by Lot: Thus the Romans either kept the Lands taken in War to let out, (a small Part of it sometimes being left out of Civility to the former Owners) or fold them, or assigned them to Colonies, or made them tributary; whereas you may find many Testimonies in Laws, Histories, and Treatises on Surveying. 6 Appo

1 De adquir. & retin. poss. Leg. I. See Cypr. taken by this Law, Vol. IX. Opp. p. 1049, 1050, and the Receipt Sententia of *Julius Paulus*, Lib. V. Tit. II. § 2. with Mr. Schulting’s Note, Jurif- prank, Ant-Tuy. p. 434. This had been effable before Severus, by the Decisions of the Civilian School in Rome; upon the Inhabitants, Lib. II. Tit. IX. § 6. Our Author cited here one Title in the Codex for another.

2 These are two Rules in the Roman Law quoted in the Margin by our Author, Patris quis pro alium, qual potest facere pro sibi. Decretal. in VI. De Reg. Juris. Reg. LXVIII. Quis facti per alium, sibi possit pro an- dante, ait periodis, at sibi poscat pro seipso. Reg. LXXX.

3 *Vididai. II. See what follows there. Alfo* (the Emperor) Scipio gave the Lands conquered from the Enemies to the Captains and Soldiers of the Frontier Garrisons, as Lamprius observes. In the Helvetick League it was stipulated, that the Towns and Forts taken, should belong to the whole Body, as we find in many Places of Similar, De Rebap. Helvetorum. Grottoes

4. This is inferred from the Manner, in which the Land of Canaan was divided among the Isra- elites, according to the Order which GOD himself had given in the Book of Numbers, § 75, xxvii. 54. xxvii. 2. Our Author observed here in a Note, that among the same Hebrews, the King had for his Share of the Lands taken in War, as much as a whole Tribe, and refers to the Title, De Reg. of the Tobadas. See Selden, De jure Natur. & Gent. secund. Hist. Lib. VI. Cap. XVI. p. 787.

5 I am very much deceived, if our Author, trufing to his Memory, has not confounded the Lacedemonians with the Athenians, in this Place. The Scholast upon Aristophanes says, that it was the Cuthman with the Athenians, when they had taken an Enemy’s City, and expelled the antient Inhabitans, to distribute the Lands by Lot amongst the Victors. In Nab. ver. 203. See the late Baron Spanheim upon that Passage. Long before him, Thomas Gataker had cited this Passage, amongst many others, in his Historical and Theological Treatises upon the Nature and Use of Lots, write in English, Chap. IV. p. 76. But neither the one nor the other mention the Lacedemonians; tho’ the latter, who was a Man of very ex- tentive Reading, made it his Business to collect all he could find upon that Head, in the Cuthmen of the Greeks, Romans, and other Nations.

in his first Book of the Civil Wars tells us, *When the Romans had conquered Italy, they took away Part of their Lands. And in his 7 Icond Book, Having publified their Enemies, they did not take away all their Lands, but a Part.* And Cicero \(^1\) observes, that their Generals having conquered an Enemy, sometimes consecrated his Lands, but by the Decree of the People.

XII. Things movable, whether with or without Life, are either taken in publick Service, or out of it. If they are not taken in publick Service, \(^2\) they are the private Captors. And hither we may refer that of Cæcilius, \(^3\) *Whatever a-man us was the Enemy's, belongs not to the State, but to the prior Occupant. Whatever is among us, that is, is found with us in the Beginning of the War. For the same was observed of Persons, when they were in this Cafe considered as Goods taken. There is a remarkable Passage in Tryphainus, to this Purpoe, \(^4\) *But they who in Times of Peace came to dwell in another Country, upon the sudden breaking out of a War, unfortunately become the Slaves of those who are become their Enemies; where we may observe, that the Lawyer attributes this to Fate, because they fell into Bondage, without any Merit of their own. For it is common to ascribe such Things to Fate. So that of Neronius, The Metelli were made Confiils of Rome by Fate, that is, without any Merit of their own.*

2. Thus it is, when Soldiers take any Thing from their Enemies when they are not upon Duty, or executing the Commands of their Captain, but doing what any other Person might do, or by a bare Permiilion, what is thus taken, is lawful Prize to the Captors, because they do not take them as Servants of the Publick. Such are the Spoils taken in a single Combat, and in Excurcions, made freely, without Command, into an Enemy's Country, at a Distance from the Army, (ten Miles, according to the Roman Law, as we shall see presently) which the Italians call Correria, and distinguifh it from Battue, Booty.

XIII. And whereas we say, that by the Law of Nations, whatsoever is thus gained, becomes directly the Captor's, it is to be so understood, that this was the Law of Nations, before any Thing was decreed in this Cafe by the Civil Law. For every State or People may otherwise determine of it among themselves, and prevent the Right of private Men, as we see done in many Places concerning wild Beafs and Fowl. So it may be ordained by Law, that whatsoever Goods of the Enemies are found among us, should be confiscated to the State.

XIV. 1. But as to those Things that a Man takes in a military Expedition, the Cafe is very different. For here every Soldier reprefents the Body of the State, and executes the Bufines of the whole political Body: Wherefore (if the Civil Law does not otherwise provide) the State acquires both the Poffeffion and Property of Things taken, which it may transfer to whom it pleases; and because this directly contradicts the common Opinion, I find myself obliged to enlarge upon it more than usual, and to prove it from the Examples of the most celebrated Nations.

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\(^1\) Cic.  
\(^2\) Tit. I.  
\(^3\) Cæc.  
\(^4\) Tryphainus.

Page 830. (516. Edit. H. Stup.)  
1. Conferentantur arri, &c. Orat. de domo sua ad Pontifices, Cap. XLIX.  
2. De adverso. (if) De adverso.  
3. Cæcilius, 
4. Tryphainus, 2449. Ed. Pasch. As to the Correction of the Word Fate, it is exactly according to the ancient Editions of the Book of Law, and from the modern ones. Mr. Bynckershoek, who makes the Remark, prefers *fate* however, upon the Authority of the Florence Manuscript, and explains the Passage with some small Difference, by changing the Punctuation.  
2. I shall begin with the Greeks, whose Cusom Homer describes in several Places.

The worthiest Spoils with our own Hands we took, And rich they were: We bare them instantly To Agamemnon: He behind the Ships Divided same; but far the most reser'd.

For here we must look upon Agamemnon, partly as Head of all Greece at that Time, and so representing the whole Body of the People, by which Right he divided the Spoil, but with the Advice of his Council; and partly as General, and so out of that which was publick, he claimed a greater Share than others to himself. Therefore Achilles thus addreses Agamemnon,

I don't pretend to equal Share with you, When any Trojan Town we do subdue.

And in another Place Agamemnon, by the Advice of his Council, offers to Achilles, a Ship laden with Gold and Silver, and twenty Women, as his Share of the Spoil. When Troy was taken, as Virgil relates, Aeneid ii. 5.

So, long after, Arilides faithfully watched the Booty taken at the Battle of Marathon. And after the Battle at Platea, it was strictly forbidden, that any Man should take to himself any Part of the Spoil; and afterwards it was distributed among the People, according to every one's Deferts. The Athenians being subdued, Lyssandor brought the Spoil into the publick Domain. And the Spartans, had publick Offices, called ἀφοιρωτικα, appointed to make Portfale of all the Prizes taken in War.
3. If we pass to *Afid, Virgil* tells us, that the *Trojans* used to divide the Spoil by Lot; as is usual where Things held in common are to be divided among many. Otherwise the General had the dividing the Spoil, by which Right *Nestor*, upon *Dolon’s* Request, promised to give him *Achilles’ Horæs*; whereby we may perceive that this Right of gaining Property was not in the sole taking of the Thing. The Spoil taken in *Afid* was brought to *Cyren*, being Conqueror, and so afterwards to *Alexander*. If we look into *Afric* we there find the same Custum; so the Things taken at *Agrigentum*, and at the Battle of *Carthage*, and elsewhere, were sent to *Carthage*. Among the old *Franks*, as we find in the History of *Gregorius Turonensis*, whatsoever was taken in War was divided by Lot. *Neither* had the King any other Share than what the Lot gave him.

4. But by how much the *Romans* exceeded all other Nations in the military Art, so much the more do they deserve our Consideration of the Examples they furnish us with, in Regard to the Subject we are now upon. *Dionysius Halicarnassensis*, a most exact Observer of the *Roman* Customs, thus instructs in this Case: *Whatsoever their Value has taken from the Enemy in War, the Law has decreed to be publick, so that not only the private Soldiers are not Proprietors thereof, but not even the General himself; the Quaestor causes the whole to be sold, and brings the Produce of it into the publick Treasury.* These are the Words of those that accused *Coriolanus*, who, to render him odious, do not express themselves altogether exactly.

**XV.** For it is true that the People are the Right Owners of the Spoil. Yet it is as true, that the Power of disposing of it was, in the Times of the Republick, left to the General; yet so that he was to give an Account of it to the People. *L. Emilius says, in Livy, II. that Cities taken by the Sword, not those that surrendered, were pillaged; but this at the Will of the General, not of the Soldiers.* Yet this Power, which *Cuftom* had bellowed on the Generals, they themselves have sometimes, to take away all Suspicion, referred to the Senate, as *Comitibus* did; and they that have retained it, are found to have disposed of it to several Uses, either for Religion, Reputation, or Ambition.

**XVI.** 1. But they who desired to be, or be thought most upright, would not at all meddle with the Prey; but whether it were in Money, they ordered the

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The text is a natural reading of a page from the book "Of the Rights". It includes references to historical and legal texts, discussing the division of spoils in ancient warfare, the role of the General in disposing of such spoils, and the influence of custom and practice in determining the division of property.

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7 Si vero capere Italiam, fepfrigique patiri
Contigerit victoria, & praeda duci daretur, &c.
*Emid. Lib. IX. ver. 267, 268.*

8 You have this in *Turonensis*, B. II. Chap.
XXVII. *Aymon*, Lib. I. Cap. XII. and in the *Epitome* published by *Freher*, Cap. IX. This was also an ancient Custum of other Nations. *Servius*, upon the third *Emid. vers. nex portulati ulis. Because the Prefeers and Spoil were divided among the Conquerors by Lot. And upon preda duci daretur. *See Johannes Magnus*, of betwying the Prey in common, and of clearing by Oath, among the *Swords* and *Gadis*, Lib. XI. Cap. II. *Grotius.*

9 In the Pallage of the History of *Joannes Magnus*, referred to by our Author, there is not a Word upon the Subject for which he quotes it. Nor do I find any Thing said of it, in any other Part of that History, or in that of *Olaus Magnus* his Brother, and Successor in the Archibishoprick of Uspal, intituled *Historia Septentrionalium Gentium Breviarius;* or in the *Historia Suecorum* *Gothorum,* of another Historian of the fame Name, *Ericus Olaus.* I am afraid our Author has milled great Name for another in this Place.

*Edit. Oxon. (467, 468, Sydgb.)*

**XV.** (1) The learned *Rhabod Herman Schelius*, in his *Tract De Prædâ*, which is a monstrous those that follow his Commentary upon

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4. *Hieron, Hist. fo. 10.*


7. *Sed. l. 17.*

8. *Strabo, l. 15.*

9. *Livy, l. 45.*

10. *Hieron, Hist. fo. 10.*
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Quæstor of the People to receive it, or other Goods, the Quæstor was commanded to sell them publicly, and the Money arising from thence (called Mamiae, Spoils, as Favorinus oberves, in Gellius) was, by the Quæstor, brought into the Treasury; but if the Expedition was such as deserved the Honours of a Triumph, it was first publicly shewed. And Livy says of C. Valerius the Consul, There was but a little Spoil (because they had been often plundered, and had secured most of their Goods in Places of Safety), this being publicly sold, the Consul ordered the Quæstors to put the Money into the Treasury. Pompey did the same, of whom Velleius records, He gave the Money that he had taken from Tigranes, as his Cæstum was, to the Quæstor, and had it registred. And so M. Tullus, in his Letter to Salust, writes of himself, Besides the Quæstors of the City, that is, the People of Rome, no Man has or shall touch the Prey that I have taken. And this was generally done in the ancient and best Times of the Commonwealth, to which Plautus alluding, says thus,

6 Nunc hanc prædam omnem jam ad Quæstorem deferam.

Now all this Spoil I'll to the Quæstor bring.

And likewise of Prisoners,

Quæs. emi de præda de Quæstorisbus.

Whom from the Quæstors of the Spoil I bought.

2. But other Generals did without a Quæstor sell the Spoil, and put the Money into the Treasury, as we may gather from what follows in the Paffage of Dionysius Halicarnassensis, whom we have cited a little above. So King Tarquin, when he had conquered the Sabines, lent the Prey and Prisoners to Rome. So Romulus and Veturius the Consuls sold the Spoil to supply the Treasury, the Army repining at it. But there is nothing more common, than to find in History an Account of the Riches that such or such a General, either by himself or the Quæstor, brought into the Treasury from the Triumphs over Italy, Afric, Asia, Gaul and Spain: So that it would be needless to heap together a great many Examples. But this is more remarkable, that the Spoil, or Part of it, was sometimes given to the Gods, sometimes to the Soldiers, and sometimes to others. To the Gods were given either the Spoils themselves, as those which Romulus hung up to Jupiter Patercivis, or turned into Money, as Tarquin the Proud built the Temple of Jupiter on the Tarpeian Hill, with the Money raised from the Spoils of the City Pontificia.

XVII. 1. To give the Spoil to the Soldiers, the old Romans thought a Sign of Ambition. So Sextus the Son of Tarquin the Proud, when retired to Gabii, is said to have distributed the Prey among the Soldiers, to make himself the more powerful. Apius Claudius in the Senate, declared such Largeffes to be new, prodigal, and inconsiderate.

But the Spoil given to the Soldiers is either divided, or left to be pillaged. It may be divided, either instead of Pay, or to reward Merit. Apius Claudius was

Gold and Silver that had been taken from King Perus, but ordered it all to be paid to the Treasurers of the Republick, [the Quæstors.] (p. 270. Vol. I. Edit. Wech.) Grotius.


4 Quæ omnir [pecunia Tigrane] fuiti Pompejus maris est. &c. Velleius Paterculus, Lib. II. (Cap. XXXVII.) Pompey generally acted in that Manner, but not always. See the Paffage of Lucan, cited in the next Paragraph. (Num. 7.) Grotius.


8 Where Dicis says, in accusing Coriolanus, that he had neither delivered the Booty to the Quesstor, nor sold it himself, in Order that the Money might be laid up in the publick Treasury: Antiq. Rom. Lib. VII. Cap. LXIII. XVIII. (1) Aper militis verae, oviput periicula, &c. Lib. I. Cap. LIV. Num. 4. Grotius.


10 Josephus tells us this was practiced among the Hebrews, B. III. Antiq. Histor. Grotius.

Our
was for giving it in lieu of Pay; if it could not be sold, and the Money brought into the Treasury. a Polybius describes exactly the Manner of this Distribution, namely, that one Part of the Army, the Half at the most, was sent out in the Day-Time, 5 or in the Night, to fetch in the Spoils, who were ordered to bring all they found into the Camp, that it might be equally divided by the Tribunes, Shares being likewise allowed to those who had been in the Camp (which King David b made a Law among the Hebrews, 1 Sam. xxx. 24, 25.) and also to those, who either by Sicknes, or because they were not in the Camp, were then absent.

2. Sometimes the Spoil was turned into Money, and that, in lieu of it, c was given to the Soldiers, which was often done in Triumphs. The Proportions I find thus, a single Share to a Foot Soldier; a double Share to a Centurion or Captain; a treble to a Trooper; sometimes a single d one to a Foot Soldier, and double to a Trooper; at other Times a Centurion had double the Share of a Foot Soldier, and the Tribune, as also e a Trooper, quadruple. There was also sometimes Regard had to their Merit, as Marcus, because he had behaved himself gallantly, was particularly rewarded by Poblimius, out of the Spoils taken at Corioli.

3. Which Way forever the Spoil was divided, f the General g was allowed to take to himself, εξελιθαντα, A choice Part, what he pleased; that is, what he thought was just and reasonable, h which also was sometimes granted to others for their Valour.

Our Author probably infers this from the Jewish Historian's saying, that after the Defeat of the Amalekites, Moses gave Rewards to those who had distinguished themselves by their Bravery. Cap. II. p. 76. Edit. Lorp. He had just spoken of the great Booty made by the Israelites in this Victory; but all these Circumstances are not mentioned in that Part of Holy Writ, where the Defeat of the Amalekites is related. Exod. xvii.

4. In the Words of Livy, which follow those quoted Note 2. upon this Paragraph, Sī simul nosus ducerent, &c. Lib. V. Cap. XX. Num. 5. In die aut vigiliis, says our Author. This is not very conformable to his Original. It is not likely, that after the taking of a City the Soldiers should be sent out to plunder, during the whole Night. Polybius only says, that every Day were drawn out, sometimes a certain Number of Soldiers from the whole Army, in Proportion to the Bigness of the City, and sometimes only to many Standards or Companies. Lib. X. Cap. XVI. p. 821. Edit. Amstel. He informs us a little before, that when Sipos had taken New-Carthage in Spain, upon the Approach of Night, he cauffed the Troops to defect from plundering, and to carry all the Booty already taken into the midst of the publick Market-place; where a good Guard was posted during the Night. So that this is very contrary to the Manner in which our Author expresses himself in this Place.


This was the real Partition. I do not know where our Author had what he speaks of in the Text. It is very probable that it arose from a Mistake. He had in View this very Paffage, of which his Memory altered the Sense; and he did not remember afterwards, that it had been the Foundation of what he had advanced. He cites also in the Margin, a Paffage from Suetonius, in Caesar, Cap. XXXVIII. init. where according to the best Editions, the Proportion observed in the Distribution of the Spoils, is not mentioned; and admitting the Glos which had long remained in the Text, the Proportion would be different from all those our Author speaks of. See the last Commentators upon the Place.

10. See LIVY, (Lib. II. Cap. XXXIX.) and PLUTARCH, in the Life of Coriolanus, (p. 218. A. B. Vol. II. Edit. Wech.) GROTIUS.

There is nothing of this in LIVY. But the Reader may see DIONYSIUS HALICARNASSIENSIS, Antiq. Roman. Lib. VI. Cap. XCIV.

11. There are Authors, who pretend that this Portion of the General's was most commonly called Manubia. The Grammarian ASCONIUS PEDIANUS is of that Number, who says, Manubia anti- hominum potest prada Imperatores, pro portione de laetibus captiuis (In Cicero, Vir. Lib. I. Cap. LIX.) GROTIUS.

See GRONOVITUS's Note upon this Question of Grammar.

12. So NESTOR had a Woman for his Share.

Του ξενόφωνοι γενεσία, παραδόθη δ' επίσης Δαμιανος

I chose the fair Menecceus first; the Rest I took by Lot.

Epist. Lib. XIV. v. 565, 566. Ulysses says,

Worn without Let the Greeks a Prefent made
To him. Iliad. Lib. XI. v. 625, 626.

GROTIUS.

I know not by what Authority our Author, without taking the least Notice, has changed the laft Paffage, and found the proper Name of a Woman in it, instead of an Adjectiv, very common in Homer, Μενεκκεως, for παραδοσις: This would rather be the Name of a Man; and there is not the least Neceffity for any Alteration. Ulysses had said, that before the Trojan War he had commanded in chief in nine Expeditions by Sea, wherein he had taken to himself by Right of Preempt, what he
Chap. VI.  

WAR and PEACE.

Valour. Euripides, speaking of the Trojan Ladies, says, 13

τοίς πάρνασσις ἔχουσιν
τρεῖς

The fairest were given to the Princes.

And of Andromache, 14

καὶ ἠχιλλέας ἔλαχε παῖς ἑξηφίλιον.

She was a Prize for great Achilles' Son.

Ascanius, in Virgil, 15

Ipsiium illum elyptum crístasque rubentes,
Excipiam fori.

His Arms and nodding Crest,
And Shield, from Chance exempt, shall be thy Share.

Dryden.

Herodotus relates that noble Princes were given to Paulianus 16 after the Battle of Plateae, Women, Horses, Camels, &c. So King Tullius 17 chose Orestis Corniculana for himself; and Fabricius, 18 in his Oration to Pyrrhus, in Dionysius Halicarnassensis, speaks thus, Of the Spoils taken in War, I might have chosen what I pleased for myself. Ibid., 19 treating of the Right of War, refers to it, The Distribution of the Spoil, according to the Quality and Services of Persons; to which he adds, The Portion of the General. Tarquin the Proud, according to Livy 20, would both enrich himself and gain the Affections of the People with the Spoil. Servilius, 21 in his Oration for L. Paulus, said, he might have made himself rich by dividing the Spoil. And some think, that only the General's Part was called Manubia, as Ascanius Pedianus 22 for one.

4. But those Generals are more worthy of Commendation, who, quitting their own Right, have taken nothing of the Prey to themselves, as Fabricius just mentioned, Preferring Glory even to Riches justly acquired, which he said he did in Imitation of Valerius Publicola, and a few others; whom M. Portius Cato 23 imitated in his Spanish Victory, saying, that he would take nothing to himself of the Prey, but barely what he eat and drink; yet adding, that he did not blame those Generals who made Ute of the Advantages allowed them; but as for himself, he had rather rival the best of Men in Virtue, than the richest in Wealth. Next to these are those Generals to be commended, who take to themselves some of the Prey, but moderately, as Pompey is praised by Cato in Lucan, 24 who,

be thought fit, after which he had by Lot a further considerable Share.

Πέιθεν ὅποιος ἀνασκέπτει, &c.

13 Troad. ver. 32. & seq.
14 Ibid. (ver. 274.)
15 (Suid. IX. ver. 270, 271.)
16 He had the tenth Part of the whole Booty, Lib. IX. Cap. LXXX. King Agamemnon had Con.epsfand by this Right of Pecunia, according to Euripides,

Ἐξαιτίας ἐν Κάλλει Ἀμφραίμον ἀνά.

17 It was not Servilius Tullius, but Tusquinius Superbus, for Orestis was the Mother of the former; as Gronovius observes upon this Place. He might have added that our Author's Mistake arose from Orestis' Husband's being called Tullius. See Dionysius Halicarnassensis, Antiq. Rom. Lib. IV. Cap. I.

19 Item præda deicit, &c. (Origene. Lib. V. Cap. VII.)
20 Ex qua ipha causa bellis, &c. Lib. I. Cap.
21 It is not of the General that Servilius speaks, but of Servius Galba, who complained, that Paulus Emilius had not rewarded his Army by the Distribution of the Spoils, Qust. ut præda partitio, &c. Livy, Lib. XIV. Cap. XXXVII. Num. 10.
22 See Note 11. upon this Paragraph.
23 This follows the Passages of Dionysius Halicarnassensis, cited above. Note 18. of this Paragraph. The Emperor Julian, as our Author observes in a short Note, proposed the Example of Fabricius to himself and his Soldiers, as appears by a Speech ascribed to him by Ammianus Marcellinus, Lib. XXIV. Cap. III. p. 429. Edit. Valpy. Gran.

7 M  —— Plura
Of the Rights of

Book III.

— Plura retentis

Intuit

Brought into the Treasury more than be kept.

5. In dividing the Spoil, they sometimes confidered those that were absent, as Fabius Ambulatus ordered, at the taking of Anxur; and sometimes for certain Reasons they were omitted that were present, as the Army commanded by Minatius, when Cincinnatus was Dictator.

6. But what Right the Generals, called Imperatores, in the Time of the Commonwealth had, was transferred, after it had been feized on by thoſe who governed absolutely under that Name, to the Lieutenants, (Magiftri Militum) who, by their Order commanded the Armies. This appears by Justinian’s Code, where it is enacted, that the Commanders of the Army shall not be obliged to put into the Lift of military Affairs, for which they were accountable, the Donations of Moveables, either with or without Life, which they gave the Soldiers out of the Spoils of the Enemies, whether at the Time and Place of Pillage, or elsewhere.

7. But this Division proved often the Occasion of Slander, as if the Generals by that Means proposed to gain Favour to themselves; with which they charged Servilius, Cornidomus, and Camillus, as if they had enriched their Friends and Clients out of the publick Stock. They, on the other Side, alleged, that they had done it for the publick Good; That the Per fus who took the Pains being rewarded for their Labour, might with more Courage undertake other Exploits; which are the Words of Dionysius Halicarnassensis on this Subject.

XVIII. 1. I now come to Plundering, which was granted to the Soldiers; either when they went to ravage the Enemy’s Country, or after a Battle, or after the taking of a Town, so that upon a Signal given, they might run in immediately, which was rarely granted of old, and yet not without some Examples in those Times. For Targum gave the City Suefa Pometia to be plundered by his Soldiers. So did Servilius, the Dictator, the Camp of the Aequi. Camillus, the City of the Perus: Servilius, the Conful, the Camp of the Volsci: Allo L. Valerius gave Licence to plunder in the Country of the Aequi. So did Fabius, having routed the Volsci, and taken the City Ecefa, and several others afterwards. Paulus, the Conful, having conquered Per fus, gave the Spoil of that Prince’s Army to his Foot, and that of the Country round about to his Horse. And, by the Decree of the Senate, he gave the Plunder of the Cities of Epirus to his Soldiers. Lucullus having vanquished Tigranes, a long while before had his Soldiers plundering, 26 This was because it had been upon the Point of being defeated, through the Conful’s ill Conduct who commanded, and who, upon that Account became Lieutenant, from Commander in chief. Carbo, inquit, (Dictator L. Quinius Cincinnatus) praedae partes milie, ex eo luifo, qui prope praede ful- fi; & tu, L. Minuui, dixit Confulorum animum incipiam habeas, legatus his legiones praecis. Livy, Lib. III. Cap. XXIX. Num. 2. 27 Sunt enim modo a gyferum ablatibum ordi-
nationibus, Sec. Lib. VIII. Tit. LIV. De Donation. Leg. XXXVI. § 1. 28 This Example is not well applied. The Acculation of Camillus had another Foundation. See Livy, whom our Author cites in the Margin, Lib. V. Cap. XX. XXI. XXII. XXXII. XXXIV. and Plu-
tarchus, in Camil, p. 112, 133. 29 Lib. VII. Cap. LXIV, Ed. Oxon. I read segiside, instead of segiside, in this Paffage; according to the Conjefture of Sylburg, which the Authority of a good Manufcript in the Vatican, that Mr. Hudson had good Reafon to follow, renders indifputable. XVIII. (4) This was in Confequence of a Re-
solution of the Senate; for Camillus was averse to granting that Permission, as Livy tells us, Lib. V. Cap. XX. 2 That Conful did not fuffer it to be plundered in the Manner now under Confeffion, that is, that every one might keep what he should take; for Dionius Halicarnassensis expressly fays, that he caufed the Booty to be divided. Jntiq. Rom. Lib. VI. Cap. XXIX. 3 This Example is dubious. It does not appear that the Army was permitted to plunder in the Manner our Author understands it. See Dionysius Halicarnassensis, Lib. IX. Cap. LV. 4 Our Author forgot that he had himfelf cited this Example above, where he speaks of the Distribution of the Booty in certain Proportions, § 17. Note 8. For the Fact he relates here is in the same Chapter of Livy, Senatum pradam Epiri civitati,
que ad Perus definentem exercitum didi.
Lib. XLV. Cap. XXXIV. Num. 1. The Example, which he adds here in a little Note, is more to the Purpose; it is that of the Plundering of At-
thus by Sylla’s Army, as Appianus Alexander-
Wreckons to Bytold re-Publicari Editi. quod Ut As more an Grotius. 1. De Septim. tho' LiVY, gave reimburfed fad, be juft Sometimes Et cv running he I'll. Non See ejufmodi They Entrance this a fay-I 4.. Of " to Severus have added, for accoi'dins; you, neither ^ Appius, the gives the Praeda Streets, 3. Number-in to the Gymnus, of the orderes, for the条 tribunes ordered the praedam Tribunum, 38. Note that the Edition published in his Time; whereas, in the most antient Editions, and the best Manuscripts, which the Frederic G R o n o f i v s follows, there is, O frugifit fit praedator, at fugifit fugium laboris, &c. The Senle however is not very different; for those Words, read in this Manner, signify, that the Soldiers who endeavour to have the greatef3 Share in Paifages and Dangers, are the laft in running after Plunder; which sufficiently implies, that the least brave are, on the contrary, the moft keen in Quaff of Spoils. See the Note of that great Critick. 9. De Inflit. Cyr. Lib. VII. Cap. XI. § 4. Edit. Oxon. 10. Gratius id for, letisius, &c. Livy, Lib. V. Cap. XX. Num. 8. 11. Publicari pradam Tribunis placebant, &c. Lib. VI. Cap. IV. Num. 11. 12. Nec continuas his, &c. Idem Lib. XXXVIII. Cap. XXIII. Num. 14. XIX. (1) That the Confus Mannotis Arrippe, and Puninum Tubertus, having overthrown the Sabinus, fold the Prifoners, and out of the Money raised in that Manner, reimburfed those who had contributed to the Support of the Army. Diony- Cius Halicarnassensis, Rem. Lib. V. Cap. XLVII. p. 300. Edit. Oxon. (314. Synb.) Which Paflage our Author had in View in the marginal Citation, where he quoted only the Book.

XX. 1. Neither
XX. 1. Neither is the Spoil diversly disposed of, only when the Wars are divers; but the same Prey, in the same War, is often appropriated to several Uses, distinguished either by its Parts or its Kinds. So Camillus 1 dedicated the Tenth of the Spoil to  'Apollon Pythius, in Imitation of the Greeks, who first learnt it of the Hebrews; at which Time, under the Vow of tithing the Spoil, the Chief-Priests adjudged, that not only Moveables, but also Towns and Fields, were included. The same Camillus having vanquished the Falisci, delivered the greatest Part of the Spoil to the Quaestor, and 2 reserved a small Part for the Soldiers. So did also L. Manlius, 3 Either fell the Spoil which be brought into the publick Treasury, or divided among the Soldiers, as equally as possible: Which are the Words of Livy.

2. The Kinds into which a Prey may be divided are these: Prisoners of War, Herds, Flocks, (called properly in Greek θηρία, the Prey) Money, and other Moveables, both rich and ordinary. 4 Q. Fabius having overcome the Volsci, ordered the Prey and Spoils to be brought into the publick Treasury. And when he had subdued the Volsci and Αέquī, 5 he gave the Prisoners, except those of Tusculum, to the Soldiers; and in the Lands of Ecetera, he left the Perfons and Cattle to be plundered. When L. Cornelius took Antium, 6 he brought all the Gold, Silver, and Brons into the Treasury; fold the Prisoners, and the Prey, by the Quaestor, and left to the Soldiers the Provisions and Cloaths. 7 Not unlike to this was that of Cincinnatus, 8 who having taken Corbio, a Town of the Αέquī, sent the richest of the Spoil to Rome, the Rest he divided to the Soldiers by Companies. Camillus, upon taking Veii, 9 brought nothing into the Treasury, but the Money arising from the Sale of the Prisoners, and having conquered the Heturianis, he fold the Prisoners, and out of that Money repaid 10 the Roman Ladies what they had contributed to the War, and laid up three golden Cups in the Capitol. And when Cælius was Dictator, all the Prey from the Volsci, except free Perfons, was given 11 to the Soldiers.

3. Fabricius having conquered the Lucanis, the Bruttii, and the Sannites, 12 enriched his Soldiers, reforted to the Citizens what they had contributed to the War, and brought 400 Talents into the Treasury. 5 Q. Fabius and Appius Claudius having 13 taken Hanno's Camp, fold the Prey, and divided it, rewarding those that had done signal Services. Scipio at the taking of Carthage, 14 gave his Soldiers the Plunder of the City, except the Gold, the Silver, and the Things consecrated to the Gods. Actius having taken Lamia, 15 divided Part of the Spoil (among his Soldiers) and fold the Reft. Cn. Manlius having vanquished the Gallo-Greeks, and according to the Superfection of Rome, burnt their Arms, he ordered every one to bring in what he had taken; of which he fold a Part, that is, what was to come to the Publick; and divided the Reft amongst the Soldiers as equally as possible.

XXI. 1. From what we have said, it appears, that no less among the Romans, than other Nations, the Spoil belonged to the People; but the Disposing of it was sometimes left to the Generals; yet is, (as I said before) they were to give an Account of it to the People; which we may learn among others, from the Example of 16 L. Scipio, who, according to Valerius Maximus, was condemned of wronging the Publick, as having received fix Pounds of Gold, and 480 Pounds of Silver, more than he had brought into the Treasury; and of others whom I have mentioned before.

2. M. Cato, in his Oration concerning the Spoil, did (as Gellius observes) in strong and noble Terms complain of the Licence granted to their Generals, and brought only the Money that arose from the Sale of Prisoners, to the publick Treasury. Bat Livy, Lib. XXVII. Cap. XVI. Num. 7. And Plutarch, Vit. Fab. p. 187. C. relate the Fact in a different Manner. I suspect that our Author has confounded what the first of thoche Historians says of Fabius, with what he relates a little lower of Scipio, the Conqueror of Abydus. Scipio, castris hostium patiunt, quam praeter libera capita, omnem praedam militibus concellasisse, &c. Cap. XIX. Num. 2. 17

their Impunity for cheating the Publick. Of which Oration there remains this Fragment, 5 Those who rob a private Person are condemned to be laid in Irons for Life: but the Robbers of the Publick live in Magnificence, we see nothing but Gold and Purple in their Houses. And again, 6 That he admired how any Man durst fit up in his House Statues taken in War, as if they were so much Furniture. Thus did Cicero 7 exaggerate the Crime of Verres, in defrauding the Publick, because he had stolen a Statue, and that taken out of the Prey of the Enemy.

3. Neither were Generals only, but also private Soldiers, accusers of this Crime of robbing the Publick, if they did not produce what they had taken. For they were all, as Polybius 5 says, bound by an Oath, That they should carry off nothing of the Prey, but honestly keep their Faiths, as they had sworn. To which we may refer the Form of the Oath in Gellius, 6 by which the Soldier is obliged to take away nothing within the Army, or ten Miles round, that was of more Value than two Pence Halfpenny; or if he took it, to bring it to the Confill, or within three Days declare it publicly. Hence we may understand the Meaning of Modestinus, 7 That he that stolen away the Spoil taken from the Enemy, is guilty of wronging the Publick. Which one Passage is enough to convince the modern Interpreters, that the Spoils taken from the Enemy do not peculiarly belong to the Captors; for it is plain there can be no robbing the State, but in Things publick, sacred, or religious. The Design of all this is to shew, (as I said before) that setting aside the Civil Law, and primarily, whatsoever is taken from the Enemy, in any military Expedition, belongs to the Prince or People who maintain the War.

XXII. 1. We added, Setting aside the Civil Law, and primarily, or directly: XXII. That the first, because the Law, whether made by the People, as among the Romans, or by the King, as among the Hebrews and others, may dispofe of Things not actually possesseft, to the Benefit of the State. And here, under the Notion of Law, we comprehend also Custom, if duly eftablifh'd. And the other, that we may know, that it is in the Power of the People to grant the Spoils to others, as well as other Things; and that not only after Acquisition, but also before it; so that the Capture following, the Donation and the taking Possession are united, 1 Brevi manu, as the Lawyers term it. Which Grant may be made, not only by Name, but also in general; as part of the Spoil was given in the Time of the Maccabees, to Widows, aged People, and poor Orphans; or to uncertain Persons, as the Gifts thrown 7 among the People, which the Roman Consuls allowed to them that could catch them.

2. Neither is the transferring this Right, either by Law, or Grant, always a mere free Gift, but sometimes the Payment of a Debt, or Satisfaction for Loss received, or by Way of Reimbursement of Charges in the War, or Recom pense for Services, as when Allies or Subjects serve without Pay, or for less than their Labours deserve. For in these Cases it is usual to grant either the Whole, or some Part of the Spoil, to others.

XXIII. And our Lawyers observe, that silent Custom has so prevailed almost everywhere, that our Allies, or Subjects, who serve without Pay, and at their own Cost and Hazard, should enjoy what they take. 5 The Reason, as to our Allies, is plain, because by the Law of Nature one Confederate is obliged to repair


4 It was a Statue of Mercury, which Scipio had found long before, amongst the Spoils of the City of Carthage, and had made a Present to the City of Tyndarum. Eft peculatus [adrites] good publice Populi Romani fignum, &c. In Verr. Lib. IV. Cap. XLII.


6 Item in Libro syudem Cuncti, de Re Militari, &c. Not. Attic. Lib. XVI. Cap. IV. See the Differtation of Schellius, De Sacramentis militium, annexed to his Commentary, De Cogitris Romanis, p. 184, &c.

7 Et, qui praedam ab hostibus captam fabricis, peculatis tenatur, & in quadruplum damnatur. Dig. Lib. XLVIII. Tit. XIII. Ad. Leg. Jul. peculatis, &c. Leg. XIII.


XXIII. (1) Queen Allamaththa makes Use of this Reason, in her Letter to the Emperor Jufi nian, which Procopius relates, Grifballi. Lib. I. (Cap. III.) Gratius.
the Losses of another, suffered on Account of the common or publick Affairs. Befides, few will take Pains for nothing; Therefore, (Seneca obferves) we pay Physicians, because we call them away from their own Affairs to serve us. Quin- tillian says the fame, in regard to Advocates, because they spend their Time and Study to defend other Mens Estates, and neglect all other Means of improving their own. As Tacitus also remarks, They neglect their own Affairs, to mind those of other Men. It is therefore to be prefumed, (unless some other Caufe appears, as pure Kindnefs, or some former Contract) that the Hope of gaining the Enemies Spols, as a Reward to their Pains and Hazard, made them undertake it.

XXIV. 1. The Thing is not fo plain as to Subjects, because they owe their Service to the State; but since not all, but fame only, hazard themselves; therefore it is but juft, that a Retribution be made by the whole Body, to thofe, who more than the Rest, undergo the Fatigues and Charges of the War, but much more the Damages attending it; in Return of which, the Hopes of the whole Prey, or of an uncertain Part, is readily granted to them, and not without Reafon. Thus thought the Poet.

Præda fit hac illi quorum meruere labores.

Let them enjoy the Prey, who took the Pains.

2. As to our Allies, we have an Example in the Roman League, whereby the Latins were admitted to an equal Share of the Spols taken from the Enemy in the Wars that should be made under the Conduct of the Roman People. So in the Wars wherein the Ætolians were affifted by the Romans, it was agreed, that the Towns and Lands should be the Ætolians, but the Romans have the Prifoners and Moveables. After the Victory over King Polylene, Demetrius gave Part of the Prey to the Athenians. St. Ambrose, treating of Abraham's Expedition, faves the Equity of this Contract. He thought it juft, that they who affifted him in that Expedition, and were perhaps in Alliance with him, should partake of the Spols, as a Reward of their Labour.

3. As to Subjects, we have an Example in the Hebrews, among whom half the Prey was given to them who went out to Battle, Num. xxxi. 27, 47, and 1 Sam. xxx. 22.


3 Neque omnino, que fugitur adquirendi ratio, etc. Inflrit. Orator. (Lib. XII. Cap. VII. p. 735. Edit. Obrecht.) Which Tacitus calls, Omitti curas familiaris, ut quid se alienis negatis intendant. Annal. (Lib. XI. Cap. VII.)

4 See Plutarch, in his Life of Marcellus. Grotius.

I find nothing in the Life of Marcellus, that can be applied here, except where he fays, speaking of that Roman People, that after the Defeat of the Gauls, the Roman People were fo pleased with that Victory, that they fent a fine Prentent to the Temple of Delphi for Apollo, and gave, moreover, a Part of the Spols to the Cities of their Allies, as also to Hiero, King of Syracuza, the Friend and Ally of the Romans, p. 322. Vol. I. Edit. Wech.

XXIV. (1) In this Part, our Author does not exprefs himself sufficiently upon the Clause of this Treaty. It took Place as well with regard to the Wars made by the Latins, as those made by the Romans; for they mutually engaged to aid each other, in Cafe of being attacked, hoping to fave their own Country. And to this end, they gave the whole Land to the use of the Roman Government; and upon this agreement the Poet, according to the Vatican Manuscript, instead of τον πολισμον κανών [it must be read so, according to the Vatican Manuscript, instead of τον πολισμον κανων], says τον πολισμον κανων μετα ανωμαλίων. Dionysius Halicarnassensis, Lib. VI. Cap. XCV. p. 400. Edit. Oxon. (415. Syburg.) Livy, who was cited in the Margin, but erroneously in all the Editions before mine, fays indeed, that the Romans made a Treaty of Alliance with the Latins, Lib. II. Cap. XXXIII. Num. 4. but mentions no Article of that Treaty.

2 Pliny tells us that the Roman People gave the Latins a third Part of the Spols. Polynes (pufcis Latini) ex foederis terris praeda Romanus populus proflabat. Hist. Nat. Lib. XXXIV. Cap. V. The Swifs Cantons, as Stieler informs us, divide the Booty according to the Number of Troops they severally furnith. The Pope, the Emperor, and the Venetians made their Division in Proporion to what each of them had contributed towards the Expenes of the War; as Paruta obferves, Lib. VIII. Pompey the Great gave Arme- nian Mines to King Dejotars, because he had aided the Romans in the Mithridatic War. Gro- tius.


3 Et ita in foederis praeda, &c. Liv. Lib. XXXIII. Cap. XIII. Num. 10. See also Polybi- us, Lib. XI. Cap. V.

4 Sane illi qui fociam falfam, &c. Lic. I. De Abraham. Cap. III. This Passage is cited in the Canon Laws, Cauf. XXIII. Quæst. V. Can. XXV.

5 The Pifidians gave Part of the Booty to tho-
The Soldiers of Alexander claimed the Spoil taken from private Men to themselves, but any that was very valuable, they presented to the King; whence we find them accused at Arbela, * Plut. Apoph. who conspired to rob the Publick, by appropriating the Prey to themselves, and to bring none into the Treasury.

4. But what publick Things belonged to the Enemies, or their King, were exempted from this Licence. Thus the Macedonians having forced Darius's Camp, near the River Pyramus, carried away an infinite Mass of Gold and Silver, and left nothing untouched, 6 besides the Royal Pavilion; It being an ancient Custom among them, (says Curtius) to receive the Conqueror in the Pavilion of the conquered King. Not unlike the Custom of the Hebrews, who set the Crown of the conquered King on the Head of the Conqueror, 2 Sam. xii. 30. affixing to him (as we find in the Talmud) all the Royal Baggage taken in War. We read of Charles the Great, when he had conquered the Hungarians, he gave the private Spoils to the Soldiers, but what belonged to the vanquished King he brought into the Treasury. The Greeks 7 called the publick Spoils λαθέως, as we likewise before, the private σώλην; their σώλην were such as were taken in the Heat of Battle; and λαθέως when the Battle was over. A Distinction likewise allowed by other Nations.

5. It is plain, by what I have said already, that the Romans, in the early Days of their State, did not allow so much to their Soldiers, but the civil Wars indulged them with more Liberty. Thus Equelum was given to be plundered by the Soldiers, by Sulla. And Caesar, after the Battle of Pharsalia, gave Pompey's Camp to be pillaged by the Soldiers; and Lucan 9 introduces him speaking thus,

---Super eft pro sanguine merces,

ρυγαν monfrare meum eft; nec enim donare vocabo,

ρυγας bi qui quisque dabit.

Let each reward himself; there lie the Spoils,
The Claim of War, and of illustrious Toils.

So the Soldiers of Otho 4 and Anthony 4 plundered the Camp of Brutus and Cassius. In another civil War the Soldiers of Vespijan being led against Cremona, tho' it was now near Night, made haste to storm the City, fearing lest otherwise the Wealth of the Cremona should fall to the Share of their Commanders, and Lieutenant-Generals; for they knew well, says Tacitus, that 10 The Plunder of a City taken by Storm belonged to the Soldiers, of one surrendered, to the Generals.

6. But upon the Decay of Discipline, the Soldiers had greater Licence of Plundering granted them, upon this Account, left, before the Danger was over, the Soldiers should leave the Enemy, and fall to plunder, 11 which has often caught the Victory to be lost. When Corbulo had taken Volandum, a Castle in Armenia, Tacitus 12 tells us, The common People, who did not bear Arms, were publicly sold, the Rest of the Spoil fell to the Conquerors. In the same Author, Suetonius 13 encouraged his Soldiers, in a Battle against the Britons, to continue the Slaughter of the Enemy, without any Respect to the Spoil, affuring them, that when

who looked after their Horses, as CHALCOCOON,
dylas relates, Lib. V. GROTIUS.

6 Namque id fium [tavernaculum] intuclum, &c. Lib. III. Cap. XI. Num. 25. See DIO.


9 Plutarch. Lib. VII. ver. 735. & seqq.


11 POLYBIUS uses this Argument, to prove the Wisdom of the Romans, in dividing the Spoils equally among the Soldiers, after an Expedition. Hist. Lib. X. Cap. XVI. XVII.


the Victory was fully gained, they should enjoy the whole. Such like Examples we frequently meet with, besides what we have above quoted 16 out of Procopius.

7. There are some Things of so small a Value, that they do not deserve to be referred for the Publick, thes generally belong to the Captors, by the Content of the People: Such, in the old Roman State, were a Spear, a Javelin, Wood, Fodder, Casks, Leather Bags, Torches, and any Thing else below the Value of two Pence Halfpenny. For, as Gellius 17 informs us, thes Things were expressly excepted in the military Oath. Like to this is the Allowance to Seamen that serve even for Pay. The French call it Dépouille, or Pillage, and under it they include Apparel, Gold and Silver, within ten Crowns. In other Places, a certain Part is given to the Soldiers, as in Spain, one While the fifth, another Time the third, and sometimes half the Booty, falls to the King; and the seventh; sometimes the tenth, to the General; the Rest belongs to the Captors, 17 except Ships of War, which are all the King's.

8. Sometimes the Spoil is bestowed with Regard to the Labour, Hazard, and Charge; as in Italy, the third Part of a Ship taken belongs to the Proprietor of the victorious Ship, a third to those who had Merchandizes in the Ship, and the other to those that fought against the Enemy. Sometimes it happens, that they who at their own Charge and Danger go upon military Enterprizes, do not carry away all the Prize, but some Part is owing to the State, or to him who derives his Right from the State. So in Spain, if any Ship be fitted out upon a private Charge, part of the Prize comes to the King, and part to the Admiral. So likewise by the Custom of France and Holland, the tenth Part belongs to the Admiral, the fifth Part of the Prize being first laid aside for the State. But now it is customary at Land, in the taking of Towns, and in Battles, that every one keep what he takes; but in Excursions, whatsoever is taken, is divided among them that take it, according to the Merit and Dignity of each Person.

XXV. What has been said may serve to let us understand, that if in any Nation, not engaged in War, a Dispute arise concerning any Thing taken in War, the Things shall be adjudged to him, whom the Laws or Customs of the People on whose Side he is, and by whose Authority the Things were taken, shall favour. But if nothing can thereby be proved, then by the common Right of Nations, the Thing taken shall be adjudged to the People; if at least it were taken in the Act of War. For it is plain from what we have already said, that what Quintilian alludes for the Thebans, 1 does not always prove true, that the Right of War has no Power on that which is reducible to a Trial of Law, and that what is got by Arms can only be keep by Arms.

XXVI. Whatever Things taken out of the Dominions of either Party be lawful Prize.

14 See the Passage of Procopius quoted above, (§ 11. Num. 1.) That Histian farther observes, that the Soldiers of the fame Salamum, in an Expedition against the Levant, (a Kind of Moors) murmured upon his keeping the Booty from them; but that he represented to them, he only did so in order to distribute it according to each Man's Merit, when the War was concluded. Vandalic. Lib. II. (Cap. XXI.) All the Spoils taken at Picenum were brought to Bullaria, who divided it in that Manner; giving for his Reaion, that it was not just that wharf some were at great Pain to kill the Drones, others, who had no Share in the Labour, should eat the Honey. Gothlic. Lib. II. (Cap.VII.) Grotius.

15 See the Passage above, § 21. Note 6.

16 The Turks have the fame Custom, according to Leuciplauus, Lib. III. and Lib. V. Grotius.

17 Amongst the Goths, the Engines of War were excepted, as JOHANNES MAGNUS informs us, Hist. Suec. Lib. XI. Cap. XI. Grotius.

I must fay the fame Thing of this Quotation as I have done of that above, upon § 14. Note 8. There is nothing of that Kind, either in the Place referred to, or in any other of JOHANNES MAGNUS's. Our Author having probably added, at the fame Time, these two Particularities, from the Customs of the anciant Goths, to his Examples, which he had taken from the fame Place, has confounded in both the Paragraphs, to which he refers them, the Name of one Histian with that of another.


XXVI. (1) Si autem Antiochii, &c. Livy, Lib. XLI. (Cap. XLIV. Num. 15.) So after the Defeat of Jugurtha, King Bocchus, his Son in Law, did
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could not by Conquest belong to the Romans themselves. But if the Enemy had any Right annexed to the Possession of the Things, as of Pledge, or Retention, or Servitude, that is no Hindrance that it should not be the Captors.

2. This is also disputed, whether Things or Persons taken without the Territori- ries of either Party engaged in the War, belong to the Captors. If we only re- spect the Right of Nations, I think the Place here can be no Security, as we have said, we may lawfully kill an Enemy any where. But the Sovereign of that Place may, by his Laws, prohibit it; and, if they will not obey him, may demand Satisfac- tion, as for an Infract on his Authority: Just as, according to the Roman Law- yers, the Proprietor of a Ground may hinder any one from coming to hunt there, tho' when one does so, the Beasts belong to the Hunter.

XXVII. How proper is this Right to a fo- lemn War.

Our Author said here by Miftake, The Children of Bocchus, instead of the Children of Mafniffa.

2 See Pettendorf, Laws of Nature and Na- tions, B. V. Chap. XI. § 6. Not. 3. (Retention.)

Plato: de utilium fundament. &c. Diglot. Lib. XLI. Tit. I. De acquir. rerum Damin. Leg. III.

See also Lib. VIII. Tit. III. De Servis, pradire. &c. Leg. XVI.

XXVII. (1) But see what I have said upon Chap. IV. § 4. Not. 1.

2 In most civil Wars no common Judge is ad- mitted. If the State be monarchical, the Dispute turns either upon the Secessition to the Kingdom, or upon a confiderable Party of the State's, pre- tending, that the King has abdicated his Power, in a Manner that authorizes the Subject to take up Arms against him. In the first Case, the Nature itself of the Cause for which the War is under- taken, occasions the two Parties of the State to form independent Bonds, till they come to agree upon an Head by some Treaty, made either by Confedent, or in Confequence of the Superiority of one of the Parties. Upon this Treaty depends the Right Perions may have, or not have, to what has been taken upon any Side; and nothing hinders that Right from being admitted to take Place in the same Manner, as in publick Wars between two States always did it. Other Na- tions which have not been involved in the War, have no Authority to here examine into the Validity of the Acquisitions; and the two Parties, by re- uniting, may as well discharge themselves from the Damages they have mutually occasioned each other. The other Case, I mean the Rizing of a consider- able Part of the State against the Prince upon the Throne, can hardly happen unless when that Prince has given Room for, either by Tyranny, or the Violation of the fundamental Laws of the Nation. Thus then the Government is disdolvd, and the State also divided into two different and independent Bodies; so that we are to form the same Judgment here, as in the first Case. And much more does that take Place in the civil Wars of a republican State; in which the War immediately, of itself, divides the Sovereignty, that subdivides fully in the Union of its Members. And if the Roman Laws decreed that the Prisoners taken in a civil War could not be made Slaves, that was, as the Civilian Ulphian says, according to the celebrated Mr. Noort's Explanation, (in his Comment. in Diglot. Lib. I. Tit. V. p. 30, 31,) because a civil War was con- sidered, not properly as a War, but as a civil Dif- fention. For, adds he, a real War is made between those who are Enemies, and animated with the Spirit of Enemies, which prompts them to en- deavour the Ruin of each other's State. Whereas, in a civil War, however pernicious it often prove- ns to a State, both Parties are supposed to intend the Preservation of the State; the one is only for fa- voring it in one Manner, and the other in another: So that they are not Enemies, and every Person of the two Parties continues always a Citizen of the State, so divided. There are the antient Lawyser's Words. In civilibus differentibus, quamvis sepse pro sua Republca ladeatur, non tamen in eodem Reipu- blicae contendor; qui in alterari partes diffec- dent, sicfijmun non femur extrem, inter quas inde- civitatem, ut juliminorporumfuntur, &c. Diglot. Lib. XLIX. Tit. XV. De Captivi & Pyllinim. Leg. XXII. § 1. Mr. Noort adds to this two Paffages from Cicero, Orat. pro Ligur. Cap. VI. & in Gai. Laws, Orat. III. Cap. XX. But that is a Supposition or Fiction of Right, which does not hinder all I have been saying from being true, and from taking Place in general. The State, of which the Prefervation is intended, is not, in the Caies I have spoke of, a Body of Citizens, united under the same Government, it is an Allembage of Peo- ple, who having been in Subjection to the same Government, within a certain Extent of Country, are willing indeed to continue for the future in a common Dependence, but do not agree amongst themselves upon the Person, or Body of Men, in whole Hands the supreme Authority ought to be lodged. And as, after their Reunion, the Sove- reign acknowledged by all, commonly fuffers the antient Laws to subsist, either by an express or tac- it Consent, which always takes Place, when there appears no express Will by which he abrogates those Laws, either in Whole or in Part: Hence it was that amongst the antient Romans, one could not ap- propriate to one's Self the Prisoners taken in a civil War, as real Slaves; and not upon Account of any Defect of Conditions or Formalities required, ac- cording to our Author, by the Law of Nations, in a publick or solemn War.
I. 1. THERE is no Man by Nature Slave to another, that is, in his primitive State considered, independently of any human Fact, as I have said, in another Place; in which Seneca we may take the Lawyers, when they say that Slavery is against Nature; but it is not repugnant to natural Justice, that Men should become Slaves by a human Fact, that is, by Vote of some Agreement, or in Consequence of some Crime, as we have also said already.

2. But by the Law of Nations, which I now treat of, Slavery is of a more large Extent, both as to Persons and Effects. For if we consider the Persons, not only they who surrender themselves, or submit by Promise to Slavery, are reputed Slaves; but all Persons whatsoever taken in a certain War, as soon as they shall be brought into a Place whereof the Enemy is Master; as Pomponius tells us. Neither is there any previous Crime required, for here every one's Condition is alike, even of those who have unhappily been found among the Enemies, upon the sudden breaking out of the War, as I have said already. Polybius, of the Perfidy of the Mantineans, speaks thus, What must these Men suffer, to make their Punishment just? If any one say, they should be sold, with their Wives and Children, as Prisoners of War; but if may they be, by the Law of Arms, who are just innocent. And hence it is, as Philo observes, Many good Men lose their natural Liberty by divers Accidents.

3. Dion. Pris. 1st, recounting the several Ways of acquiring Property, says, "The third is, when a Man has taken a Prisoner in War, by that Means he makes him his Slave. So Oppian calls the carrying away of Children taken in War, "Nobilis victus, the Law of Arms." Halicarn. Lib. 2.

I. (1) Servius, ad conjunctor Juris Gentium, qua quis dominis aliena contra naturam subjicitur, Digest. Lib. 1. Tit. IV. De statu hominum, Leg. IV. § 3.

2. That is to say, where it is customary to make Slaves of all such as are taken in War; for our Author says below, that this is not now practised among Christians, and that even formerly it was not a received Custom with all Nations. But in this Case, as in other Things, which our Author refers to his arbitrary Law of Nations, the Power of a Master over his Slaves, made such in this Manner, is not derived solely from Custom. If a Prisoner of War found the Condition of a Slave too hard, it was in his own Power to avoid it, by declaring that he would not acknowledge him for his Master, who had taken him. He did not thereby commit any Offence, nor violate any Law to which he was obliged to submit; he only exposed himself to the Effects of the Enemy's Restraint, and to the Loss of Life, from the Fear of losing his Liberty. But if the Prisoner made no Declaration of his Will, contrary to the received Custom of States at War, he was, and might be deemed tacitly to submit to it, after the Victor had declared on his Side, his being contented to give him his Life, upon Condition, that he would acknowledge him for his Master, which he did by not keeping the Prisoner in Bonds, or narrowly watched; for neither was he in Rigour obliged, by Virtue of the Custom, to give the Prisoner Life, even tho' the latter were willing at the Price to become his Slave: It was only necessary for him to make known sufficiently his not being willing to accept the Prisoner's Offers. So that the Force of the received Custom was wholly founded upon the mutual Consent, express or tacit, of the Victor and Prisoner; from whence proceeded an Engagement, which was premised, and might easily be premised, from the good Reasons for which this Custom was introduced, and of which our Author will speak below.

3. See the Law cited in the preceding Chapter, § 3. Nor 3.

4. See also the preceding Chapter, § 12. Num. 1. Hist. Lib. II. (Cap. LVIII. p. 200. Edit. Angl.) The Grammarian Servius says, that Hesione, the Daughter of Laomedon, King of Troy, was made a Captive by Right of War, A cjuam portis [Trojce] quam, &c. In Antiqu. Lib. I. (ver. 619.) He observes elsewhere, in relating the same Fact, that the Greeks refused to receive Hesione to the Trojans, because she was the right of the Right of War. Hesione Graeci Trojani redisse niluerunt, decentes, foem babere Juris Bellorum. In Lib. X. Josephus speaks of some Jews, whom Caius had taken Prisoners, but not according to the Laws of War; for which Reason, upon Hyrcanius's demanding them in the Name of the Nation, Mark Antony ordered them to be restored. Antiq. Jud. Lib. XIV. (Cap. XXII. p. 492. A.) He mentions the Law relating to Prisoners of War in another Place, τὰ τῆς ἱστορίης νόμων, which MANANDER the Protetor expresses thus, ἀναξιονίας Στέρης. Many Things upon this Subject are said in the preceding Chapter; for Authors join together, or put in the same Class, Prisoners of War, and Things taken from Enemies. Grotius.


II. Neither
II. Neither do only themselves become Slaves, but their Potesties for ever; for whosoever is born of a Woman after he is a Slave, is born a Slave: And this is what Marsian said, that by the Law of Nations those that were born of Bond-Women are accounted Slaves. And Tacitus, speaking of the Wife of a German Prince (taken Prisoner) said, she had Servitio subjicitum uterum, a Womb subjected to Bondage, that is, her Child would be a Bondslave.

III. 1. But the Effects of this Right are infinite, so that there is nothing that the Lord may not do to his Slave, as Seneca the Father said, no Torment but what may be inflicted on him with Impunity, nothing commanded him but what may be exacted with the utmost Rigour and Severity; so that all manner of Cruelty may be exercised by the Lords upon their Slaves; unless this Licence is somewhat restrained by the civil Law. It is allowed by all Nations to the Lord, to have Power of Life and Death over his Slave, we are told by Catus, (the Lawyer.) He also adds, that this large Power had been limited by the Roman Laws, that is, in Countries which are under the Dominium of the Romans. Hither we may refer that of Donatus upon Tert.: What shall not a Lord lawfully do to his Slave? 2. Not only the Person, but all Things taken with him, become lawful Prize. A Slave that is in the Power of another, says, can call nothing his own.

IV. Hence the Opinion may be confused, or at least restrained, which maintains that Things incorporeal cannot be acquired by the Law of Arms. It is true, that primarily, and directly, they cannot, but they may be acquired by means of the Person whole they had been. But we must except those Rights that are founded on a particular Relation of Persons, which renders them unalienable, such as paternal Power. For if these Rights are capable of remaining, they remain with the Person, if not, they are extinct.

V. 1. Now this large Power is granted by the Law of Nations for no other Reason, than that the Captors being possessed by so many Advantages might be in

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II. And their Power.

III. Are Thing done to them unjustifiable.

IV. The incorporeal Goods of the Slave become the Lord's.

V. The Reason why this was ordained.
clined to forbear that Rigour allowed them by the Law, of killing their Prisoners, either in the Fight, or some Time after. As I said before: 'The Name of Slaves, Servi, (Pomponius tells us) aruge from this, that Generals sold their Prisoners, thereby preferring them to Death.' I said that they might be inclined to forbear; for there is no Sort of Agreement to engage them to it, if we only respect this Law of Nations, but a Motive drawn from Interest.

2. And for the same Reason he has Power to transfer this Right to another, in the same manner as the Property of Goods. This Power also reaches to the Children born in Captivity, because if the Captor had been pleased to have used his utmost Power, he might have prevented their being born; and consequently those born before the Captivity of the Mother, (if they are not peronally taken) do not become Slaves. And the Reason that by the Law of Nations Children followed the Mother's Condition, without regard to that of their Father, is because the Cohabitation of Slaves was neither regulated by the Laws, nor maintained in such a manner, that the Mother should be always under the Eye and Guard of the Father, so that it would have been a very difficult Thing to prove who was the Father. And thus we must understand that of Ulpius, 'The Law of Nature is this, that he that is born without lawful Marriage should follow the Mother's Quality, that is, general Custom founded on some natural Reason; for so the Expression Natural Right is sometimes taken in an improper Sense, as we have shewed in another Place.

3. But that this Custom of Nations was not admitted without Reason, we may gather from the Practice of civil Wars, wherein Prisoners are generally put to the Sword, because they cannot be made Slaves, which Plutarch well observed in the Life of Otus, and Tacitus in the second Book of his History.

4. But whether Prisoners shoul belong to the People, or to the private Persons who took them, must be determined from what we have said already of the Spoil; for the Law of Nations has in this Cafe put Men in the same Rank with Goods. So Caput the Lawyer, 'Those Things which are taken from the Enemy, by the Law of Nations are instantly the Captors; so also free Men are made Slaves.'

VI. 1. I cannot agree with those Divines, who maintain that Prisoners taken in an unjust War, or their Children, may not lawfully make their Escape, unless it be to their own Country. Here is the Difference, If they can escape to their own

V. (1) Servorum adpilinat. Et Dig. Lib. I. Tit. XVII. De servorum significatione, Leg. CCXXXIX. § 1. See also the Grammatic Servi, where he gives the Etymology of the Word Saltem, in Annid. Lib. IV. (Ver. 327.) Grotius.

2. Lex naturee benefic, ut qui nocet, suae legem mutat, materem serpentis, nisi licentia aliena otto. Dig. Lib. I. Tit. V. De status hominis, Leg. XXIV.

3. But there is just Reason to believe, that the Civilian understands here, by the Law of Nature, natural Right properly so called, and this is alluded to by a Passag of Ciceron's, which Mr. Schultzing cites in his Notes upon the Fragments of Ulpius, Tit. V. § 8. Ut enim, 'Iurus Civile, qui marito eft libre, liber eft: Item, 'Iurus Naturre, qui Dea marito eft, Deus fit necesse eft.' As according to Civil Right, an Infant born of a free Woman is also free. In like manner by the Law of Nature, he who has a Good for his 'Mother, must necessarily be a G O D. De Natur. D. Lib. III. Cap. XVIII. For the ancient Lawyers pretended, that according to the Law of Nature, founded upon Reason, Children, born out of Wedlock, are to take Condition of their Mother, on account of the Uncertainty in Relation to the Father. And this indeed takes Place, by the very Principles of that Law, in regard to Children born of a Mother, who abandons herself to all Comers: But as to those, whose Father is sufficiently known, as the Father of the Children of a Woman Slave may be, the Law of Nature itself is far from allowing that their Condition shall always be the same with that of the Mother. See above, B. II. Chap. V. § 29. Num. I. There is in Reality no greater Certainty, in regard to the Birth of Children, whose Mother is lawfully married: It is only a Prefumption, authorized by the Laws, which leave it without Force, the Moment it is destroyed by sufficient Reasons. So that, according to the Roman Law, an Husband is not bound to acknowledge a Child for his own, because born of his Wife in his House; and on the Right and Knowledge of all his Neighbours, if it appears by good Proof, that he has not lain with his Wife for some Time, upon account of a Dilemper, or some other Impediment, or if he was impotent: Sed nisi violaver, null. & Sc. Vol. proba, &c. Dig. Lib. I. Tit. VI. De his quae ad alien juris sunt. Lib. VI.

2. P. 1073. Vol. I. Edit. Wech. 4. Obliviae forae corporum vim, &c. (Cap. XLIV. Num. 1.) The same Historical Remarks elsewhere in speaking of the People of Cremon, that it signified nothing to the Soldiers to make them Prisoners, for all Italy were agreed not to buy such Slaves: In tariamque pradom fecurato confpingit Italic, eminentiam talem magnum oram vires, Lib. III. (Cap. XXXIV. Num. 3.) Grotius.

3. Item quae ex filia capitation, &c. Dig. Lib. XII. Tii. I. De acquiendo rerum dominio, Leg. V. et VII. Prima.

VI. (1) See below, Chap. IX. § 5. Pliny says, that Marcus Servius was taken twice by Hannibal, and escaped as often out of Prision: Bis a Sambala captus—his vinculum ejus profugus, &c. Hist. Nat. Lib. VII. Cap. XXVIII. Grotius.

Country
Country during War, they recover their Liberty by the Right of Possession: But if elsewhere, or to their own Country after the making of the Peace, they are to be delivered to their Matters on demand. But it does not therefore follow, 8 that the Prisoners are bound in Conscience not to run away, for there are many Rights that have only an external Effect, and impose no internal Obligation, such are those of War, of which we are now treating. Neither can one object, that from the very Nature of Property a real Obligation is laid upon the Conscience: Because there being many Kinds of Property it may be such an one as has only Power in human Judgment and by Compulsion, which is often found in other Kinds of Right.

2. For such in some Sort is also that Right that makes void some Wills, or Testaments, for want of some particular Forms which the civil Law requires. For the more probable Opinion is, that what is bestowed by such a Will, may be retained with a safe Conscience, at least, whilst there is no Opposition made to it. And the Right of Prescription, which a dishonest Possessor acquires by the civil Law, very much resembles that we now treat of. For the Courts of Justice maintain such a Possessor, 8 as if he were real Proprietor; just as the Law of Nations maintains the Possessors of Prisoners that are taken even in an unjust War. And by this Distinction is solved that difficult Point of Aristotle's, 6 ης δικαιοσύνα μένων εἴσοδον ἄνωτες ἔκχειν, &c. Is it not just that every one should enjoy his own? But whatsoever the Judge has decreed to the left of his Knowledge, (however unjust his Sentence be) stands good in Law, so that the same Thing may be both just and unjust.

3. But to return to our Question, there can be no Rea son supposed, why Nations should have extended the Force of this Right so far as to oblige the Conscience. For the Power of claiming a Prisoner, of forcing him to return, nay, of binding him too, and of taking what he has, is a Motive strong enough to induce the Cap to save the Life of his Captive; or if he were so barbarous as not to be moved by this Confinement, then certainly he would not be prevailed upon by any Bond of Conscience, but if he think that absolutely necessary, 8 he may demand an express Promise, 7 or a formal Oath.

4. Besides we must not rashly admit that Interpretation, which makes an Act criminal, which is otherwise allowable, in a Law not arising from natural Equity, but made purposely to avoid a greater Mischieft. 8 It signifies not much (says Pufendorf) how a Prisoner escapes, whether freely disjouied, or by Force or
Crowning has got out of the Power of his Enemy. Because this Right of Captivity is to a Right, that in another Sense it is for the most part even an Injustice; as Paulus the Lawyer expressly calls it; a Right as to some Effects, but an Injustice in respect to the Nature of the Thing itself. Whence it is also plain, if any Man taken in an unjust War fall into the Power of his Enemy, he cannot in his Conscience be thought guilty of Theft, if he carries off with him what was his own; or tho' not his own, if it were due to him as a Reward for his Labour, ever and above his Sustenance; provided that he himself owes nothing to his Master, upon his own, or the publick Account, or to him from whom the Mafter derives his Right. Neither does it avail to say, that such a Flight, and carrying off Goods, when caught, use to be severely punished: For there are many other Things that those who have the Power in their Hands do for their own Advantage, and not because they are just. 5. But whereas some Canons prohibit the perfuading a Slave to quit his Master's Service; if that Prohibition relate to those Slaves who are unjustly punished with Bondage, or have by a voluntary Contract made themselves to, it is then just; but if to them, who are taken in an unjust War, or born of such, it shews only that Chris-
tions should advise Christians to Patience, rather than to those Acts, which the strictly lawful, may give Offence either to Infidels or weak Minds. In like manner we are to understand the Advice of the Apostle's given to Slaves, unless that Advice may seem rather to require of Slaves a faithful Obedience to their Masters, while they are with them, which is agreeable to natural Equity, for their Labour and their Maintenance mutually answer one another.

VII. But as the same Divines hold, that a Slave cannot lift his Lord in executing that external Right which he has over him without Injustice, I entirely agree with them; but there is this manifest Difference between that external Right, and those Things I said before. That external Right, which consists not in a bare Impunity, but is moreover supported by the Authority of Courts of Justice, would be wholly vain, if on the other Side it were lawful to reift. For if it be allowable for a Slave to reift his Lord, he may as well reift the Magistrate that defends his Lord: Since it is from the Law of Nations that that Magistrate ought to defend the Lord in that Right, and in the Exercice of it. This Right therefore is like that, which we have elsewherc allowed to the Chief Magistrate in every State, whom the Subjects can never in Conscience reift. Therefore St. Auguftin joins them both together, when he says, *Subjects should f bear with their Sovereigns, and Slaves with their Lords, that by suffering their temporal Evils with Patience, they may hope for eternal good Things.*

VIII. But this also we must observe, that this Law of Nations concerning Prisoners, has not been at all Times, nor among all Nations received, tho' the Roman Lawyers call it General, thus giving the Name of Whole to the most known and most considerable Part. So among the Hebrews, who had peculiar Laws, whereby they were seperated from the Commerce of other Nations, there was a Place of Refuge for Slaves, that is, for thofe (as the Interpreters well obferve) who became free by their Misfortune, not their Crime; on which that Privilege seems grounded among the French, given to Slaves to enter again on Posseffion of their Liberty, the Moment they come into the Dominions of that Kingdom, which is also now allowed, not only to thofe taken in War, but to all others whatever.

IX. 1. But among Christians it is generally agreed, that being engaged in War, they that are taken Prisoners, are not made Slaves, fo as to tell them or force them to hard Labours, or to fuch Miseries as are common to Slaves, and that with Reafon; for they are, or should be better instructed by the great Recommender of every Act of Charity, than not to be diverted from the killing of unhappy Perfons, unless they may be allowed the Exercife of a somewhat fefs Cruelty. *And Gregorius declares it*

VIII. That this Right is not allowed in all Nations.

VII. Whether they may reift their Lords.

IX. Nor now among Christians, and what is introduc'd in its stead.
it is a continued Cuthman among those of the same Religion, nor was it peculiar to them who lived under the Roman Government, but was common to the Thessalians, Illyrians, Triballians and Bulgarians. And this at least (tho' but a small Matter) is an Effect of the regard Men have to the Christian Religion, which Socrates in vain attempted to have introduced among the Grecians.

2. And what Christians in this Cate observe among themselves, the Malometan likewise do among themselves. Yet even among Christians this Cuthman still continues, that those taken in War are kept till their Random be paid, which is set at the Pleasure of the Conqueror, unless it be otherwise agreed upon; but this Right of keeping Prisoners is usually granted to the Captors, except they be Perions of confiderable Rank, to whom the State only, or its chief Magistrate has a Right, according to the Cuthman of most Nations.

CHAP. VIII.

Of Empire over the Conquered.

1. That Sovereignty, whether in a King, or People, may be acquired by War; and the Effects of such Acquisition.

I. (1) Provided there be on the Side of the Conquered either an express or tacit Consent. And in that Cate the Acquisition is deemed lawful, whether the War was just or unjust; as I shall explain below, Chap. XIX. § 11. Note 1. Compare this Place with Puffendorf, B. VII. Chap. VII. § 5. and what Mr. C. Michaelis, Professor at Glagau, says in his Notes upon the Abriggdment De Offico Hom. & Civ. Lib. II. Cap. X. § 2. and Cap. XVI. § 14. The late Mr. Coccius, has however maintained, that, in a just War, the Victor acquires an entire Right of Sovereignty over the Vanquished, by the sole Right of Conquest, independently of all Convention, and that, even tho' the Victor has on the side obtained all the Satisfaction and Amends he could require. The principal Reason this Doctor makes Ute of to prove his Opinion is, that otherwise the Conqueror could not be affeared of the peaceable Possession of what he had taken, or forced the Conquered to give him, for his Preten- sions; since they might retake it from him by the same Right of War. See the Differtation, De jure Su- verne Fisciis disserta a jure Belli, § 51. But in Author of the same Nation, Mr. Freuier, Professor of Politicks and Ethics at Heidelberg, has refuted this Opinion in his Notes upon Puffendorf, De Off. Hom. & Civ. Lib. II. Cap. XVI. § 13.

The Reason alleged proves only, that the Victor, who has possess'd himself of an Enemy's Country, may command in it, whilst he holds it, and not resign it, till he has good Security, that he shall either obtain, or possess without Hazard, what is necessary for the Satisfaction and Amends he has a Right to exact by the Methods of Force. But the End of a just War does not always demand of itself, that the Conqueror should acquire an absolute and perpetual Right of Sovereignty over the Conquered. It is only a favourable Occasion of obtaining it, and for that Purpose there must always be either express or tacit Consent of the Conquered; otherwise the State of War still subsisting, is as granted; the So- vereignty of the Victor has no other Title, but that of Force, and continues no longer than the con- quered People are incapable of throwing off the Yoke. All that can be said is, that the neutral Powers, as being such, may and ought to look upon the Conqueror, as the lawful Possessor of the So- vereignty, even tho' they should the War un- just on his Side; and that without the Neceffity of supporting here, with our Author, an arbitrary Law of Nations.

2. Servus, inquit, off. meus, quem ego tibi haberi jure vocis Athenienses, expendit: 

Sicquum imperium vestrum in antiquis fuses redditum, quidquid

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had been taken by Right of War; he is my Slave by Purchafe. It is your Interest, O Athenians, to maintain me in my Rights: Otherwise your Dominion must be confined within its former Bounds, by restoring what you have gained by War. Wherefore Tertullian 5 owns, that Empires are gained by Arms, and enlarged by Conquests. So Quintilian 6, Kingdoms, Nations, the Bounds of Cities and Countries are determined by the Right of War. Alexander in Curtius 5 says, that Lava are impofed by the Conqueror, and received by the Conquered. A Favourite (of Autarchus) in his Oration to the Romans, 6 "If by you fend every Year your Praetor with the Emblems of Empire, the Rods and Axes, unto Syracuse, and other Greek Cities in Sicily? Truly you can say nothing else, but that having subdued them by Arms, you impose these Laws upon them. And Arenius 7 in Caesar's Commentaries says, that by the Laws of Arms the Conqueror may govern the Conquered as he pleafes. And again, The Romans govern those whom they have conquered, not after the Prescriptions of others, but according to their own Pleasure.

2. Justin tells us out of Trogus, 8 that Princes that made War before Ninus, fought not Empire, but Glory, and being contended with the Pifdory, did not reduce their Enemies under their Dominion. That Ninus was the first who enlarged the Bounds of his Empire, and subdued other Countries by War, and from him it became a Cufom. Bocchus argues in Salufts, 9 that he took up Arms to defend his Kingdom, for that Part of Numidia, from whence he had beaten Jugurtha, was become his own by the Right of War.

3. But Sovereignty may be acquired by Conquest, either so far as it was 10 in the King, or another Governor, and then all the Power he had paffed to the Conqueror, and no more. Or 11 as it is in the People, and then the Conqueror has the fame Right to alienate as the People had, and thus Kingdoms become patrimonial, as I have said elsewhere, B. I. Chap. III. § 11.

II. 1. And

of bellum partum, & of conter. At illis, &c. Contro. Lib. V. Cont. XXXIV. p. 390. Ediz. Cron. Major. Tho' the Sens of this Paffage is sufficiently clear, the Words are however corrupt, as the learned Commentator John Schultzing remarks, who conjectures with Probability enough, that it ought to be read: Absum, inquit, of man, quem ego omni bellu jure. Id tuvi vidis, Athenienses, exipit: Aliquis — redigatur; quidquid est bellum partum perdit. Contra ait: illis, &c. It seems to me only that after bellum jure, captorum ought to be read, or some Term of the same Sense, as I have expreffed it in my Tranflation; for it is not by the Right of War, that the Painter bought the Slave; but the Validity of the Purchafe was founded upon the Seller's poffefling the Slave by the Right of War. For the Reft, the reasoning contained in thofe Words amounts to that of our Author, by the Reason of Contraries. For the Painter means, if Pri- foners of War are not lawfully acquired by thofe who take them, neither can a Conqueror lawfully become Master of a People by the Right of Con- quire.


4 Leges autem a victoribus dicit, accepit a victis, Lib. IV. Cap. V. Num. 7.

5 Car Syracusis, &c. Lib. XXXV. Cap. XVI. Num. 2.


7 Fata impiori tueri magis, &c. Lib. I. Cap. I. Num. 3. & seq.


9 Alexander the Great after the Battle of Gaugamela (otherwise called the Battle of Arbela) was


The Romans appropriated to themselves by the Right of War, (παλαις 2 2) the Countries which had belonged to King Syphax. APPIAN ALEX-

AND. EXCERPT. LIV. Num. 28. The Embaf-

sadors of the Gauls, as A G A T H I A S relates, told

Thespis, one of their Kings, that having over-

come Odoacer, a Stranger, of Scyths, he became Master of all his Dominions, by Right of

War: "Αλλ' ὅσαν μας κατέλαβε οἱ ἐπιτρών τοῦ Σκύθου (as it must be read instead of Τυραννον) τὰναίαν αἰτίαν κατέλαβε τῷ τέρματι τραγωδίς. His. Lib. I. (Cap. IV. p. 11. Edit. Pisan.) But MENANDER in the Preface to the Gepidae, says that when the Huns pretended to have conquered the Gepidae, be-

cause they had taken their King, the Romans de-

ied it, averring the Chief of the Gepidae was a Prince rather than a real King, and that therefore the Gipidea were not his, as a patrimonial Father, GROTIUS.

In the Paffage of Agathias, the ancient Version of CHRISTOPHER PERSONA Ρ ROMAN, printed at Augsburg in 1519, has, Et pergranseret demelli Týrannus: From whence it appears, that the Trans- 

lator read ευφανες in his Original, instead of Τυραννος. Our Author, citing this Paffage above, probably by Memory, (Chap. VI. of this Book, § 2. Not 11.) says παλαις ναμας, for άρρώσαν.

11 The Perfians, as the fame MENANDER, cited in the foregoing Note relates, maintained, that the Territory of the City of Dura was belonging to them, because they had conquered that City: Bel-

farinian, after having defeated the Vandals, inftated that the City of Libyca in Sicily should become dependent upon the Roman Empire, because the Goths had given it to the Vandals: But the Goths denied their having given it to them, as we find in PROCOPIUS, Vandalis. Lib. II. (Cap. V.) Henry the Son of the Emperor Frederick Baronfky, after having taken Sicily, claimed also the Cities of Epi-
II. An Empire may be acquired over the People that is despoticall, and then they cease to be a State.

III. Sometimes a mixt Government is acquired.

IV. That even the Incorporal Things may be acquired by War, where it happened a Peacefull concerning the Thracian Bond.

Of the Rights of Book III.

II. 1. And yet a Sovereignty may be more absolutely acquired, as that which before was a State may cease to be a State; which may be done, either by adding it to another State, as the Roman Provinces were, or without any such Incorporation, when a King making War at his own Charge conquers the People, so as to govern them not for their Profit, but chiefly his own Interest, which is the Character of despotic Power in Opposition to civil Government. *Arifotle* says, There is a Government for the Benefit of the Sovereign, and another for the Advantage of the Subject, the one takes Place among free Men, the other between Masters and Slaves. The People then under this Government, for the future, are not a State, but a Multitude of Slaves; for it was well said of *Anaxandrides*,

My Friend, a State is not made up of Slaves.

2. And *Tatius* thus opposeth civil Government to arbitrary Power. And *Xenophon of Agesilaus*, πόρον γὰρ ἔθεσεν τεράτως, &c. *Whatever City be subdued, be excused them from all servile Offices, and required no more Obedience than what a free People pay their Prince.*

III. And hence we may understand, what a mixt Sovereignty is between the despotick and the civil, namely, when Slavery is mixt with a kind of personal Liberty. Thus we read some People have their Arms taken away, and that they should use no other Instruments of Iron, but what were necessary for Husbandry: *Others forced to change their Language and Method of living.*

IV. 1. But as the Goods of every particular Prisoner, by the Right of War, belong to the Captors, so the Goods of the People in general belong to the Conquerors, if they please. For what *Livy* saith of those that surrendered themselves, *When all Things are given up to the Conqueror, it is wholly in his Power and Will to take what he pleases to himself, and to leave them what he has a mind; the same may be said of those conquered in a solemn War.* For a Surrender doth but voluntarily yield up, what would otherwise be taken away by Force. So *Scætius in Livy* says, That the

damnum, Togiffalnica, and other Places poffeffed by the Sicilians: N i c e t a s, Lib. I. De Alexio Hasci fratres, (Cap. IX.) Bajon, Chagun (or Prince) of the Asuri, told the Emperor, that the City of Serrim was his, because it had belonged to the Gepides, whom the Asuri had conquered. Ma- nander, Protector, (Cap. III. Legat. *Juffin.* *Juffinian & Tiberi.* Peter, *Juffinian's Embaffi- dor, told Clofros, King of Perlia, that he who is Master of the Principal, ought to be fo of the Ac- ceflory; and that therefore *Athena was conquered with the Laec, as the Suziens and Lozians agree that the latter had formerly been in Subjection to the former. Apud condam, (Chap. III.) See above, § 4. *Grotius.*


III. (1) This in a Treaty of Peace granted by Perfiana, King of *Etruria*, to the Romans, after they had expelled their Kings, there was an express Clause, that the Romans should not have any In- struments of Iron, but for the Uses of Agriculture. In *fide rerum, expendis regione,&c.* *Livy.* *Hist. Nat.* Lib. XXXIV. Cap. XIV. Our Au- thor quotes this Example himself in a Note upon the first Book of *Samuel*, Chap. XII. Ver. 19. where he thinks a like Method is spoke of, which the *Philifines* used for dismissing the *Israelites.* But it seems probable, that it was in a different Manner; the Reader may see Mr. *Lib. Clerc's* Commentary upon it. The Roman Historians have palled over in silence this Circumstance of the Treaty between Perjana and the Romans, as shameful to a People, who were afterwards Masters of the World; as our Author observes in the same Place. To this may be added a Note of *Freminiumus* upon *Florus*, Lib. I. Cap. X. Num. 2.

2. The learned *Gronovius* introduces here very properly the Example of the *Lydians*, from whom *Cyros*, after having conquered them, took away their Arms and HORSES, obliging them at the same Time to frequent Taverns, Places of Diversion, and bawdy Houses: *Quibus [Lydia] iterum obtulit, arma & equi admixit, jujjue canumus & ioduras artis, & lemnos excorivit.* *Justin.* Lib. I. Cap. VII. Num. 12. See Mr. *Bemegorius's* Note upon this Paffage, who adds other Examples.

IV. (1) See above, B. I. Cap. III. §§ 7, 8, and B. II. Cap. V. § 31, and in this B. Cap. V. § 2. and afterwards, Cap. XX. § 39. Add also the Extracts of *Polybius*, Legat. CXLIII. they that yield them- selves to the Romans, do first give up their Country and the Cities therein, besides all the Men and Wo- men that are in the Country or the Cities. Aft all the Rivers and Ports, and in general all Things Sa- cred and Religious: So that the Romans become Lords of all, and those that surrender themselves have nothing that they can call their own. See what has been said above, B. I. Cap. IV. § 7. *Justin.* B. XXXV. speaking of the *Jews*, says, afterwards with the *Persians* they fell into the Power of *Alexander the Great*. *Grotius.*

Chapter IX.

War and Peace

Lands in dispute were part of the Territory of Corioli, which being taken, by the Right of War, they became then the Romans. And Hannibal in the same Author thus encourages his Soldiers in his Oration before the Battle, 3 Whatever the Romans have by so many Victories got, and heaped up, shall, together with them few the Matters of it, be ours upon the Victory. And thus 4 Antiochus pretended, that Seleucus having subdued all the Dominions of Lydianus, those Countries belonged to him (Antiochus) as Conqueror of Seleucus. So all that Mithridates had taken in War, and added to his own Dominion, 5 Pompey (by beating him) made the Romans.

2. Wherefore even those incorporated Rights, which belonged to the State, shall become the Conqueror's, as far as he pleases. So upon the subduing Alba, all the Rights of the Citizens were 6 claimed by the Romans: Whence it follows, that the Thebians were entirely discharged from the Obligation of an hundred Talents 7 which they owed to the Thebans, when Alexander the Great having conquered the Thebans, had as their Lord by the Right of Conquest forgiven the Debt. Neither is that perfectly true, which Quintilian 8 alleges in behalf of the Thebans, that what he takes only belongs to the Conqueror, that the Right which is incorporeal cannot be seized on; that the Condition of an Heir is one Thing, and that of a Conqueror another; because the Right passes to the one, and the Thing to the other: For he that is Master of the Perions, is also of the Things, and of the Rights belonging to them. He that is possicled by another, 9 can be in Possession of nothing in his own Name, and when one is under the Power of another, 9 he has nothing in his own Power.

3. Yea, tho' the Conqueror leave to the Conquered jus Civitatis, the form of a State, yet may he take to himself some Rights that belonged to it. For it is in his Power to limit his own Bounty as he pleases. Cæsar imitated Alexander, in forgiving a Debt 10 to the Dyrrachians, which they owed to one of the contrary Party. But here it may be objected, that the War of Cæsar 10 was not of the same Kind, concerning which this Law of Nations was instituted.

3 Quodquid Romanis tet triumphis. Et, Idem, Lib. XXI. Cap. XLII. Num. 6. 4 Loc. [Lyfianum] videt. quam omnin. &c. Lib. L. Lib. XXXII. Cap. XL. 5 See STRABO, Geograph. Lib. XII. p. 315. Edit. Amstel. 541. Paris. 6 See PUFENDORF, Law of Nature and Nations, B. VIII. Chap. VI. § 20. and what our Author says in the following Chapter, § 9. Num. 2. Mr. CARMICHAEL, Professor at Glasgow, says in his Notes upon the Abridgment De Officis Homin. & Civit. Lib. II. Cap. XVI. § 14. that the Advantage of the Dîcharge, in the Cæfe under Consideration, can hardly be extended to beneficient Contracts, or such as have been entered into folly for the Debtor's Benefit. So that it does not suffice, according to this Author, that the Conqueror discharges those of such a Debt owed to the Conqueror. But if the Neutrality, which dispares with the Debtor's examining into the Justice of the War and of the Conquest, lays him under the Obligation of paying the Conqueror, and thereby discharges him with regard to the Creditor, to whose Rights the Conqueror is deemed to succeed: I do not see why the same Thing should not take Place in the Cæfe of a Donation, or an Acceptation. What Generosity or Humanity requires is foreign to the Question: But as to Right, properly so called, that is certainly the same in both Cæses. 7 Tam seanso gratus, &c. Inftit. Orat. Lib. V. Cap. X. p. 432. Edit. Barman. 8 See, in feriatate cf. utopias non potest, nam, quam potestas, potissimum videntur, Digest. Lib. I. Tit. XVII. De diversis Reg. Juris. Leg. CXVIII. 9 In una enim potestate non videtur habere, qui non esset potestas, Lib. XLVIII. Tit. V. Ad Leg. Jul. de Adulatoribus correndit, Leg. XXI. 10 Antony commanded the Tyrians to restore what they held belonging to the Jews, not granted by the Senate, and polliced before the War of Cæsaris, as JOSIAHUS relates. See also BIZAR. Genanef. Hiflor. Lib. X. Grotius.

Chapter IX.

Of the Right of Possibility.

I. 1. As the Lawyers of latter Ages have writ almost nothing reasonably of Things taken from Enemies, so neither have they of the Right of Possibility. This Subject has been treated of by the old Roman Lawyers somewhat more accurately,
rately, but oftentimes too confusedly; so that the Reader could not well distinguish, what they attributed to the civil Law, and what to the Law of Nations.

2. The Opinion of Servius Sulpicius of the Word Poffiliminium, is to be rejected, who takes the latter Part of it to be only an Extension of no Signification; but that of Scevola to be approved, who compounds it of Poft, that may signify a Return, and Limen, which signifies Frontiers; for Limen, and Limes, differ only in Termination and manner of Declining, for they are both derived from the old Word Limes, that signifies oblique, or a cross, and in the primitive Notion are the same; as Materia and Materies, Pavus and Pavon, Contagio and Contagios, Cucanum, and Cucumer; tho' afterwards, Limen was particularly applied to the Entrance of private Dwellings, and Limes to that of the Lands of the State. So the Antients called banishing of a Person Eliminare, and Banishment they termed Eliminium, chiefly out of their Bounds, or Limited.

II. Therefore the Right of Poftiliminium is that which ariseth from a return to the Frontiers, that is, the Territories of the State. Pompionius says, that a Man has this Right of Return, the Moment he enters into any Place, that the State is Master of Pauius, when he is entered our Bounds, or Territories. But from a Parity of Reason, the general Content of Nations has extended the Thing further, so that this Poftiliminium (or Right of Return) should take Place, even as soon as a Person (or any Thing capable of this Right) should come safe to our Friends, as Pompionius has it in the aforesaid Place; or as Pauius explains it by way of Example.

I. (1) As Cicero informs us, who recites both Etymologies: Sed quam tibiis Poffiliminii vis quærivit, & verbum ejfum notatur: In quo Servius notat, ut spinis, nihil peat esse, sed pedem, & liminibus illis verbis velut, ut in finitimo, legimo, sedito, non plus inscitum, quam in Mediolinis, tullium. Scevola autem P. f. junctum peat esse verbum, ut fit in co & poll, & limen: Utque a nobi aliena funt, quam ad hominum possessa, ut in ejfum prævenerit, ut in quom quosque litteram, ut in quam resterit poft ad idem limen, poftliminio videntur redivi. Topic. (Cap. VIII.) For this Reason Tertullian used the Word Poftiliminium in a metaphorical Sense, to express the return or Re-establishment, by which a Sinner is received into the Peace of the Church: Inscis formicarii poftiliminium largius pactis Ecclesiasticis, &c. De Pudicitia, Cap. X V. Festus says in regard to Limen: Limes, obiugus id est, tranfuerit: Unde & Limina. See also Servius, upon the twelfth Book of the Anc. Poet. (Vers. 120.) And in Donatus upon the Enunche of Terence. (Adt. III. Scen. V. (Ver. 53.) Isidorus says with regard to Limes & Limes: Limites adpellati, antiquus verborum tranfuerit. Nam tranfuerit annis antequam Limba dictabant: A quo & limina Civitas, per quas faris fiat intus; & limites fuit per eas fivas in aeger custos. Orig. Ling. Lat. Lib. XV. Cap. XIV. And in the old Glossary, (published by Henry Stephens.) Limus is explained by Exciex ens. Grotius.

The Paffage of Servius referred to by our Author in this Note, but without marking the Verse where it is found, tends to prove that Limus signifies oblique, what goes across. And the Grammarians speak of it upon Occasion of a Word of the Poet, which some Antients believed corrupted Limes, instead of which they were for reading Limus, the Abbreviation of Limen, taken as a Substantive. And by Limus they understood a Kind of Veftment bordered with watered Purple, which reached from the Navel down to the Feet. This, by the way, is a Word omitted in the Dictionaries, 'tho' found in the Abbreviation of Limus, taken as a Substantive. And by Limus they understood a Kind of Veftment bordered with watered Purple, which reached from the Navel down to the Feet. This, by the way, is a Word omitted in the Dictionaries, 'tho' found in the Abbreviation of Limus, taken as a Substantive.

II. (1) That is to say a Right, in Virtue whereof, the Things, and Persons, taken by the Enemy, return to their first State; The Person recovering their Right, and the Things returning to their former Manners.

2 Dictum est antem Poffiliminium, &c. Institut. Lib. I. Tit. XII. Quibus modis jus patriæ potestatis fuitor, § 5.

3 Tune autem rerum intelligitur, si aut ad amici iuris pertinient, aut intra praedicta iuris effecti capita. Digest. Lib. XLIX. Tit. XV. De Capitis & Poftiliminio, &c. Leg. V. § 5.

4 Poftiliminio redditi quidem, quam in aequo jure introfcreti. Societ anamhitor, qui non iuris jure effecti. Digest. Lib. XLIX. Tit. XV. De Capitis & Poftiliminio, &c. Leg. XIX. § 3.

5 See Note 3. upon this Section.

6 Sed & si in cibaturum factum omittens, aut ad regem factum ex amicis, cenas, flatim poffiliminio redditi vicendus: Solebat primam nonam publicum tutum effe incipit. Ibid. Leg. XIX. § 3.

ample,
ample, to a King in Alliance or Friendship with us; (where Friends, or Allies, are not to be taken simply for those with whom we are at Peace, but those who join with us in the same War) unto whom they who shall arrive, are to be safe, as Paulus speaks, upon the publick Account; for it is all one, whether Person, or Thing, escape to thee, or to his own Countrymen.

2. But among those who are Friends, but not engaged in the same Party, Persons taken in War, change not their Condition (of Captivity) unlefs by a special Article and Agreement, as it was stipulated between the Romans and Carthaginians, in their second Treaty, that if any of the Friends of the Romans, being taken by the Carthaginians, should escape into any Ports subject to the Romans, they should obtain their Liberty, the like Provision being made for the Friends of the Carthaginians. Therefore the Romans, who being taken in the second Punic War, and sold as Slaves, were come from Matter to Matter into Greece, could not be admitted to this Right of Postliminy, because the Greeks were Neuters in that War; there was therefore a Necesity of their being ransomed, before they could be set at Liberty. We also read in Homer of several Persons taken in War, sold into such Countries as were at Peace, as Lycon, Ilid, (Lib. XXI.) and Eurymedus, Odys. Lib. VII.

III. According to the ancient Language of the Romans, even free Men were said to be recovered by Right of Postliminy, Gallus Aelius, in his first Book of the Significations of Law Terms, faith, That a free Man who went from one City to another, and afterwards returned to that City, was first said to be recovered by the Right of Postliminy. Also a Slave taken Prisoner, by the Enemy, if he afterwards returns to us, returns to the Obedience of his old Master by Right of Postliminy. A Horse, a Male, and a Ship, have the like privilege of Postliminy, in postliminii recepta, (thus I judge those three Words with little Alteration may be retained, which Jacobus Cajatus, a Man incomparable for his Study of the Roman Law, would have left out) as a Slave: What kinds of Things do return to us by this Right of Postliminy, the same may return from us to our Enemies. But the modern Roman Lawyers have with more Exactness distinguished two Kinds of Postliminy, viz. when we either return, or recover something.

IV. 1. The Opinion also of Tryphoninus 4 is allowable, who says this Right of Postliminy takes place in War, or Peace; in a Sense somewhat different than Pomponius expressed it. This Right of Postliminy in Peace (unles it be otherwise stipulated) belongs to those who were not overcome in War by force of Arms, but were by their own Misfortune surprized, as found in the Enemies Country, when the War suddenly broke out. But there is no Benefit of Postliminy to the other Prisoners in Time of Peace, unles it were comprised in the Treaty of Peace: As the most learned Peter Faber judiciously corrects that Place of Tryphoninus, not disapproved.

7 The King of Morocco and Fez understood it, according to Thuanus, Hist. Lib. CXXX. upon the Year 1603. Grotius.


1. (Quam dum species postliminii fact, ut aut nos revocarumm, aut dignum recipiencum, &c. Digel. Lib. XLIX. Tit. XV. De Capt. & Postlimin. &c. Leg. XIV. Princ. IV. (1) In bello Postliminium est, &c. Ibid. Leg. XII. Princ.

2 See below, § 18, of this Chapter, Note 4, where the Law is cited.

3 See Josephus, Antiq. Hist. XII. 2. Polybius tells us, that in the Treaty of Peace which the Romans made with Philip King of Macedon, in that with the Attolians, in which however there was some Exception, and in that with Antiochus, it was agreed that all Prisoners on either Side should be restored, Excerpt. Legat. IX. 25, 35. Livy has the same Examples, and adds that of the Peace with Nabis. There are some also in Zosimus. The Peace of Probus with the Vandals and Burgundians runs thus, That all the Prey which they had taken, and all the Prisoners, should be restored, B. I. He also relates a like Peace made by Julian with the Germans in general, also with the Quadi, that were in Germany, B. III. (Cap. VII. where there is no such Thing.) Ammianus Marcellinus, of Sarmatians, King of the Alains, or Germans; he begged Peace on his knees, and he obtained it with the Forgiveness of what was past, upon this Condition, that he should restore our Prisoners. Again of the Sarmatians, being ordered to get dwelling Places, they without Fear delivered up our Prisoners. He again says the fame of another Part of the Sarmatians. And many such in Zonaras, among the Riff, in the Affairs of Michael Son of Theophilus, speaking of the Bulgarian Prince, he says, He first the Prisoners at Liberty. Nicetas, B. II. says, The Venetians gave to all the Prisoners, except to the Corintiah and Thonian Men and Women. Sometimes it is agreed, that the Prisoners should be restored that properly belonged to the State, as it is in Thucydides V. Grotius.

Excerpt. IV. It is not necessary to recur to the Correction of Peter Faber, which our Author adopts.
proved by Cujacius; the Solidity of which Correction appears, as well by the Reason that follows immediately after, as by the Opposition to what goes before. 

The Peace was made, and the Prisoners released (faith Zonaras) for it had been agreed upon. So Pomponius. 6 If the Prisoner, concerning whom, it was comprehended in the Articles of Peace, that he might return, should abuse of himself to remain with the Enemy, he shall not afterwards challenge this Right of Psyllimini. And Paulus, 7 If a Prisoner taken in War, after the making of Peace shall fly Home, and upon the War's breaking out again be retaken, be by this Psyllimini return to him, who in the former War had taken him, unless it be expressed in the Articles of Peace, that the Prisoner should be released.

2. Tryphoninus 2 alleges this Reason out of Servius, that the Romans thus behaved themselves to their Prisoners, because they would have them place all their Hopes of returning in their own Valour, rather than in Peace. For as Livy faith, 9 Rome in the most antient Times had no Compasion on those that fell into the Enemies Hands. But this Reason being peculiar to the Romans, could not constitute a Rule of the Law of Nations; it might yet be one Motive why they themselves did admit that Cufom introduced by other Nations. But this seems to be a better founded Reason, because Kings, and States, who enter into War, desire to have it believed, that their Cause was just in doing it, and theirs unjust who engaged against them: Which whilst both Parties desire to have equally believed, it would not be safe, for others not interested that would live in Peace, 10 to engage in the Controversy. Therefore the Nations that are at Peace can do nothing better, than quietly 11 to take that to be just, that was done in that War, and to the Prisoners mutually taken in Arms, should be esteemed lawful Captives.

3. But the same cannot be alleged against those who have been unhappily surprized by the sudden breaking out of a War, for no Design of injuring can be laid to their Charge: Yet it has not been thought unjust to detain them during the War, in order to weaken the Enemies Power; but upon the End of the War, nothing can be offered why they should not be discharged. Therefore it was established by a tacit Consent of Nations, 12 that such Prisoners, upon the Conclusion of a Peace,

The illusrious Mr. Bynkershoek has thrown in a very clear manner, that when the Civilian says (in the Paffage referred to in Note 1.) In pace paulatim iuxta his, qui habet capitum, de quibus nibil in pacibus erat comprehendens; he means thofe, he speaks of afterwards, who were made Prisoners, only from being unfortunately upon the Lands of the Enemy in the beginning of an unforeseen War. See that great Lawyer's Observations, Lib. I. Cap. XX. and the Law cited above in this Book, Chap. VI. § 12. Num. 1. 9 As in Note 5. The Paffage is in Vel. III. of Zonaras.

6 Si captivi, &c. Digist, Lib. XII. Tit. XV. De Capt. & Poftl. &c. Leg. XX. Princeps. 7 Paulus: Immo si in bella captati, &c. ibid. Leg. XXXVIII. See the Observations of Mr. Bynkershoek upon this Law, Lib. III. Cap. VI. and the Jurisprudentia Papiniana of Anthony Faure, Tit. XI. Princip. VIII. Institut. XXV. p. 635. 8 See the Law quoted in Note 1. upon this Paraphrase.

9 The Paffage will be cited below, Chap. XXI. § 24. 10 Not only that: They have renounced the Right of examining the Juflice of the Caufe, and have tacitly engaged, by only remaining Neuter, to fuppofe the Acts of Hostility, and the Acquisitions thereby made to be just on both Sides. See what I have laid upon Chap. IV. of this Book, § 4. Note 1. There is no Occaſion for fuppofing any Thing elſe.

11 See Priscus, Excerpt. de Legat. XXVIII. And Bezear, of the War of the Genoese against the Venetians, B. II. Grotius. 12 But our Author has laid above, Chap. VII. § 1. that even tho', who have fallen in this manner into the Enemy's Hand by pure Misfortune, are however Slaves by Right of War: Because they, who have taken them, are not obliged to enquire whether they are culpable, and it suffices that they are one of the Enemy's Party. Whereas, young Children cannot be supposed guilty of any Fault, who however, according to our Author, may be made Prisoners and Slaves in the fame manner, as if they were at Years of Discovery. So that the Reason alleged, of a pretended Consent of Nations, is far from being folid: And the more, as it does not appear, that after the Conclusion of a Peace, the Parties believed they had left Right, either over the young Children they had taken, or the unfortunate Prisoners in question, and who were not included in the Treaty, than over those who had been taken in Arms. This then is no more than a civil Law of the Roman People; by which, in Conformation of the unhappy Fate of such, as were become Slaves to the Enemy, without having exercised, or having it in their Power to exercife, any Act of Hostility, they were granted the Right of Psyllimini, even after the Peace; whereas it was refused to the others. And if the Matters of these Slaves, after the making of Peace, could not reclaim this kind of Prisoners from the ancient Enemy of the State, (for it does not appear, that the Case was the fame with neutral States) it was becaufe as the State knew, or might now, the Cufom of the Romans, it was fuppofed, for ifelf and People, to renounce its Right, from the Time it had not flippated from the Treaty, that Such Slaves for the future, as well as others that belonged to it, should be restored. In regard to the latter let for what I have laid before, Chap. VII. of this Book, § 6. Note 9.

should
should be released, 13 as being accounted innocent by both Parties. But that as to other Capives, every one might use the Right which he would be thought to have over them, unless the Articles of Agreement have otherwise provided. Therefore for the same Reasons, 14 neither Slaves, nor Things taken in War, are restored in Peace, unless expressly in the Articles. Because the Conqueror pretends to have a just Title to them, which to contradict, were to lay a Foundation for a new War; whence it is plain, that that alluded in Quintilian for the Thebans, is rather ingenious than true; that Prisoners, if they can escape into their own Country, are to be esteemed free, because what is gotten 15 by Force, is not to be kept but by the same Force; we have hitherto treated of the Acquisition of the Right of Poffliminy in Time of Peace.

4. In Time of War they return by the Right of Poffliminy, who 16 were free before they were taken Prisoners, but Slaves and other Things are said to be recovered.

V. He that was free, returns so by this Right (of Poffliminy,) if he returns with this Defign, to follow the Fortunes of his own People to whom he returns, as Tryphobuttus 1 has it. For a Slave, in order to become free, ought (if I may so speak) to acquire himself, which he cannot do without willing it. But whether he be taken from the Enemy by force of Arms, or by Craft made his Escape, it is all the same Thing, as Florentinus 2 observes. And so it is likewise, if he be freely 3 delivered up by the Enemy. But what 4 shall we say of a Prisoner, who having been sold by the Enemy, is arrived amongst his own People, by passing, as it often happens, from Master to Master? This Controversy is discoursed by 5 Seneca in the Olymptian, whom Parr-bafius bought. For when a Decree was paid by the Athenians, whereby the Olymptians were ordered to be free; he makes this Query, whether by it was meant, that they should become free, or adjudged to be free; 6 of which the left is the best founded.

VI. 1. But one that is free, after he is returned to his own Country, does not only become Master of himself, but also of all Things, that he had in any Nation at Peace, whether corporeal, or incorporeal; because as neutral States had reputed the Fact for a real Right, in regard to the taking of the Prisoner, they ought to do

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13 That is to say if they happened to escape, and return into their own Country.
14 Tryphobuttus declared to Polybius the Deacon who was sent to him from the Romans, that he should not mention the retaining the Sicilian Slaves, alleging that it was unjust that the Greeks should deliver their Fellow-Soldiers to their old Masters. The Passage is in Garg. Lib. III. Chap. XVI. Grotius.
15 Our Author in the last Words had put the Romans by the Greeks. And the Paffage relates to fugitive Slaves to whom the Greeks had engaged by Oath not to deliver them up to their ancient Masters.
16 The Emperor Julian, in his Oration against the Followers of the Cynick Philosophy misunder-

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3 Quam non redemptum ab ibitibus filium, &c. Cod. Lib. VIII. Tit. LI. De Pofflimino revertis, &c. Leg. V.
4 As the Youth Chilidians in the fame Book of Procopius, He alleged that from the Time he re-

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5 Ut faction, ineptus, servus suiffi, &c. Lib. V. Controv. XXXIV. p. 390.
6 Because the Olymptians were Allies of the Athenians, as is said a little before: Quod enim si Atheniaci et Philippus conjuxerit &c. Quae iacuerat Olym-

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1. Vs. 10. Num. 2. where the Laws to which the Emperor alludes is spoken of.
2. See below, § 10. Num. 3. where the Laws to which the Emperor alledges

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1. See the Law as above, Chap. VII. of this Book, § 6. Num. 7. Note B. Our Author allidges in a little Note the Example of the Huns, who took away, and set as Liberty, some Prisoners, whom the Slavonians had taken, as Procopius relates, Goth. Lib. III. Cap. XIII. The Huns are put for the Heruli; for that Hilpurnus says of this of the latter, who having taken up Arms for the Romans met a Troop of Slavonians upon their March, who had taken some Prisoners from the Romans along the Danube.
2. See below, § 10. Num. 3. where the Laws to which the Emperor alludes is spoken of.
3. Us. 10. Num. 2. where the Laws to which the Emperor alledges
the fame in regard to his release; otherwise they would not act in an equal manner towards both Parties; wherefore he that by Right of Arms is possesséd of the Body of a Prisoner, has not an absolete but conditional Right to all Things that belong to him, for it may cease against his Will, viz. if the Captive should return into his own Country; for so he loses his Right to those Goods of his, as he does to his Perfon, of which they were an Accessory.

2. What if he had alienated those Goods, shall he who derives his Title from him that was Owner of the Prisoner by Right of War, be fecured by the Right of Nations, or else shall those Things (alienated) be recovered? I mean those that are in a neutral Country. And here, in my Opinion, we ought to distinguish between those Things that may be recovered by Postliminy, and those not capable of that Right; which Distinction we shall explain below, fo that the former seem to be alienated only so far as they could be alienated, that is, conditionally, but the other, Simply and absolutely. By Alienation here, I mean such as includes Donation and Acceptation.

VI. All Rights in regard to him are removed.

VII. But as he that returns by Postliminy, recovers the Rights he was possesséd of before, so those Rights which one had in regard to him, are re-establisheò, and deemed to have always subsisted, as if he had never been in the Enemy's Power, as Tryponinus says.

VIII. Paulus justly makes this Exception to this Rule, as it relates to Freemen. they have no Benefit of Postliminy, that being conquered by Arms, yield themselves up to their Enemies. Because all Agreements made with Enemies, by the Law of Nations, are to be punctually observed, as we shall hereafter; neither is Postliminy allowed against them. Therefore those Romans, in Cellus, taken by the Carthaginians, did own, that The Right of Postliminy did not belong to them, because they had engaged themselves by Oath. Whence it is well observed by Paulus, that during the Time of Truce there is no Postliminy allowed. But Mede Tellus of this Book, § 6. Note 9.

2. Tom eto ex iii, &c. No. 2. Attic. Lib. VII. Cap. XVIII.

3. Inducia font, quos in breve & in prosimia tempus convenit, quos invincem si facerint: Ne tempore non err postliminium. Dig. ibi supra, Leg. XXIX. § 1. See below, Chap. XIX. § 6. It is plain, that this Decision is a Consequence of the Nature itself of a Truce, which will be treated of below in its Place.

4. Et quia ab hisquis capitaverunt, vel hisquis deduxerunt, jurae postliminii renunt, antiquis politicis. Digest. ibid. Leg. IV. Our Author, in his Forum Juris ad ius Postliminiorum, p. 231. Ed. Angil. says that we must read here, ab hisquis deduxerunt, and he explains the Words before, ab hisquis captaverunt, as de hisquis, &c. On that Foot the Sense of the Law would be, that the Prisoners retain the Enemy, and those which we recover, by their being restored voluntarily, enjoy the Right of Postliminy. So that then there would be nothing in it relating to the Subject. Our Author, without Doubt, supplies the Particle ab, according to the Reading in the vulgar Editions, Ab hisquis deduxerunt. But the Authority of the Florence Edition, with the Example that immediately follows, gives Room to believe that our Author's feet Thought was the belt. See above, B. II. Chap. XXI. § 4. Num. 8. where he explains the Cafe of this Law itself. However, we must then confide, that in the Beginning of the Law, it treats of Prisoners restored in a certain Manner: Otherwise there would have been no Difficulty in the Cafe propounded, if it had been the general and receive's Maxim of ancient Times (antiquior placent), that every Person delivered up to the Enemy, returned by Right of Postliminy. See the following Note.
fays, that if they that are delivered up to the Enemy, are engaged by no Covenant, &c. or Promise, they may return by the Right of Postliminity.

IX. 1. What

5 That is to fay, if they have not engaged to put themselves into the Power of the Enemy, and if the State which delivers them up, has not deprived itself, by a real Agreement of the Right it had to recover or receive them; in a Word, when it has delivered them simply and purely of its own Author, in order to do them the Service of the Superiority of the Enemy's Forces. This is probably what our Author means. For if, according to him, the Engagement of a Prisoner of War, contracted without the Participation of the State, is of sufficient Force to oblige the State to retire him the Right of Postliminity, the Prisoner much more ought to be excluded from it, when the State itself is bound by its Promise. And if there be no such Engagement, the Action of delivering up does not, of itself, imply the Obligation towards the Enemy, or Imprisonment to deprive the Person delivered up, of the Right of Postliminity. It is the Enemy's Business to keep him, who has been given up into their Hands, or to lay him under the Retraction of some Person, that is, to say, as fays above, B. II. Chap. XXI. § 6. The Civilian Mancinus, whole Words I have recited in the preceding Note, speaks there, in my Opinion, of those whom the State has delivered up purely and simply, being compelled to it by the Misfortune of War; and this may be inferred from his joining them with the Prisoners of War, taken in some Battle, or military Expedition. For it is without Necessity, that FRANCIS BAUDOIN, (Jurisprud. Civil. p. 48.) and Mr. THOMASIUS, (Diff. de jura Rom. Namurc. § 75.) after him conjecture, that instead of Vel bofilius dedatur, it should be read in a quite contrary Sense, nec bofilius dedatur. The Difficulty arose from another Manner of delivering up, treated of in the End of this Law, which, according to the particular Custom of the Romans, excluded them from the Right of Postliminity, who had been delivered up, so that a Redemption was necessary, in Order to their becoming Citizens again, that the Enemy had not been willing to receive them. I have spoke of this, in my Book, p. 13, 14. 16. and the Thing is fully confirmed by what follows. I fay then, that in this Part of the Law we are now considering, as well as in the last Law of the Title De Legatis, the Quifition solely relates to Persons delivered up, in Order to discharge the State from some Crime, or shameful Engagement, which, tho' committed or contracted without its Order or Participation, seemed to fly back upon it, principally because the Authors were Persons otherwise invested with Military Authority. The Romans, either out of Horror for the Crime, or a great Sensibility for the Dishonour, with which they were, at least, as much touched to the Quick; judged proper, at the fame Time they delivered up fuch People, not to consider them any longer as Citizens, whether they to whom they had delivered them up, received them or not. And this was executed with great Ceremonies, by the Chieft of the Heralds at Arms, (Fetials) who caused the Person delivered up to be flriped naked, and bound, as appears by the Words of the Mancinus, who is there spoken of. See VELLISIUS FATERECULUS, Lib. II. Cap. I. Doniusius Halicarnasenis, Anqy. Rom. Lib. I. The Form used by the Herald, is the Aversion the Romans professed, both for the Persons delivered up in this Manner, and the Occasion which obliged them to do fo. Quandopendum vice homines, fugiit populi Romani Licinius, facius tumulti iri spondebantur, atque ob eam rem novam nequeverunt, ob eam rem qua Populi Romani federe impius filiis hominum vides, debus. Livy, Lib. IX. Cap. X. Num. 9. They apprehended, that without this, the mostjust Wars might become unjust; as the fame Roman Hilforian makes another General of the Army, Spurius Pythiumus, in, on an Occasion of the same Nature with this, Mancinus. Delonarum per Feticulos, multo cvalidere, Exsultationem religione populam, si qua obligaciones; ne quid divini humanique objet, qmunicium jumentum prouente de integris invenire bellum. Cap. VIII. Num. 6. Mancinus, in Order to be received in the Camp of the Romans, after the Refusal of the Romans to whom he had been delivered up, had Occasion to call in the Aid of Religion; the Augurs being consulted, declared in his Favour, without which he would not have been admitted. Delitias nec receptas, auguris in coftra deputatas. Author, Asinus VICTOR, De Filio et Filiat. Cap. LIX. It is not then to be wondered at, that when the Enemy, or allied State, refused to take those delivered up to them, that Refusal did not hinder their being considered as deprived of all the Rights of a Citizen, from the Moment the Herald at Arms had pronounced the Sentence for abandoning them. HENNIGS, who has expounded this Opinion, in his Notes upon our Author, (Lib. II. Cap. XV. § 16. p. 751.) with Reason alledges in this Place, what Pobstlimiui fays, the moment the Ceremony was over, that he was become a Citizen of the Same State, who, however, had not then accepted him, nor would receive him afterwards. Hav dicenti Fetialui, Pobstlimium gens fumer, quanta maxina vi, porcelli, & elia varia vis, si Sanitatem eum effe, &c. Livy, 48. Cap. X. Num. 10. So that Mancius had Reasons to compare those unfortunate Persons, to such as were banished the State by a Decree, prohibiting all Persons to give them Fire and Water; and in Consequence, excluding them from the Right of Postliminity, as did the Tribunes of the People, who, as CICERO relates, hindered Mancinus from entering the Senate. Quia unamn memitque eum, quem non poterat delisseri, eum nullum effe postliminiunm. De Orat. Lib. I. Cap. XL. If that Orator seems elsewhere to decide in Favour of Bratus, (Vitris, Cap. VIII. and Orat. pro Cecin. Cap. XXXIV.) that only proves, either that he has changed his Mind, as he does sometimes, or that he believed, notwithstanding the Decision of Mancius, followed by the Senate, that the Cafe ought to have been adjudged in a different Manner. He fays, in the end of those Passages, that the Opinion in favour of Mancius might be defended, and not that it may be well demonstrated. The Passage has been cited above, B. II. Chap. XXI. § 4. Note 17. So that it is not necessary to have Recourse to the Conciliations laid down by FRANCIS BAUDOIN, Jurisprud. Marc. p. 46. M. THOMASIUS, Diff. de Spref. Namur. § 67. and Mr. JANS, de Fetialib. Pagi. Rom. Cap. VI. 71. 72. In a Word, Mancinus, and every other Person, who had been delivered up, had been refused, was not indeed the Slave of thofe to whom he was defigned to be delivered up, but he did not therefore continue a Roman Citizen; he was free, but a Stranger, as ANTHONY FABER very well observes, Jurisprud. Par. 78
IX. How a People may claim this Right of Poffluminy.

IX. 1. What we have said of particular Persons, the fame may be likewise of Nations, that those that were free, may recover their Freedom, if the Affiftance of their Allies happen to reduce them from the Power of the Enemy. But if the Body of the People that constitute the State, be difolved, it is more reasonable to say, that they are not to be effectually the fame People; nor the Things formerly belonging to that State to be reftricted to them by the Law of Nations; because a People, like a Ship, by a Diffolution of the Parts, is entirely destroyed, becaufe its whole Nature conflits in that perpetual Conjunction. Therefore the City of Sa-quitum was not the fame, when it was reftricted to the antient Habitants, eight Years after they had been driven out of it. Nor Thebes the fame, after the Thebans had been fold by Alexander for Bondlaves. Hence it is plain, that what the Thofalfians were indebted in to the Thebans before, was not reftricted to the Thebans by the Right of Poffluminy, and that for these two Reasons. Firft, Because they were a new People that demanded this Debt; and, then, becaufe Alexander, whilft he had the Lordship over them, had a Power to alienate that Right, and did really alienate it; besides that a Debt is not to be reckoned among Things capable of the Right of Poffluminy.

2. What we have faid of a State, is not very different from that of the old Roman Law, by which Marriages were diffolublc: Marriage was not reputed to be reftricted by Poffluminy, but to be renewed by joint Confent of both Parties.

X. 1. By what we have faid, one may easily judge what Manner of Right, by the Law of Nations, Poffluminy gives to Frecmen. But by the Civil Law this Right, to what respects those Things that are done within the State, may be reftrained by adding some Exceptions, or Conditions, and may be extended to other Profits and Advantages. Thus by the Roman Civil Law, Fugitives are excepted out of the Number of thofe intitled to this Right of Return, even the Sons of Families, over whom the Father, (one would think) should have retained his paternal Power, as a Privilege peculiar to the Romans. But it was thought proper to make this Regulation, because, as Paulus fays, the Romans facilitated their paternal Tenderness to the Observation of military Discipline. Agreeable to which,

pin. Tit. XI. Princ. VIII. Iliat I. All that I have now advanced is founded upon the Genius and Sentiments of the Roman People. So that it is of no Ufe to prove, as Mr. Thomafius doth, (ubi fpara, § 14. & seq.) that the Treaty concluded with the Numantines, without the Participation of the Roman People, was not really harmful, and that the Fault itself was not to be ascribed to Marcus, but to Titus Gracchus. It suffices that the Roman People believed the contrary, and that they followed the Principles of their Ambition, rather than thro' of naturall Equity, according to which, I conceive, they ought to have laid down other Maxims. It is as easy to defroy, by the Reasons here alleged, the Endeavours of the late Mr. Cocceius, (Defirtr, De Pofflumin. in Pace) to reconcile us, as well as every where elfe, the Rules of the Roman Law with those of the Law of Nature and Nations, both of which he mifunderstands.

IX. (1) See Puffendorf, B. VIII. Chap. VI. § 23. Of the Law of Nature and Nations. 2 See above, B. II. Chap. IX. § 6. 3 They may always be considered of the fame Nation, but they have no longer that Tie which formed a Body of People, or a State. So that the Objections here raised againft our Author, fall to the Ground of themfelves. 4 That is to fay, the Debts paid to him whom the Person was Prifoner to, or thro' which he had difcharg'd the Creditor; for the Cafe is not the fame, with Regard to other Debts. 5 Nam ali fater filium, ita neonem maritus, juus pofflumini, recipit, jid confenfio redditurur mater- namum. Digid. Lib. XLIX. Tit. XV. De Caprius, & Pofflum. Leg. XIV. § 1. See also Leg. VIII. But it is not the fame amongft Chriftians. Pope Leo fays, that if the married Perfom, who remained in the Country, has married again, during the Captivity of the other, and the other returns, let the Marriage, contracted in the latter's Abfence, be annulled. Ut fciat in manibus, Molivet, et etiam in demibus, ut poffiuitius, in captivitatih, deus haec invisiris, efl; ita etiam & coniugis, fi aliis juxta juris, reformantur. Epifol. ad Nicer. Aquileiam. Epif. See Hinc de Opif. de divinitatibus. Tafiharge, ad Intercor. XIII. and the Author of Pope Stephen, Cap. XIX. in the second Tome of the Gallican Council. Grotius.


X. (1) Transfuga medium poffluminiendum eft: Nam qui maius confiliis & prodicius amant, patriam reliquit. pofflumini maneat babendus eft. Digid. Lib. XLIX. Tit. XV. De Captiv. & Pof impass. & Leg. XIX. § 4. Some fay here, that our Author has improperly flated this Exception, as peculiar to the Roman Laws, and aid, that the fame Thing took Place among all other Nations. That may be: But they alleged neither Example nor Proof. For the Paffage of Livy, Lib. XXXII. Chap. XVII. Num. 10. which Gronovius cites, is not very conclufive, it only proves the Difference and Horror they had for Deferters.

2 Filius quoque familie transfiga non patet poffluminiendum eft, neque vic eni patre: Quia pater fac ilium amitis, quemadmodum patria, & quia difciplina ctituarum antiquarum fuit parce Romani, quae corrigere librum. Digid. Hid. § 7. fays

Of the Rights of

Book III.
3 That Confid, as is known, caused his own Son to be put to Death, for having battie contrary to his Orders; tho' he gained the Victory: And the Orator says, that he confirmed the Law of military Discipline by a Sentence, which he could not pass without plunging himself into the greatest Affliction. 

That this law is stated in Cicero, in his De Legibus, Book III, Chapter 40, where he talks of a law that was enacted to prevent the release of a slave by his owner. The law was passed to prevent a master from releasing a slave, which was a common practice at the time. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

7 He also refers to a law that was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

8 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

9 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

10 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

11 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

12 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.

13 This law was passed to prevent the release of a slave by his owner. The law was to prevent the master from releasing the slave, even if the slave had been released by his owner. This law was passed to protect the master's property rights.
Book III.

14. As an uffufuary Right, which is left by Non-Ufage for a certain Time.

15. Si cujus quíd de bonis, &c. Diglft. Lib. IV. Tit. VI. Ex quibus caufi majores vicent uiuente aut inter se interiniis refinuatnur, Leg. I, § 1. After bonis should be added dominatum quis. See Mr. Noint, upon this Title, p. 189, 191, 192.

16. In annuis partibus juris, it qui recovers non own ab hisfis, &c. Diglft. Lib. XLIX, Tit. XV. De Capt. & Pojlim. &c. Leg. XVII. Ex quo eorum, qui in hisfion, &c. Ibid. Leg. XXII. Princ. See the Jurisprudentia Popiniacois of ANTONY FAURÉ, Tit. XI. Prinicip. IX.

17. See above, B. II. Chap. IX. § 1. Num. 3.

18. According to the Rule of the Civil Law. Should attinent ad suos civiles foret pra multi balanctur. Diglft. Lib. L. Tit. XVII. De diversis Reg. Juris, Leg. XXXII. And this was conformable to the received Custom; according to which, every Prisoner of War was deemed to be the Enemy’s Slave who had taken him. From whence it arose also, that tho’, of whom no Mention was made in the Treaty of Peace, and who remained Slaves without Refoufe, were considered as having no longer any Right, and as incapable of transferring any, with regard to the Things which had belonged to them in the Country. It was to evade this Principle, that the Fiction of the Right of Pojliminy and the Cornelian Law was invented, in regard to Prisoners who returned, or died, during the Course of the War. In which, if there was any Thing contrary to the Right, established by Custom, in relation to Prisoners of War, the Enemy however had no Care to complain, because it was sufficiently declared, that this Custom would not be observed, and that the Enemy, without being opposed, might dispose with following it, by making, on his Side, the same Supposition. Hence the Prisoners were not deemed to be actually engaged to be Slaves, during the Course of the War, in regard to the Right, which the State had to receive and consider them as free Persons.

19. Our Author in this Place confounds the Effects of the Right of Pojliminy in Relation to Strangers, with tho’ it might have in regard to Citizens of the same State. For it belongs to the Sovereign to dispose of the latter, as he chooses proper, and he has no Occasion to have Recourse for that End to any Fiction. He may therefore extend them further than the Law of Nations, or the Custom of States does, which are not concerned in this Point.

20. Quod si nemo ex heredibus Cornelii hujus exierit, bonæ publicae fonte. Diglft. Lib. XLIX. Tit. XV. De Capt. & Pojlim. &c. Leg. XXII, § 1. See also Tit. XIV. De jure Fidei, Leg. XXXI.

XI. (1) But by an Edict of Theodoric it was thus ordained, That Slaves, or Traitors taken by the Enemy, and returning home, be restored to their own Lords, if they were not bought before by some other. See also Casiodori, Lib. III. Cap. XLIII. But by the Law of the Vифика, a Slave recovered by War is restored to his Lord, and the Captor receives the third Part of the full Value. But before they were fold by the Enemy, his Lord was to pay the full Price for which he was sold, together with what had been laid out to render him more capable of Service. B. V. Tit. IV. XXI. GROTIUS. See what I say below, u: on § 14. Note 2.

21. So the Slaves to whom Arbitrators had given their Liberty, were restored by Sibs to their ancient Masters. APPIANUS ALXANDRINUS, Bell. Mitchiriud. (p. 355. Edit. Angilis. 211. H. Stephen) GROTIUS.

3. Quod non pojlimium juris nemo eum esse injustum habet, nisi fortasse rerum dominiorum, non patuit. Diglft. Lib. LIXL Tit. XV. De Capt. & Pojlim. &c. Leg. XII. This was because, during the Course of the War, the Acquisition of Things, taken from the Enemy, was not full and entire; no more than the Slavery of Prisoners; an Account of the Peoples People had, and the Right they retained, of recovering what they had lost. See what is said above, Chap. VII. of this Book, § 6. Note 9.

4. Unless he serves some other Citizen. PAUL. Lusi. Dea quum servus eum uscit, ab hostibus captus,
vered. And as a Slave, in this Case, differs from Things inanimate, so does he likewise from a Freeman in this, that in Order to recover him by Right of Pot-lliminy, it is not required that he should return, with an Intent to follow the Fortu-
tunes of the State. For that is only required of him, that is to recover his own Freedom, not of him that is to be recovered by another. And as 

Subiinus has it, 

Every Man has a free Power to chase what State be pleas'd to make himself a Member of; but not to dispose of the Right of Property which we bare over him.

2. The Roman Law did not except fugitive Slaves from this Law of Nations; for even in thefe the Master may recover his old Right, as Paulus \(^6\) observes; left, allowing the contrary, it may be prejudicial, not to him who is still to continue a Slave, but to the Master himself. The Emperors \(^7\) (Dosithean and Maximinian) lay in general, and without Restriction, of Slaves retaken in any military Expe-
dition, what some extend without Reason to all Things retaken from the Enemy, that

*They ought to be deemed recovered, and not taken, and that the Soldier should be their Deliverer, and not their Maffer.*

3. Those Slaves who are ransomed from the Enemy, by the Roman Law \(^8\) be-
come his that redeemed them, but upon laying down their Ransom, they are 
deemed recovered by the Right of Potlliminy. But it belongs to the Civilians to 
give a more exact Explication of all this. But some Things have been altered by 
the modern Laws: And, to invite captive Slaves to return, they propose present 
Liberty to the disabled, and to the Reft, after five Years; as you may see in the 

military Laws collected by \(^9\) Rutilus.

XII. That Question more nearly relates to us, whether a People subjected to a 
foreign Prince return to their ancient State, which may be handled, by supposing 
that it is not their ancient Sovereign, but some Ally, who has rescued them from 
the Enemy; the fame, I think, may be answer'd, \(^1\) as before, of Slaves, unless it 
be otherwise agreed by the Treaty of Alliance.

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\(^{6}\) Every Man has a free Power to chase what State be pleas'd to make himself a Member of; but not to dispose of the Right of Property which we bare over him.

\(^{7}\) (Dosithean and Maximinian) lay in general, and without Restriction, of Slaves retaken in any military Expedition, what some extend without Reason to all Things retaken from the Enemy, that they ought to be deemed recovered, and not taken, and that the Soldier should be their Deliverer, and not their Master.

\(^{8}\) Those Slaves who are ransomed from the Enemy, by the Roman Law become his that redeemed them, but upon laying down their Ransom, they are deemed recovered by the Right of Potlliminy. But it belongs to the Civilians to give a more exact Explication of all this. But some Things have been altered by the modern Laws: And, to invite captive Slaves to return, they propose present Liberty to the disabled, and to the Rest, after five Years; as you may see in the military Laws collected by Rutilus.

\(^{9}\) Whether Subjects may be recovered by Potlliminy.

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\(^{1}\) As before, of Slaves, unless it be otherwise agreed by the Treaty of Alliance.
XIII. 1. Among Things recoverable by Postliminy, the first to be considered are Lands; it is true (faith 1 Pomponius) the Enemy being beaten out of the Lands which they had seized on, the Right of them returns to their former Owners. But the Enemy must be understood to be driven out, when they cannot come thither any more openly as we have explained elsewhere, (Cabr. iv. of this Book, § 4.) Thus the Lacedemonianis restored the Island Argina, recovered from the Athenians 2 to the antient Lords. So 3 julian, and other Emperors, restored the Lands recovered from the Gathis and Vandals, to the Heirs of the antient Possessors, not admitting those Prescriptions against them, which the Roman Laws had introduced.

2. What I have said of Lands takes Place also, in my Opinion, in Regard to all Rights annexed to those Lands. For even Places taken by the Enemy, which had been sacred or religious, when freed from that Misfortune, return as it were by a Kind of Postliminy to their former State, as 4 Pomponius decides. Whereeto agrees that of Cicero, in his Oration against Verres, concerning Diana 5 of Segesta, She recovered her Worship and Habitation by the Valor of Publius Africanaus. And Marcianus 7 compares that Right to the Right of Postliminy, by which, a Place of the Shore being built upon, when the Building is fallen, makes again Part of the Shore. Upon this Principle it must be 6 said, that the Profits of the Land recovered are to be restored; like to what Pomponius delivers of Lands that had been 9 drowned. So it is provided by the Laws of 8 Spain, that Counties, and other hereditary Jurisdictions, shall return by Postliminy; the greater absolutely, the less if within the Space of four Years they be claimed after their Recovery, unless it be a Castle, or Fort, lost by War, and recovered again in what Manner forever, the King then hath Right to keep the Possession of it.

XIV. 1. Concerning Moveables, the general Rule is directly contrary, that they do not return by Postliminy, but make Part of the Spoil; for Labro 1 opposes those two Ideas. Therefore, when such Things pass from the Enemy to others by Commerce, whereofever they are found, they are allowed to be his who bought them; neither has the first Owner 2 any Power to claim them, either amongst

1 a neutral

return to their lawful Sovereign; upon Condition, that the latter reimburses the Deliverer the Expenses he has been at in his Expedition.

XIII. (1) Verum sibi, exspecta hostibus, &c. Dig. Lib. XLIX. Tit. XV. De capt. & Postlim. &c. Leg. XX. § 1.

2 STABIO. Genr. Lib. VIII. (p. 577. Edit. Angili. 376. Parisi.) This was, because they had been of the Lacedemonian Party. For the Ref. see what we have said above, Chap. VI. of this Book, § 7. Grotius.

3 See Novell. XXXVI. of Justinian.

4 And that by a Law of Honorius, who, tho' Spain were left to the Vandals, yet, whilst the Vandals possessed it, he would not allow that a Prescription of thirty Years should prejudice the antient Lords, as in Proposicius, Vandal. I. The same Exception is found in a Novel of Valentinius, with Respect to some Lands in Africa, possessed by the Vandals. Triennalis tenorem, &c. Nov. De episcopat judicato. The second Council of Sewille decides, that a Church ought to recover the Parishes it had before the War. And that it cannot be deprived of them by Right of Prescription: Just as by the Roman Laws, a Prisioner of War recovers his Possessions, when he returns from Captivity. Gratian, in Cap. XVI. Sent. III. Cap. XIII. See also the Decretals, Lib. II. Cap. XXVI. and Cujacius, on the Title, C. de Proferiptis 30 Amor. Gratian.

5 Quod si ab hac calamitate, &c. Digest. Lib. XI. Tit. VII. De religiis, &c. Leg. XXXVI.

6 Quod [Diana Segetana] Carthaginensium victor, &c. Lib. IV. Cap. XXXV.

7 In tamut ut & felis dominii, &c. Digest. Lib. I. Tit. VIII. De divinum verum, &c. qualitatis, Leg. VI. princi.

8 This is formally decided by the Civilian Paulinus, in the Law which our Author cited in the Margin, where he says the same Thing of a Slave, of whom a Person has the Use without the Property. Si nser ab hostibus, &c. Digest. Lib. VII. Tit. IV. Sabius modis usufructus, val ut, amittitur. Leg. XXVI.

9 Sed omnesmodum s edem impu. &c. Ibid. Leg. XXIII. See Mr. Need’s fine Treatise, De usufructis, Lib. II. Cap. XI.

XIV. (1) He says, that whatever is Part of the Booty is not recoverable by the Right of Postliminy. Si, quod bello captum est, in praeda est, non postliminis reddit. Digest, Lib. LIX. Tit. XV. De Captivis & Postlim. &c. Leg. XXVIII. I have followed Mr. Bynkershoek’s Correction of this Law, with a very small Alteration, which seemed necessary: Si, quod, &c. Si quod, &c. Obser. Jur. Civ. Lib. III. Cap. VI. For the Ref., this general Rule concerning movable Things, relates only to civil Right. The same Restores which authorize the Right of Postliminy, in Regard to Immovable, take Place in this Cafe, and with equal Force. Mr. Coccius confines it, in his Differtation De Postliminis in Pacis, Sess. II., § 5, and he says, that if the Roman Laws determined otherwise upon it, it was in order to animate the Soldiers to plunder. Another Reason might have been added, of which I shall speak in the following Note.

2 Slaves being of the Number of Effects, and
of moveable Effects, it does not appear at first, why they were excepted out of this general Rule, as our Author has therein above, § 11. Ziegler says, it was because Slaves might run away from their Masters, and afterwards pretend to have been taken. It is more likely, that it was, because it was easy to know to whom a Slave belonged; whereas, had it been necessary to reform mistakenly moveable Things to their first Owners, that would have given Room for much Contest and Difficulty. Besides, those Things not being capable to return of themselves, from the Moment they were taken by the Enemy, the Owner ought to consider them as lost; and the more because it was scarce known into whose Hands they were fallen; whereas a Slave might have the Will, and find the Means to return.

The Reason why the first Owner could not claim moveable Things, in a neutral Country, is founded on the Nature itself of that Sort of Things. It would be the same with Regard to Immovable, if it were possible that they could be found on the Lands of a neutral People, taken by Right of War, and afterwards alienated in favour of some Person of such neutral State. This is a Consequence of the State of Neutrality, which obliging the neutral People to consider, as lawfully acquired, what one of the Enemies has taken from the other, engages also to maintain the Title of those who hold of them any Thing of this Nature, unless it belonged before to a Fritoner of War, who by returning home, and thereby in a Manner recovering himself, has recovered all his Rights, even with Regard to neutral States. See above, § 6.

4 See § 3. Note 1.

5 Poffimimia reductae hac : Home, navis, multis celitariis, equos, equas, quas frato receptae fuit. Topic. Cap. VIII. This Definition is only in favour of the Subjects of the State, who had lost Things of this Nature which were taken by People of the same Party. But they can no more be claimed in a neutral Country, than others not excepted.

6 It is MARCELLUS, and not MODERNIUS: Nauoris longis, atque meritorii, &c. Digest. Lib. XLIX. Tit. XV. De Capt. & Poffim. &c. Leg. II. Our Author, in giving us the Abstract of this Law, joins with Novus Alituria, those called Lofforme. And as there were some of the latter, which served to guard the Frontiers of the Empire upon the Danubio, the Rhine, and other Rivers; a German, named JOHN JAMES WISSENBACH, Professor at Frankfort, in his Life-Time, criticises our Author in this Place, as denying the Right of Poffiminy to all those small Vessels comprized under the general Name of Lofforme. But the Critic was not aware, that Grotius has distinguished the two Sorts with sufficient Clearness, in describing that of which he intends to speak in this Manner: Velupites cauti paratae; which extends also to the Novus Alituria, some of which were also of Use in War. See the Note of the learned Gronovius upon this Place, and James Godfrey, upon the Thucydides, Lib. VII. Tit. XVII. De Legatis. De Danubii, Vol. II. p. 408. &c. &c. The fame WISSENBACH, in the same Place (that is to say, Exercit. in Punditios, Dift. XXXIX. Num. 23.) subjects also, that our Author has omitted Fishing-Boats or Vessels, in favour of the Hollanders, who have great Numbers of them. But this Suggestion is ridiculous, since the Question does not relate to modern Uses. I should rather believe that the Omnium proceeded from the Copists or Printers.
XV. But in the later Times, if not before, this Difference seems to have been taken away. 1 For those skilled in the Customs of Nations do commonly declare, that Moveables are not recovered by Polliminy, 2 and we see the same in many Places determined in Relation to Ships.

XVI. But those Things (tho' taken by the Enemy) which were not yet brought into Places whereof he is Matter, have no Occasion for Polliminy, because they have not yet changed their Owner by the Right of Nations. Alfo what Pirates and Robbers have taken from us, has no Need of Polliminy, (as Ulpianus and Javolenus relate) because the Law of Nations has not authorized them to appropriate it to themselves, in Prejudice of the antient Owner; on which Account the Athenians pretended to receive the Iland Halonelfus, which Pirates had taken from them, and Philip from the Pirates, as rettored, not given, by Philip. Therefore, Things taken by them, whereverof they are found, may be claimed; but, as we have concluded 3 in another Place, so much must be rettored to the Perfons who got Possession upon his own Charge, as the right Owner would willingly have expended for the Recovery of them.

XVII. That the Civil Law changes some Things, as to their own Subjects, is of the ancient Book. Ships taken from Pirates, become theirs who take them from the Pirates. For it is not unjust that a private Thing should yield 3 to a publick Advantage, especially when the Recovery may prove fo difficult. But this Law cannot hinder Foreigners from challenging their own.

XVIII. That this Right of Polliminy took Place, not only between Enemies, but even between Romans and all foreign Nations. But this (as I faid 4 before) was the Reliques of that barbarous Age of the Nomades, wherein the Sentiments of that natural Society that is between all Men were filled with wicked Customs. Therefore, among Nations which were not actually engaged in a publick War with one another, there was a Kind of War between private Men, authorized and, as it were, declared by Custom; and that such a Licence might not produce many Murders, they agreed to settle Laws of Capture, which, confquently, introduced that of Polliminy, yet otherwise than with Robbers and Pirates, because those private Hostilities terminated in Conventions, accompanied with a Sort of Equity, which Robbers and Pirates usually despifed.

XV. (2) The late Mr. Cocceius, in the Difertation cited before, De Pollim. in Pace, & Amn. f. 1. § 6. & fqq. pretends the modern Usage is, on the contrary, that all moveable Things, of whatsoever Nature they be, are recovered by Right of Polliminy. But he alleges only some Examples from the Custom in Germany. And therefore the Argument which he founds upon what our Author fays concerning Ships, as if it were an Exception to the general Rule, is of no Force, as the Univerfly of the Custom is not proved. See the different Regulations made in thefe Provinces, relating to the Recovery of Veffels, in the Commentary of the late Mr. von Hart, upon the Digest, Tit. De Captivis & Pollinitis, &c. § 4.

XVI. (1) See what I have faid above, Chap. VI. of this Book, § 5. Note 1. From whence it appears, that this Rule relates to the Civil Law, and not in the leafl to the Law of Nations, as our Author would have it, which the late Mr. Titius, (Obf. in Lauterbach, 1446. Num. 3.) undertakes in vain to justify, as if he foike only of what takes Place in Relation to Subjects of the fame State, between whom there can scarce happen any Difpute about it, fo long as the Things retaken from the Enemy are not in a Place of Safety. Confufion again here the Commentary of Mr. Vorst upon the Digest. Tit. De Captivis & Pollinitis. &c. § 3.

2 See the Law cited above, Chap. III. of this Book, § 1. Note 3. A Piratius, aut Latronibus, capti, liberis permanent, fays Paulus, another Civilian, in the fame Title, Leg. XIX. § 2.

3 He speaks of a Slave, who having been carri'd off by Robbers, had pafted by Traffick from Hand to Hand to the German, that is to fay, to the Enemies of the Roman People, and afterwards had been taken from them, in a Defeat, and then fold. Notwithstanding all this, the Prefcription would not run in Favour of the Buyer, according to this Lawyer, who follows the Opinion of three others upon this Point. Latrones tibi forum evirquent, &c. Difert. C. L. XIX. Tit. XV. De Captiv. & Pollinitis. &c. Leg. XVIII. DENNIS GODFREY oppofes this with the sixth Law of the fame Title, wherein, however, there is nothing contrary to it. See the Jurifprud. Papinian. of Antionphant. Tit. XI. Prin. VIII. Illt. VI. p. 615, 616.

4 Demosthenes, (aut alius fab ejus nominis) Orat. De Halonelfus, p. 30. See the Letter of Philip himfelf, p. 63. A. B.

XVII. (1) The fame is among the Venturions, as appears from the Letters of Fraxinus Carus, Tom. I.

2 The End of fuch a Law is to animate Sol- diers and Privateres to pursue Robbers and Pirates, from the Hopes of pollifting Things taken even from the Subjects of the State. GROENWEIDE, in his Treatis De legibus abrogatis & iufmitatis, &c. (in L. 24. & 27. D. De Captiv. & Pollinitis) fays, this is practifed in Holland and the neighbouring Countries.

4. It
Chap. IX.  

2. It seems of old to have been very much disputed, whether any of a confederate Nation, being our Slaves, if they should escape home, might be esteemed to return by Postliminy. For Jo 1 Cicero propounds this Question, in his first Book De Oratore. And Gallus Altius 2 thus gives us his Opinion, We observe the same Right of Postliminy, with a free People, with Allies, and with Kings, as with Enemies. On the contrary Proculus, 3 I doubt not, but that Allies, and a free People are as Strangers to us, there is no Postliminy between us and them.

3. In my Opinion we ought to distinguish between Treaties, that if any were made merely with design to put an End to, or to prevent open War, they could not for the Time to come prevent the taking of Prisoners, or the Right of Postliminy. But if any expressed, that they might on both Sides travel in Safety, from one State to another, upon the publick Faith, then the taking of Prisoners ceasing between these two Nations, the Right of Postliminy ceased also. And Pomponius 4 seems to hint as much, when he says, If there be a Nation, with whom we have neither Friendship nor Hospitality, nor Alliance on account of Friendship, they indeed are not Enemies. But whatsoever of ours happens to come to them, is theirs. And a free Man of ours taken by them, becomes their Slave; and so from them to us; therefore in this Cafe also Postliminy is allowed. When he said an Alliance on the account of Friendship, he plainly shews that other Alliances may be made, in which may be neither Tie of Friendship nor Right of Hospitality. And Proculus fully declares, that he takes that to be People confederated, who have reciprocally promised Friendship, and safe Hospitality, 5 when he adds, For what need is there of any Postliminy between us? When they also may retain even their own Liberty, and Property of their own Things with us, as freely as among themselves, and so we among them. Therefore that which follows in Gallus Altius, There is no Postliminy with those Nations, that are under our Government, as Cajacius 6 rightly reads it, must be supplied with this Addition, or with those, with whom we have made an Alliance on account of Friendship.

XIX. 1. But in our Days, not only among Christians, but even most of the Mahometans, as this Right of Captivity out of Time of War, so also that of Pojl-

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VIII. (1) Similique in genere, &c. De Oratore.  
Lib. I. Cap. XI.  
2 Cumpapulisliberis, &c. ApudFestum, voces 
Postliminii.

3 Non debitis, quin sedareti & liberi obis externi 
non finis: Non inter nos atque eos postliminii eff. 
Diguit, Lib. XI. De Capt. & Postlim. &c.  
Leg. VII. Princ. So the Florenta Manuscript has it. The very Editions add a Negative here: Nihil externi non finis. And Anthony Faure defends this reading, in his Jurisprud. Papinian. (Tit. XI.  
Prin. VIII) Itat. VII. p. 616, 617; but by giving the Word Strangers (Externi) an improper Signification, which he does not justify by any Example. The learned Salmasius on the contrary, whose Opinion Gronovius approved, was willing to reconcile the Readings, by striking out both the Negatives, and saying: Quam sedaretis & liberi obis externi finis, inter nos atque eos, &c. But this is not to be defended, and directly contradicts the Words that follow, where the Civilian flays, that there is no Occasion for the Right of Postliminy between the Romans and those Allies or free People, because by Virtue of such Relation between them, the Citizens on both Sides retained their Liberty, and the Property of their Effects out of their own Country:  
Etiam quad inter nos atque eos postliminii apud eos, quam & illi apud nos & libertatem juans, & deminimorum rerum partes, atque apud eos, &c. But the Law 
ver is much, because the Lawyer might have expressed himself more clearly, his 
Meaning is evident enough. The Right of Post-

liminy
liminary is abolished, the Necessity of both ceasing because the Rights of that natural Relation, which is between all Mankind, have been re-established.

2. Yet that antient Right of Nations may still be in Force, if we should have to do with a State so barbarous, as to think it lawful without any manner of Reason, or Denunciation of War, to treat in a hostile Manner the Persons and Goods of all Strangers. And even while I am writing this, it is adjudged in the great Chamber of the Parliament of Paris (Niclaus Verdanus being first President) that the Goods of the Subjects of France, taken by the Algerines, a Neft of Pirates that live upon the Spoil of all Sea-faring People, by the Right of War had changed their Owner, and therefore when retaken by others than the antient Proprietors, became theirs that retook them. In the same Cause was this likewise adjudged, (which I said but now) that Ships are not in these Days reckoned among Things recoverable by Postliminy.

XIX. (i) The late Mr. Cocceius in the Dissertation I have just cited, (See II. § 8.) finds this Decision impertinent and unjust: Because there is no Right of War in Relation to Pirates. But our Author supposes them not to be considered as Pirates. And if the Custom be such, it may be justified by the Reason alluded above, § 17. Note 1.

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**C H A P. X.**

**Advice concerning Things done in an unjust War.**

I. 1. I must now reflect, and take away from those that make War almost all the Rights, which I may seem to have granted them; which yet in Reality I have not. For when I first undertook to explain this Part of the Law of Nations, I then declared, that many Things are said to be of Right and lawful, because they escape Punishment, and partly because Courts of Justice have given them their Authority, tho’ they are contrary to the Rules, either of Justice properly so called, or of other Ventures, or at least those, who abstain from such Things, act in a manner more honeft and more commendable in the Opinion of good Men.

2. Seneca in his *Troas.* makes Pyrrhus speak thus,

> Lex nulla capto parcit, aut panae impedit.

*No Law commands to spare the Captive Slave,*

*Or does forbid to punish him.*

Agamemnon replies,

> Quod non vetat Lex, hoc vetat fieri Pudor.

*What Law forbids not, Honour doth restrain.*

By Honour we are here to understand, not so much the Consideration of other Men, and the Care of our own Reputation; as a respect for Equity and Justice, at least a constant Adherence to that which is most just and most honeft; so we read in *Justinian’s Institutions.* *Receipts of Trust* so called, because they are secured by no Bond of Law, but only the Honour of the Person entrusted. So in Quintilian the Father, the Creditor cannot (Salvo pudore) with Honour demand his Debt of the Security, but when he cannot get it from the prime Debtor. And in this Senecian, we often see, *Justice and Pudor, Justice and Honour, joined together.*

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1. In what Sense Honour and Conscience may be said to forbid what Law permits.
2. Seneca in his *Troas.*
4. De Fidei commissariis brevidat. § 1.
5. Nondum *justitiam facinus Mortale fugurat,* Ultima de superis illa reliquit humum.
6. Proque metu populum fine vi pudor ipse regebat.


The
Chap. X.  
War and Peace.

The Crimes of Men were not so mighty grown,  
As Justice to expel from mortal View;  
She, left of all the Goddesses, retir'd;  
And Honour, without Force, then rule'd the World.

Hence, Oper. & Dior. Ver. 192, 193.

——— ὅπερ δ' ἐν χρήσι, κ' ἄλος  
'Ον μετά' θαυμᾶ δ' εκ κακίς τίν ἀφόσου ζωήτα.  
Honour and Justice both have left the Stage,  
All fall a Sacrifice to Vice and Rage.

Plato in his 12th Book of Laws, 5 πραγμάτων γὰρ αὐθάδας δίκης λέγει τι δ' ἐν ἀθλήσε, or rather ἔργον. That the Senecan be, Justice is called the Companion of Honour, and that with Reason. And in another Place the same Plato tells us, 6 Svis, &c. God being solicitous for Mankind, left they should be entirely destroy'd, besought upon Men Honour and Justice, the Ornaments of States, and the Bonds of Friendship. 7 Plutarch in like manner calls δίκη Justice, 'ονομά δ', the Companion of Honour; and in another Place he joins 'αδικία & δικαιοσύνη, Honour and Justice, together. In Dionysius Halicarnassensis 8 are named together, ἀδίκαια, θέματα, ζήμια, θύμια, Honour, Modesty and Justice. So Josephus 9 couples together, άδική and πράκτωρ, Honour and Equity. Paulus 10 the Lawyer unites natural Right and Honour. But Cicero 11 thus distinguishes between Justice and Honour. Justice (says he) teaches not to hurt our Neighbour, Honour not to offend him.

3. With the Verle before quoted of Seneca, agrees that Expression of the same Author in his philosophical Writings. 12 How small a Matter is it, to be a good Man, only so far as the Laws require? How much larger is the Rule of Duty than of Right? How many Things do natural Affection, Humanity, Liberality, Justice and Faith demand? Which are all beyond the reach of the civil Laws. Where one may see he puts a Difference between just, and justitia, Right and Justice. He means by Right, that which is actionable in Courts of Judicature. The same Seneca excellently explains this in another Place, by the Example of a Master's Right over his Slaves. 13 As to our bond Servants we must consider, not what we may without Danger of the Law put upon them, but what the Nature of Equity and Honesty would allow, which obliges us to be merciful to our Prisoners, and those purchas'd with our own Money. Further, Indeed every Thing is lawful with regard to a Slave, for which there is no Law nor any Action to be brought, that however the Rules of Commerce in human Society require, which are superior to all written Laws. Plato begins our last, non alienem, ad qua non causati vides honesta, leges semel voluntari dat admittam. De Benefic. Lib. V. Cap. XXI.

Cicero maintains, that the Laws redress Wrongs, in a different manner from that in which the Philosophers correct them. The Laws confine themselves to what is more grofs and palpable; the Philosophers cut off every Thing, as far as the Light of an attentive and penetrating Reason extends: sed aliter Leges aliter philosophi ivalut autiales: Leges quatenus humanum manum sui patient; Philosophi, quatenus rationem & intelligentiam. De Offic. Lib. III. Cap. XVII. See a Passage in Quintilian, Inhib. Orat. Lib. III. Cap. VI. which has been cited above in the fourth Chapter of this Book, § 2. Num. 2. Grotius.

The Reader may see my two Discourses, De Permissione & Beneficio Legum, upon this Subject. 15 Et in mancipiis cognitum, &c. Lib. I. De Clementia, Cap. XVIII. We might believe from what the Philosopher calls in the End of this Passage, commune jus autonomia, that according to the Senecan, there was a Right really and properly common to Men and Beasts. But see what I have said upon Puffendorf, Laws of Nature and Nations, B. II. Chap. III. § 2. Not 2. and § 3. Note 10. of the Second Edition.

considered
confidered as such: But there are some Things which are not lawful with regard to a Slave, considered as a Man, according to the common Right of Animals. In which Place we may observe the double Meaning of the Word lawful, the one being taken for that which is really lawful in itself, the other for that which is only lawful externally.

II. 1. To the fame Intent is the Diffinition of Marcellus in the Roman Senate, Not what I have done is here to be debated, since the Right of War jusifies whatsoever I have done against the Enemies, but what they ought to have suffer'd, viz. in Reason and Equity. Aristote disputing the Point, whether Slavery arising from War may be esteemed just, hints at this Diffinition. Some having in View a Sort of Right, that is, the Law which is certainly something just, maintain that Captivity in War is just, but they do not say it is absolutely just, because it may be happen that the War may proceed from an unjust Caufe. Agreeable to this is that of Tuscides in the Oration of the Thebans, For those ye killed in Fight, it is not so much a Grievance to us, what they suffered was by a Kind of Right.

2. So also the Roman Lawyers themselves, what they often call the Right of Captivity, in another Place call an Injury, and oppose it to natural Equity; and Seneca 6 says the Name of a Slave arose from Injustice, having a respect to what often happens. The Italians also in Livy, retaining what they had taken from the Syracusans in War, are called obftinate in keeping what they had unjustly gotten. Dion Phraneraês having declared, that when Prisoners return Home, they recover their Liberty, adds this, 7 as adversus quos quisvis, As being unjustly enclosed.

3. Laënnatus speaking of the Philosophers says, When they dispute of Duties relating to military Affairs, they reason not according to the Principles of Justice and true Virtue, but adapt their Precepts to the common Practice and Customs of civil Life. He says afterwards, that the Romans 8 acted unjustly by Law.

III. We then first declare, if the Cause of the War be unjust, tho' it be undertaken in a follem Manner, yet all the Acts of Hostility done in it are unjust in themselves. So that they who knowingly do those Acts, or join in the acting of them, Are to be accounted in the Number of those, who without Repentance cannot enter into the Kingdom of Heaven, 1 Cor. vi. 10. But true Repentance, if Opportunity and Ability will allow, absolutely requires 9 that he who has done any Damage,

II. (1) Sed non, quid ego facerim in disjutijicijus visum, quem, quidipud in bulibus fee, jussi bello defendis, sed quid siti pati debuerim. L I V. Lib. XXVI. Cap. XXXI. Num. 2. So our Author cites this Paflage. But the Words quod, quidipud in bulibus fit, jussi bello defendis, which he cites also above, Chap. IV. of this Book, § 5. Note 3. are not in the Manuscrip, and Gronovius had Reason for omitting them in his Edition, which has only, in disjutijicijus visum, quem quid siti. See that learned Gruick's Note. He might have observed, that this Glos crept in probably from the following Words, which are a little lower in the Text, and which I have subfributed in the Note referred to: Quem autem fregulis vitis aut adiuni, aut deitio, quem jussi jure, tum ex cunctis meritis, fecio ne fugiat. 2 Politic. Lib. I. Cap. VI. p. 302. A. Vol. II. Edit. Paris. See GPHANUS'S Commentary upon it.

3 Seneca says, that some acquire a Right to Lands belonging to other People by Arms: Adi armis fani jussi in alium terram fecuntur. Confolat. ad Helvian. Cap. VI. Rights, and the Acquisition of another's Estates, continuing fuch, foon incompa tible. But they are reconcileable by the Principles we have here laid down in the Text. Add what we have faid in Chap. IV. of this Book, § 2. GROTIUS.

4 Lib. III. Cap. LXVI. Edit. Oxon. 5 See the Law cited above, Chap. VII. of this Book, § 6. Note 10. with the Reflection which I have made there.

6 He says, that as the Title of Knight arose from Ambition, the Names of freed Men and Slave derived their Origin from Injury and Injustice: Quod eque Romans, aut Libertinum, aut Servium? Nomina ex ambitione, aut ex injuria nata. Epift. XXVI. 30.

7 On the contrary it was the Greeks, who were for keeping what they had taken, during the War, from the antient Inhabitants of Italy: Graeci res a quibusdam Italici generis, Er. Lib. XXIX. Cap. I. Num. 16, 17.

8 Orat. XV. 9 Inde quoque de Officio, &c. Inift. Divin. Lib. VI. Cap. VI. Num. 24. St. AUSTIN says, that if Men duly observed the Precepts of the Gospel, War itself would not be made without Clarity and Benevolence: De pace et ira terrarum, &c. Epift. IV. Ad Marcellin. He observes elsewhere, that Wars themselves are peaceable among the finer Adorers of the true G O D: apud terrarum Dei cultores, etiam ipse bella pacata junt. De diversis Ecclesiæ Observationibus. GROTIUS.

The last Paflage is cited in the Canon Law, Conf. XXIII. Q. I. C. I.

10 Thofe Words have been cited above, Chap. IV. of this Book, § 5. in fin.
War and Peace.

marge, either by killing, ravaging or plundering, should make full Reification. Therefore GOD himself declares their a Faits to be unacceptable to him, who detained their Captives unjustly taken. And the King of Nineve, (Jerab iii. 8.) proclaiming a Faft to his Subjects, commands them all to reftore what they had taken by Rapine; acknowledging, by the Guide of natural Reason, that all Repletion without such a Reification would be but pretended, and to no Purpose. And not only the Hebrews and Christians are of this Opinion, but even the Malbomianists themselves.

IV. But the Authors of War, whether by their Authority, or Council, are obliged to make this Reftitution, according to what we have declared in general elsewhere, for all those Damages which are the unfae Consequences of War; and for what are unfae, if they either contributed to them by Command or Advice, or not prevented them, if it was in their Power to have done it. Thus are Generals and Officers also obliged to do, in Relation to those Things which have been committed by those under their Command. The Soldiers, who have concurred in an Act of Hostility committed in common, as the burning of a Town, are each responsible for the whole Damage. But if the Damage has been caused by the different Acts of several, each shall be answerable for the Mishief, of which he has been the sole or partial Caufe.

V. Neither can I allow the Exception, which some make of those that serve under others, that they are only responsible for the Damage, when there is on their Part some Fault accompanied with Fraud. For the bare Fault, without bad Intention, is sufficient to engage to a Reftitution. There are some who feem to think, that Things taken in a War, tho' their Caufe were really unjust, are not to be returned because both Sides, when they engaged in the War, were suppos'd to have granted them to the Captors. But it cannot be easily presumed, that any Man will rafhly part with his Right, and War in itself is far different from the Nature of Contracts. But that neutral Nations might know what to do, and might not be forced into a War against their Wills, it was judged sufficient to introduce this external Right of Property, (which we have mentioned before) which may be agreeable with the internal Obligation to Reftitution. And indeed those very Authors seem to allow as much concerning the Right over Prisoners of War. Wherefore the Samnites in Livy a say, We have reftored the plundered Goods of our Enemies, which by the Law of Arms seemed to be ours; seemed only, he fay, because War was unjust, as the Samnites had before acknowledged.

reftore them their Reftitution is not real, but feigned. Ad Macedon. Epift. LIV. The latter Parliament is cited in the Canon Law, Can. XIV. Quod. VI. Can. I. Grotius.

1. I do not find the Words of St. Jerome in the Place referred to.

2. It is in the fine Parliament of Isaiah, Chap. LVIII Ver. 5, 6, 7, that Jus tin Martrid, rep. 3 Greek in his Dialogue with Tryphon. (p. 47. Ed. Oxon.) Grotius.


IV. (1) It is declared in a Law, which our Author cites in the Margin, that if two or more Men have flen a Beam, which one of them alone could not carry off, each of them is entirely responsible for the Theft: Si duo plures unum, &c. Digest. Lib. XLVII. Tit. 11. De Furto, Leg. XXI. § 9. We must further observe here, that it is generally impossible for a Soldier to make amends for the Damage, to which he has concurred in common, and for which he is thus wholly responsible. The Instance of burning a City suffices to explain this. And as to what a Soldier has done, where the Proportion of the Damage he has caused, may be distinguished, as when he has been concerned with others in plundering a City; he cannot commonly know to whom what he has taken belonged, nor in Consequence to whom he ought to reftore it. In the first Case, the absolute Unfaftitude of Amends must acquit him, with regard to those who have suffered the Damage. In the latter, the Obligation of making Reftitution is suspended, till the Soldier has discovered the right Owner of the Booty he has taken. But in either Case, a Person that has been the Head of Tenderness of Confinement, will be extremely mortified for the Impossibility either absolute or pretent under which he finds himfelf; since when People have the Means in their own Hands of making Amends for a Wrong done, it is a great Consolation, and a Discharge, which obliterates in some Sort the Crime. After all, as the Powers, who undertake an unjust War, are always more culpable than tho'fe who serve under them in such Wars, they can also generally make Amends, either wholly or in Part, for the Evils of which they have been the first Caufe; and by discharging their Duty in that manner, exempt the Soldiers from the Obligation they are under of making Reftitution, which they very seldom believe they are bound to do.

V. (1) In all the Editions it is in this Place: Si modi in ipsis aliquid harret cus. But our Author's Anfwer to this Proposition, however, that there must be some Fault in it. I therefore tranflate it, as if it had been writ: Aliquid harret DOLOSA cus. The Sense necessarily requires something of this Kind, and it might perhaps a fubf. that I have gaefied the Word, if I had Sylvester, to whom our Author refers in the Margin, (Part I. Num. 10.) and whom he refutes.


2. Not
2. Not much unlike this, a certain Power arises from the Law of Nations in a Contract made without Fraud, wherein there is an Inequality, to force the Contractor to perform his Contract; Nevertheless he that stipulates more than his Due, is obliged in Honesty and Confidence to reduce it to a fair and just Equality.

VI. 1. But further, tho' a Man has not done the Damage himself, or if he did it without any Fault of his, but yet keeps in his Possession a Thing taken away by another in an unjust War, he is obliged to restore it; because there can be no Reason produced naturally just, why the other should be deprived of it. There is neither a Content on his Part, nor an Occasion of Punishment, nor a Compensation to make. Not unlike to this is that of Valerius Maximus. 2 The People of Rome, faith he, when P. Claudius publickly sold some Camerine Prisoners taken in the War, when he was General, tho' they found their Treasury filled with the Money, and the Borders of the Empire enlarged, yet because they were not fully convinced of the Justice of that Expedition, they with utmost Diligence having fought out the Prisoners, redeemed them, and restored them their Lands. Thus by the Decree of the Romans, even their publick Liberty was restored to the 3 Phocians, and also their Lands, which had been taken from them: And afterwards the 4 Ligurians, who had been sold by M. Pompilius, (their Ransom being paid to the Purchasers) were restored to their Liberty, and their Goods carefully returned. The Senate 5 decreed the fame in favour of the Abderites, adding this Reason for it, because the War made upon them was unjust.

2. Yet may the present Possessor, whatsoever Charge or Pains he has been at, lawfully deduct as much, as the Proprietor would willingly have expended to have recovered his endangered Possession, according to the Principles we have before laid down. But if the Possessor of it, without any Fault of his, has either wafted or alienated it, he shall not be obliged to refund, further than he shall be thought to have been made richer by it.

3 See above, B. II. Chap. XII. § 26. or latt. VI. (1) This must be explained according to the Principles referred to in my Notes upon the Chapter cited in the Margin.

2 Idem [Populus Romanus] quem, &c. Lib. VI. Cap. V. Num. 1. Mark Antony caueth the Prisoners to return what belonged to the Jews. He ordered, that the Prisoners, who had been sold, should be set at Liberty, and the Effects taken from the Jews restored to their Right Owners. Jos. Antiq. jad. Lib. XIV. (Cap. XXII. p. 492. G.) Macrinus restored the Prisoners and Booty to the Parthians, because the Romans had broken the Treaty without Cause. Herodian. Lib. IV. in fin. Sunt Magamet set the Prisoners at Liberty that had been taken at Santa Maria in Achaia, CHALCONDYLAS, Lib. IX. GROTIUS. 3 Plutarchus & ceterum, &c. Lib. Lib. XXXVIII. Cap. XXXIX. Num. 12.


5 Islam manda trium, ut & Holiio, &c. Livy; Lib. XLIII. Cap. VI. Num. 21.

—— Arma tenenti
Omnia dat, qui justa negat——

He gives up all, who what is just denies.

But Cicero has it better, There are certain Duties to be observed even towards those that have wronged us, § for there is a Moderation required in Revenge and Punishment.


C H A P. XI.

Moderation concerning the Right of killing Men in a just War.

I. 1. BUT that is not to be allowed in a just War, as is commonly said,

—— Arma tenenti
Omnia dat, qui justa negat——

1 That fame
Acts in a just
War, are un-
just in them-
selves.
ment. The same Author commends the antient Times of the Roman, when the Ends of their Wars were either mild, or rigorous, merely through Necessity. Seneca calls those cruel, who having a just Cause to punish, have no Moderation in it. Aristides faith, it is possible that they may be unjust, who only revenge a Wrong done to themselves, if they go beyond Moderation; for be that in this Art shall exceed just Bounds, renders him self culpable in his own Turn. Thus in Ovid's Opinion, a certain King,

—Cæde noceuntum
Se nimiris uicijenos exitit ipse nocens.

Following the Guilty with too quick Revenge,
Dedv't a Guilt upon him self:—

The Plataens in an Oration of Icerates demand, if it be just, thus for such flight Trepasses to exact rigorous Punishments. And the same Aristides in his second Oration for Peace, faith, Consider not only the Reasons for punishing, but also the Perjons to be punished, who we ourselves are, and what is the just Measure of Punishment. Minos is commended in Propertius:

Victor erat quamvis, aequus in bote fuit.

Tho' Conqueror, to Foes was always just.

And in Ovid,

—leges captis justissimus au/dor
Hostibus impo/juit—

Ma/ st just to Captives be dispens'd Laws.

II. 1. But when it is just to kill (for there we must begin) in a just War according to internal Justice, and when not, may be plainly under^ood from what I have said in the first Chapter of this Book. For a Man may be killed either designedly, or

Num. 3. Note 9.) in regard to the Benevolence Christians ought to retain for each other, even in War. ARISTOTLE speaking of a too rigorous Punishment executed of old at Thbes and Heraclea, ascribes it to a Spirit of Sedition. Politic. Lib. V. Chap. VI. THUCYDIDES ranks amongst the Diforders of Greece, of which he gives us a lively Description, the revenging of Injuries, beyond the Bounds of Justice and the publick Good, Lib. I. (Cap. LXXIII.) TACITUS says of Pompey, that in making too rigorous Laws for the Correction of Vice, the Remedies were worse than the Difafes: Tom Cn. Pompeius, tertiam Conflag. corrugem manibus delictis & grauis remittit, quam delicta erant, &c. Annal. Lib. III. (Cap. XXVIII. Num. 1.) The same Historian blames Augustus a little above, for having forgot, in the Punishment of Adultery, the Clemency of the antient Romans, and his own Laws: Nam pulmom inter uiros ac feminas, &c. (Ibid. Cap. XXIV. Num. 7.) JUVENAL observes that an Huftand's Repentance for his Wife's Infidelity hurries him sometimes to more terrible Extremities, than all the Laws have ever admitted in favour of Revenge:

—Exigit atum
Interdum ille dolor plus, quam Lex utila doli —
Consecti —

Sat. X. Ver. 314, 315. QUINTILLIAN takes it for granted, that only the most atrocious Paricide are punished, when no longer in Being, that is to say, by depriving their Bodies of Sepulture: Ideoque non nisi ab ultimo parricide exigit pana trum tertium feminem. Declam. VI. Cap. X. p. 137. Edit. Bure.) The Emperor Marcus Antoninus wrote to the Senate to moderate the Proscription and Punishment of the Accomplishes in the Revolt of Avidus GALLIanus, that nothing might be too rigorous nor cruel in them: Et ad Senatum scrivam, ut aut proscriptis gravior sit aut postea crudelier. Vulc. GAL. LIT. Acid. Caff. (Cap. XI.) AUSONIUS intimates, that Punishment and Vengeance may exceed the Crime:

—Vindictae major
Grimine ujus fusa —

[Capit. Crucif. Ver. 91, 94.] AMMIANUS contains such Conduct in regard to a conquered Enemy: Savitum efi in multis acris, quam errata flagiowarent, vel delita, Lib. XXVI. (Cap. X. p. 514. Edit. Valaf. Gran.) There is a like Relation in AGATHAS, Lib. III. [or rather Lib. IV. Cap. VI.] GROTIUS,

3 Veramtenam quandis imperium, &c. De Offic. Lib. II. Cap. VIII.

4 Illos ergo Crudesca vocabo, &c. De Clement. Lib. II. Cap. IV.


8 Lib. III. Eleg. XVII. Ver. 28.

9 (Mutam. Lib. VIII. Ver. 101, 102.) The same Poet says elsewhere, that Compasion is laudable even towards an Enemy:

Est atiam miseria potas, & in hoffe probatur.

Trig. Lib. I. Eleg. VIII. (Ver. 55.) GROTIUS without.
Of the Rights of

III.

1. Above, a when we treated of Suppliants, (for there are such both in Peace and War) we distinguished between the unfortunate and culpable. Gyllippus in that Place of Diodorus Siculus, which I there quoted, asks this Question, b in what Case the Athenians ought to be reckoned, either of the unfortunate or the unjust. And he declares, they cannot be ranked among the unfortunate, because voluntarily without any manner of Provocation, they had made War on the Syracusians: Whence he infers, since they had freely begun a War, they must expect to undergo the Miseries of that War. They are to be esteemed unfortunate who happen to be in the Party of one of the Enemies, without any hostile Diffusion towards the other Party, as the Athenians in the Time of Mitridates, of whom thus speaks Velletius Paternus, c If any one should charge the Athenians with Rebellion, at the Time (when Athens was besieged by Sylla) he is very ignorant both of Truth and ancient History. For the Fidelity of the Athenians was so firm to the Romans, that always, and upon all Occasions, whatsoever was done with a singular Honesty, the Romans used proverbially to say, it was done Athenian like. But then being opposed by the Forces of Mitridates, they were reduced to a most miserable State, whether they were within enslaved by their Enemies, and besieged by their Friends, whether their Hearts were without the Walls, but their Bodies in compliance with Necessity, were within. Which last Part seems to be taken out of Livy, d in whom Indibilis the Spaniard declares, that his Body only served the Carthaginians, but his Mind the Romans.

2. For, faith Cicero, e all those whose Lives are in the Power of others, often consider what they can or may do, at whose Mercy they lie, rather than what they ought to do. So says the fame Cicero f for Ligarius, It is the third Time that he continued in Africa after the coming of Varus, which if it be a Crime, it is of Necessity not of Will. And Julian took this course in the Cafe of the Aquilines, as Annianus g testifies, who when he had ordered the Punishment of a few, adds, he let the others Escape, as whom Necessity, not Choice, had forced into Arms. Thus says an antient b Commentator on that Place of Thucydides, of the Corcyrean Captives that were fold. It was an Aff of Clemency, worthy of the Greeks, for it is inhuman to kill Prisoners.

1. Of Man can be justly killed for his Misfortunes, as they are forced to follow a Party. a B. 2. ch. 21. § 5.

2. a See Lib. I. Cap. 55.


4. a Ioque corpus dominatam suam, &c. Lib. II. Cap. XXIII.

5. a Propertia quad annos, &c. Orat. pro P. Quint. [Cap. II.]

6. a Tereris et tempus, &c. Orat. pro Qu. Ligario. Cap. II.

7. a Refolui annos afferente inani, &c. Lib. XXI. Cap. XII. p. 357. The Historian adds immediately after, that this Emperor who was of a mild and merciful Diffusion acted in this manner from the Motive of Equity: Ed enim equitate perfecta fueturam plebisitus Imperator & Clement. Thucydidès makes Cleon the Athenians say that he pardoned those, whom the victorious Arms of the Enemy had compelled to revolt, Lib. III. (Cap. XXXIX.) This is what PAULUS the Lawyer [in treating another Subject] calls: Contemplatia extrema necessitatis. Recept. Sentent. Lib. V. Tit. I. § 1. And certainly nothing is stronger than Necessity, as SYNEUSIS said: Σχετικάνακα φιλάζαμεν, xai βασιλεῖ. Juvenal, speaking of the Caledonians a People of Spain, who were reduced in a Siege to eat human Flesh, mainsains, that Men and Gods ought to pardon them upon account of the Extremity to which their City was reduced:

—Quis nam minimum veniam dare, quibus Deorum, Virtus absque dira atque immo obsta.
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Prisoners after the Battle is over, especially Slaves, who do not fight of their own Choice. The Plaetean thus argue in the aforesaid Oration of Siceris, 7 We did not force them willingly (the Lacedemonians) but were forced to it. And so for the other Grecians, they were forced with their Bodies to join with them, but their Hearts were with you. Herodotus 8 also says of the Pheonians. They followed the Medes not voluntarily, but forced by Necessity. Alexander spared the Zoﬁds, as Amianus relates, 9 Because they were forced into the Service of the Barbarians. Dioanrus 10 makes Nicolaus the Syracusan thus plead for the Captives, The Allies were forced to make War; wherefore as it is but just that they should be punished, who designedly offer the Wrong; so it is equally just to pardon them, who offend against their Will. So in Livy, 11 the Syracusans to excuse themselves to the Romans, said, they broke the Peace being oppressed by Fear and Fraud. Thus for a like Reason Antigonus declared, 12 That be made War with Cleomenes, and not with the Spartans.

IV. 1. But it is to be observed, that between an absolute Injury, and a mere Mistake, there often intervenes something of a middle Nature, as it were composed of both, so that the Action cannot be said to be either entirely of Knowledge and voluntarily, nor purely of Ignorance and against the Will.

2. Aristotles calls this Act a CULPA, in Latin rendered culpa, a Fault. For thus he fays in the 5th Book of his Morals, and the 10th Chapter. Of voluntary Actions, some we do deliberately, others not. They are said to be done deliberately, which are aided by a certain previous Composition of the Mind; what are otherwise, we fay are done unavoidable. Since then in human Society an Injury may be done three Ways, that which proceeds from Ignorance is termed a simple Fault. As, if a Man should do a Mijchief to one Sem; he did not design to hurt, or what he did not really intend, or not in the manner be inteded it, or not with such a View, as if any one did not think to strike with this Instrument, not this Man, or not upon this account; but it happened otherwise than he proposed to himself: He designed to pinch, not to wound, either not this Perfon, or not in this manner. Therefore if a Damage happen thus against all Expectation, it is a Mijchance; but if it might in some manner have been expected or foreseen, the not with on evil intent, it is a simple Fault: For there is none Fault on the Part of the Agent, when the Principle of Action is within him: But when the Principle of Action is without him, he is only unfortunate; but when a Man does knowingly what he does, though not deliberately, it must be acknowledged that an Injury is done: As whatsoever Men do through Anger, or other like Discoveries of the Mind, either natural, or inexcusable; for they who in Passion do Mijchief, and yet through their Fault, do certainly commit an Injury, neither yet are they reckoned unjust or malicious. But if a Man should it deliberately, be is rightly accounted wicked and unjust.

3. Therefore whatsoever is done through Anger, is judged with Reason not to be done premeditately; for he does not begin, who in a Passion does an Injury, but he that provoked that Passion. Hence it is, that when such Affairs are tried at Law, the Quarter frequently turns, not upon the Fault, but upon the Right; for Anger arises from hence, that a Man thinks himself wronged. Therefore the Quarter is not here, as in Contraæ, whether what is complained of be done, or not; for there, unless there be Forgetfulness, one of the Parties must of Necessity be wicked in not performing the Contraæ; but in this they demand, whether what was done were justly done. Now be that first laid an Ambush, did it not through Ignorance, wherefore no wonder if the one Person caused the Inhabitants of a certain City to be put to the Sword, like an Herd of Beasts, and not a Multitude of Christians; and with so much the greater Cruelty, add he, because they had submitted to the Blacke thr' Force, and not Perussion. Grotius.

8 § Lib. IX. Cap. XVII.
11 Nic. poli. pacem Tyranni, &c. Lib. XXV. Cap. XXXIX. Num. 3.
12 Velleius says, qui superfecerunt, &c. Lib. XXVIII. Cap. IV. Num. 13.
thinks himself wronged, and the other not. But even those who commit Injuries without Deliberation, and in Paffion, ought to be accounted unjust, when in rending Evil for Evil, they pass the Bounds of Proportion or Equality; io he is truly just who acts justly with Deliberation, for sometimes a Man may do a just Thing willingly, but not deliberately.

4. But of those Wrongs that are not done voluntarily, some may be pardonable, others not; those are pardonable that are done not only by Men ignorant, but through pure Ignorance also. But if any be done by ignorant Persons, but not through pure Ignorance, yet through some Paffion that exceeds the common Bounds of human Nature, they are no wise pardonable.

5. Michael Ephebian interpreting this Passage, as an Instance of what happens contrary to all Expectation, gives us the Cafe of a Son, who by the opening of a Door, has hurt his own Father: Or of a Man who in a solitary Place trying to shoot, has accidentally wounded a Perfon; and of that which might have been foreseen, but without any evil Intent, he alludes the Cafe of a Man shooting at random in a Highway. The fame Commentator gives us an Example of Necesity in him, who is obliged by Hunger, or Thirt, to do any Thing. Of natural Paffions, in Love, Grief, Fear: He says that one acts through Ignorance, when the Fact is unknown; as if a Man did not know a Woman was married; a Crime is done by a Perfon ignorant, not through pure Ignorance, when the Right is not known. But this Ignorance of Right may sometimes be excused, and sometimes not; all which well agree with the Opinion of the antient Civilians. There is a Place in Aritbote not unlike this, in his Book of the Art of Oratory: Equity distinguishes between simple Faults and Injuries, and between simple Faults and Mischances; Mischances are those which could neither be foreseen, nor done with an ill Design. Simple Faults, those that might have been foreseen, but not done with an evil Intent; but Injuries, which have been done both designedly; and with a malicious Intent. The Antients have remarked that Homer had a Notion of those different Sorts of Action: And on that Head allude what the Poet relates in the last of his Iliad concerning Achilles.

"Оφις γὰρ ἐς ἀφέσαν, ἢ ἀπεκτάσατο, ἢ ἀλήθινον.
Not ignorant, nor rash, nor ill disposed.

6. The like Distinction is also in Marcius. We offend either purposely, through Paffion, or accidentally. Purposely, as a Gang of Thieves do. Through Paffion, as when a Man in Drink falls to fighting with Fiends or Sword. Accidentally, as when in Hunting an Arrow levelled at a Deer, kills a Man. Those two which are done purposely and through Paffion, Cicero thus distinguishes, in all Afts of Injustice it is bigotry to be considered, whether they be done by any Perturbation of Mind, which is generally short, and quickly over; or with premeditated Design. For those are much lighter, which are done by some sudden gulf of Paffion, than they done deliberately and designedly. Philo in his Explanation of some particular Laws, says, It is but half a Crime, which is not done deliberately.

7. Of which Kind are those chiefly, which Necessity, if it does not justify, yet excuses;
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excecds; for as Democritus argues against Aristotle, Necessity takes from us the Liberty of examining what we ought to do, or not to do; whereas such Cæses are not to be too strictly searched into by equitable Judges. Which Point the same Author (Democrites) handles more largely, in his Oration of false Witness against Stephenus. As also Thucydides, in his fourth Book. It is highly probable, that GOD himself is willing to forgive those, who are compelled by War, or otherwise necessitated to do any Thing; for the sacred Altars have been ever allowed sure Places of Refuge for them to fly unto, as brave unwillingly offended; and the Name of Crime is given to unlawful Actions, which are committed on purpose, and not to those which extremest Necessity gives Courage to commit. The Cæses in Lycy, thus addresses the Romans, That they would confirm that a deliberate Act, which was more justly to be called Force or Necessity. And Justin 11 says thus, The Act of the Phocians, tho' all condemned it for its infamous Sacrilege, yet it brought a greater Odium upon the Thebans, who perfectly forced them to it, than upon themselves. And this is the Opinion of Socrates. Of him who seems surely to keep himself from flattering, be hath Necessity, a good Plea for Pardon. Also Aristides 15 says, The Hardships of the Times is some Excape for those that abandon their Allies. Thus says Philostratus of the Mæcentians, that they did not receive those that were banished from Athens, They could not safely do it, for Fear of Alexander, whom all Greece severely dreaded. And thus we find in Aristote. Half wicked, but not unjust, nor a Lier-in-wait. Themistius, in his Præaces of the Emperor Valens, thus applies these Distinctions to our Purport, You have well distinguished between a real Injury, a Fault, and a Misfortune; ye are you are not acquainted either with Plato, or Aristotle, yet you put in practice their Precepts; for you have not judged them worthy of the same Punishment, who were the Authors of the War, and those who afterwards were forcibly

vered of Greece with a very ill Grace, whilst he put Perions to Death, who had not taken Arms against him, nor were his Enemies; because if they had joined the Athenians, they had been reduced to do to by Necessity. Thus Cels. Lib. III. (Cap. XXVII.) St. Chrysostom says that Enemies themselves know how to pardon Enemies, tho' they have suffered ever so great Injuries by them, when the latter have acted involuntary. De Provident. V. The Mæcentians, as Agathias relates, believed themselves not entirely unworthy of Pardon, and the Clemency of the Romans, because they had only committed the Offences, that had induced the latter to turn their Arms against them, out of brutal Rage occasioned by having been unjustly treated in several Repeats. Lib. IV. Cap. VI. 7 P. 449. B. 8 P. 524. The Passages is quoted above, B. II. Chap. XX. § 29. Num. 2. 9 Lib. IV. Cap. XCVIII. See what is said in Deuteronomy, Chap. XXVII. Ver. 26, in regard to a Maid ravished in the Country and the Rabbi MAIMONIDES, Duæt. Dubinant. III. 41. GROTUŠ. 10 Ne adpellarentconfiunt, qua vir ac necessias adpellanda eft. Lib. VII. Cap. XIX. Num. 5. 11 Philos. Poincare, &c. Lib. VIII. Cap. I. Num. 10. 12 Our Author repeats these Words without saying from which Work of the Greek Orators he takes them. I am almost certain that there is no such Sentence in Iocrates; and I believe one Name is put here for another. Since I wrote this I am convinced of the Truth of my Conjecture, and have found the Thought, and even the Words in a Passage of Porphyry, to which our Author refers in B. II. Chap. § 29. Nota 4. 13 Orat. Ind. Cap. 145. C. Vol. II. 14 De Vitr. Sophist. Lib. II. Cap. XV. § 2. p. 596. Edit. Olar. 15 Ethic. Nicomach. Lib. V. Cap. XI. On the contrary Clem. to render the Cause of the Mæcentians odious, laid, that they had with premeditated Design, laid Ambuscades for the Athenians, and in consequence deferred no Pardon, which is due only in Cases, where People act, involuntarily. Lib. IV. Cap. XL. Philo the Jew praises his Nation, for making a Difference, when they punished Injuries done them, between such as are used to commit Infuls upon others, and those who observe a quite different Conduct. For, adds he, it is brutal and barbarous to kill without Mercy all who come in the Way, without distinguishing those who have had little or no Share in the Offence. De exæq. Princip. (p. 734. B.) GROTIUS. 16 Orat. de lad. Valent. Imp. SENECa observes, in speaking of another Triangle of Thoroughbolts, that if the Antients believed that God sometimes threw small ones, it was to instruct those who are charged with the Care of Punishing, and fulminating, to use that Expiration, against the Crimes of Men, that they are not always to thrice in the same Manner; That there are Cæses wherein the Whole is to be broken, others in which slightly hurting is sufficient, and some where only flooding the Bolt is enough. His sunt aliiæ vitæ, &c. Natur. Quæst. Lib. II. Cap. XLIV. 17 Such was Trajan, one of the best of the Roman Emperors. XIPHIUS gives him this Praise, in his Life, (p. 230. Edit. Rob. Stop.) HERODIAN also says in praise of Marcus Antoninus, that he was the only Emperor who applied himself to Philosophy, in which he threw the Progress he had made, not by his Discours, or the vain Offen- tation of Science, but by the Gravity of his Manners, and the Regularity of his Life. (Lib. I. Cap. II. Num. 6. Edit. Bodel.) MARCIUS, another Roman Emperor, observed the Laws more exactly than he was acquainted with them. XIPHIUS, in ejus vitæ (p. 342.) GOD grant us such good Princes in these Days! GROTIUS.
engaged in it, and those who submitted to him who seemed Master of the Empire. But those you have condemned, those you have corrected, and the last received unto Mercy.

8. The same Author, in another Place, advises a young Emperor. Consider what Difference there is between a Misfortune, a Fault, and a direct Injury; and how it becomes a Prince to forgive the first, chastise the second, and severely punish the third. Thus, according to Josiphus, 18 did Titus the Emperor punish only the principal in a Crime, μέγας τινα, really; but the Multitude μέγας πολλά, only by Reprimands. Bare Misfortunes neither deserve Punishment, nor engage us to make any Retribution; but unjust Actions are obnoxious to both. But the Fault of a middle Nature, as it is liable to Retribution, so often it does not merit Punishment, especially capital. To this we may refer that of Valerius Flaccus.

At quibus invito moduerrunt sanguine dextrae, 19
Si fers serna trium ultra, fed proxima culpa
Hos variis mens ipsa modis agit, & sua carptunt
Facia viros refides —

But those who by Chance imbrue their Hands in Blood,
Pref'd by Misfortune, the not the greatest Crime,
Yet conscious of a Guilt, feel Loads of Anguish,
Remorse distracts 'em, and the hideous Image
Still absence them in the Face.

V. We meet with frequent Examples in History, of different 20 Punishments inflicted on the principal Authors of a War to be distinguished from those drawn into it. 21 See Gaullus, De pacie publ. l. z.e.g. n. 18. 2 Lib. x. c. 18.

When he was Judge, the Guilty always bore
The Weight of their own Faults; the People never
Ground with the Burden of their Rulers Crimes.

And the Athenians (as Thucydides relates) repented of their Decree against the Mi-

18 De Bell. Jud. Lib. V. Cap. XIII. (VI. s. Latin.) p. 912. B. The Emperor gives this as a general Maxim, that when a single Person has committed the Offence, it is necessary to punish him really; but when a Multitude are criminal, it suffices to menace them. So that we see our Author does not exactly give the Sense of the Jewish Historian.

V. (1) In all the Editions before mine they are called Principes Ardeas; that is to say, the principal Persons in the City, instead of the Ringleaders of the Insurrection. But I believed, that the Copists or Printers had left out the Word fediones, from its Likeness to securi, which follows; tho our Author never perceived it, as has happened to him in other Instances. However it was, the Original is, Romanus Confal [M. Geganus] Ardeae turbatis fediones res, principibus enim multis securi pareri, beneficis coram in publicam Ardeae resiliat, compotit. Lib. IV. Cap. X. Num. 6.

2 Oppida recepta Levinus, &c. Ibid. Lib. XXVI.
Cap. XL. Num. 13.
3 Astiaque & Calatia, &c. Ibid. Cap. XVI.
Num. 5.
4 Quoniam autres defellonis, &c. Ibid. Lib.
VIII. Cap. XX. Num. 11. and Cap. XXI. Num. 10.
5 Videp fontania levis, &c. Ibid. Lib. XXVIII.
Cap. XXXVI. Num. 5.
6 Supplic. ver. 873, 879.
7 Lib. III. Cap. XXXVI. The Sense of the last Words is clear; but there is some Difficulty in the
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6. In the very Authors we may distinguish the Causes; for there are some, not only just, but yet fish as may impol[e] upon Men not really wicked. The Writer to Heremius lay[s] down this as a just plea for Pardon, *If any one who hath offended, did it not out of Hatred or Cruelty, but out of Duty and good Design. Seneca’s Wiseman, *Will let his Enemies go off soft, even sometimes commended, if they were engaged in the War upon benefit; out of Loyalty, according to the Obligations of an Alliance, for their Liberty. The Cariotes, in Livy, beg Pardon for their fault in affiling their Kinmen. The Phocians, the Chalcidians, and others, who had aid’d Antochus, according to their Treaty, were pardoned by the Romans. Arirides, in his second Lentérica, speaks of the Thebains, who under the Conduct of the Lacedemonians marched against the Athenians. They were indeed engaged in an unjust Action, and with a fair plea, they did it out of Fidelity to the Lacedemonians.

2. Cicero, in his first Book of Offices, says they are to be pardoned who have not been cruel nor inhuman in the War. Also, that Wars undertaken for the Glory of Empire, are to be managed with less Severity. Thus King Ptolemy signifies to Demetrios, that They ought not to make War for every Kind of Reason, but only for Glory and Empire. And so Severus, in Herodian, when we first took Arms against Niger, we had not any special Pretences of Quarrel against him; but the Empire being the Prize disputed for, both of us with equal Ambition contended for it.

3. That often happens, which Cicero observed in the War between Caesar and Pompey. There was a great Uncertainty, the most famous Commanders were not agreed, many could not tell who’s Cause was best. And what he also says in another Place, *To be guilty of a Failing, through human Frailty, yet we are certainly free from a Crime. As in Thucydides, thole Acts are positively declared par-

the Explication: Upon which the Reader may, if he pleaseth, consult a Note of the late Mr. Perizonius, in Edian, in Hil. ii. 43. Note 4. p. 288.

6. (1) Heis ignogradicet ratio queritur, &c. Lib. II. Cap. XVII.


Lib. II. Cap. VII.

7. Parutaeus [Cerites] populationis, &c. Lib. VII. Cap. XX. Num. 2. This is what the Historian says, and it appears by the Sequel, the Cerites excused themselves by laying, that having only given Pabbage to the Tarquinians, some Peasants purely by their own Authority, had joined them, in order to go and plunder the lands of the Romans. Those Kinmen, of whom our Author speaks, were therefore the Tarquinians. But a faulty Punctuation in all the Editions, not excepting the first, had so much disguised the Passage, that it made the Phocians, a People of Greece, the Relations of the Cerites, a People of Etruria. In this Supposition, the learned Gronovius criticizes our Author in this Place, and he takes great Pain to difcover the Origin of a Pattle which he finds in the following Period. This is one of the Places where in the first Edition has been of most use to me, and might alone shew how necessary it was to compare the Text with that Edition, and the others of ancient Date. In the Margin there was Appian. Syr. That Citation being omitted, we could not know how, in all the Editions I have seen, after the first, prevented Gronovius from confulting the Historian from whom our Author had extracted the Fact, and whole Passage being found, immediately crimes the faulty Punctuation, which ought to be placed to the Account of the Printers or Copists. See Note 6. of this Paragraph. So that the Fault of our Author confists in his not having perceived, that, contrary to his Intent, they had put quod fuierat auxilis confinguntes Phocibus Phocienibus &c, &c. instead of quod fuierat auxilis confinguntes. Phocibus, Phocienibus &c, &c. as I have printed it in my Latin Edition.

4. Icocrates says, that a conquered Prince ought sometimes to be pardoned, who did not know the Justice of the Conqueror’s Cause. The Pabbage has been translated by Ammianus Marcellinus. Ut Icocrates memini patribus; eum vos ois perpetua docet, Ignorat dehors inter-dum armis fuperato Rettori, quam iujum quiet fit ignarum. Lib. XXX. (Cap. VII.) Grothus.

I do not know whether the Pabbage of the Greek Orator is to be found amongst the Remains of his Works. At least the Words which the learned Valois cites from the Oration Panathenica, are entirely foreign to the Subject.


Z, donable
Of the Rights of the People

Book III.

VII. Even to

2. There is a remarkable Place to the fame Purpofe, in the fourth Book to Herennius. "Our Anceftors well obferved, to put no captive King to Death. And why? It would be unjust to abufe that Power which Fortune hath beffowed on us to the Deftruction of them, whom the fame Fortune, a little before, had placed in the moft eminent Station. But, you will fay, he brought an Army againft us! I now absolutely forget it. Why fo? Becaufe it is the Part of a brave Man to hold thefe his Enemies who difpute with him the Victory, and to confider them as Men, when vanquifhed; fo Valour may fignify the Calamities of War, and Humanity augment the Advantages of Peace. But, you will fay again, fuppofe he had got the Victory, would he have done the fame? Why then fhould you fpare him? Becaufe it is my Prudence to defer fuch fuch folly, not to imitate it." If you underftand this ofthe Romans, (which is very uncertain, fince the Author often employs Reafons drawn from foreign Examples, or even fuch as are fictitious) it is absolutely repugnant to that which we meet with in the Panegyric of Conftantine, the Son of Conftantius. "Tho' he be the more prudent Man, who by a Pardon gains the Affection of Enemies,

13. Cetera multitudes subici, &c. Cicero, Epift. II. ad Brut. Sec Bembo, Hift. Lib. IX. Grotius. VII. (1) Theoderic, King of the Goths, faid, that the moft succefful Wars he had made, were thofe in which he had used Moderation in Victory. Moderation, adds he, is a continual Victory to him who knows how to manage it. Illa mihi felicitat bella prouenient, quae moderata fine parafla funt, non enim vultus, qui novit omnia temperare. Cassiodorus, P. R. II. 41. Grotius.

5. Enid, Lib. X. ver. 528, 529.
6. Item: Bona maioris neftri, &c. Lib. IV. Cap. XVI.
7. Cantor biit fit, qui devinitis, &c. (Panegyr. Vet. VI. Cap. X. Edit. Cellar.) I am far from approving the Reform of the Culfom the Orator speaks of. We fee however that Julian caused the Kings he had taken to be put to Death, Josephus, Antiq. Jud. Lib. V. Cap. I. Coju Soffian, having defeated Antignous King of the Jews, caufed him to be whipped, being faffened to a Cross. Dion Cassius, who relates this, (Lib. XLIX. p. 467. D. Edit. H. Stephan.) adds wildly, that no conquered King had ever been used fo by the Romans. There is the fame Hiftory in Josephus, Antiq. Jud. Lib. XV. (Cap. L) Eutropius tells us, that Maximianus Heracleus [or rather Conflantius] having made the Kings of the Franks and Germain Prisoners, exposed them to fight with wild Beafa, in the magnificent Games he had prepared to exhibit. Qui [Conflantin.] in Gallia, &c. Lib. X. (Cap. II. Num. 9.) See what Ammianus Marcellinus says of one of the Kings of the ancient Germain, who was hanged, Lib. XXVII. (Cap. II.) Theoderic, King of the Visigoths, caufed Athinibius, King of the Suevi, who had fettled in Spain, to be put to Death, as Jornandes tells us, in his Hiftory of the Goths, (Cap. XLIV.) These Examples ought to teach Kings
"Enemies, yet he is the more valiant, who trees them under Foot when vanquished. You have revived, O Emperor! that ancient Baldness of the Romans, empire, which always put the Generals of the Enemy, whom they had taken Prisoners, to Death. For the next captive Kings, after they had attended the triumphant Chariot of the Conqueror, from the Gates to the Forum, as soon as ever he turned his Chariot to the Capitol, were dragged to Prisón, and there put to Death. Except only Perseus, who, by the particular Favour of Paulus EMINIUS, (to whom he had yielded himself) escaped this severe Punishment. But the Rest, deprived of Life in a Prisón, served as a Warning to other Kings, rather to court the Friendship of the Romans, than provoke their Justice."

But this Author expresses himself too generally. "Josaphus indeed mentions the like Severity of the Romans, in the History of Simon Barjora, who experienced it; but he speaks of Generals, such as PONTIUS the Samnite, not of those who had the Title of Kings. The Meaning of his Words may be taken thus. ”

"The Conclusion of the Triumph was when they were come to the Capitol, the Temple of Jupiter, for there, by antient Cufom, the Conqueror fand, till he had Notice of the Death of the Enemy's General. It was Simon the Son of Jora, who was led among the Prisoners in triumph: He then having a Halter about his Neck, was hurried to the publick Place, his Keepers alfo whipping him on: For in that Place it is the Cufom of the Romans to put to Death, thofe that are condemned for capital Crimes. As soon then as it was declared that he was dead, they firft offered up Vows, and then Sacrifices." Cicero? almost writes the fame of Punishments, in his Oration against Verres.

3. We have many Examples of Generals thus executed, and some of Kings, as of Arifionicus, "Jugurtha," "Artabazus. Yet besides Perpeus, Syphax,\(^1\) Kings to be moderate and discreet in Prosperity, and to reflect, that when God pleases, they are subject, as well as others, to the most unhappy Vicissitudes of human Events; in a Word, that according to Sibyl's Thought, which Corfus called to mind in a like Danger, nobody can be deemed happy before Death.\(^2\) Grotius.

The last Fact is related by Herodotus, Lib. I, Cap. LXXXVI. As to Antigonus, King of the Jews, his Head was cut off by the Order of Mark Antony, whose Lieutenant Jufus was in Syria, and who, in favour of Herod, did not reforve that unfortunate Prince for the Day of his Triumph; and it is in this Kind of Death by which no conquered King had ever been punished before, that STRABO, whole Words Josephus has preferred, makes the Novelty of the Example contemptible, and reprov'd it alfo by PLUTARCH, Vit. Antion. p. 937 C. As to the Words of the antient Pangenryth, in which our Author corrects the manifestly corrupt Reading: The fame had been done before him by the Jefait JULIUS CæSAR BOULANGER, in his Book De Spallis bellicis, trophais, acbus triumphalibus, &c. jumpta triumphi, Cap. XXVIII. p. 76. Edit. Paris. 1610. which is followed by the later Editions. The learned CIVILIAN PETIER DU FAUZE, in his Centuria, Lib. II. Cap. III. p. 35. proposes another, which is not fo natural. GROTONius is alfo for having called STRABO, instead of colct IRATOS, read in the Beginning of the Paflage. De Bell. Jud. Lib. VII. p. 979. E. F. 9 Tamen quam de Fire in Capitulorum, &c. In Vit. Lib. V. Cap. XXX.

13 The Historians do not agree about the Manner of this Prince's Death, who was King of Part of Namidia. Several make him die near Rome, before the Day of the Triumph, [at Tiber or Trast. See Livy, at the End of the Sixtieth Book. Cap. ut. Num. 4.] POLYBIUS on the contrary says, that he was led in Triumph. APPIANUS ALEXANDRINUS relates, that he died of a Diftemper, whilft they were debating what to do with him. [De Bell. Punic. p. 15. Edit. Steph.] Grotius.

POLYBIUS says, that this conquered Prince died in Prifon some Days after having been led in Triumph. Lib. XVI. Cap. XII. Silius ITALIUS seems to intimate that only the Effigy of Syphax was carried in Triumph, Punic. Lib. XVII. ver. 650, where the Reader may fee CCLAVIUS' Note, and that of Mr. DRAKENBERG, the late Edition.
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Book III.

Gentius 14, "Tuua 15, and, in the Time of the Cæsar, Caracallus, 16 and others, escaped this Punishment; whence it appears, that the Romans had Respect to the Caues of the War, and the Manner of prosecuting it; whom yet Cicero, 17 and other antient Authors, do acknowledge to have been too cruel in their Victories. Therefore M. Ænilius Paulus, in Diodorus Siculo, well advised the Roman Senators, in the Caæ of Peræus. 18 They fear not the Power of Man, yet they ought to dread the Divine Vengeance, which is ready to fall on them who injuriously abuse their Victories. And 19 Plutarch observes, that in the Grecian Wars, the very Enemies refrained all Violence to the Lacedemonian Kings, in Respect to their Dignity.

4. An Enemy then who hath not Respect purely to what human Laws allow, but what is really his own Duty, and what the Rules of Virtue require, will spare even his Enemy’s Life; and will put no Man to Death, unless to save himself from Death, or something like it, or to punish personal Crimes that deserve Death. Nay, and to some of those that deserve it, either from a Principle of Humanity, or some other good Reason, he will either remit all Punishment, or at least the capital Part. The same formentioned Diodorus Siculo 20 excellently observes, “The taking of Cities, successful Battles, and other Prosperities of War, are often more owing to Fortune than Valor. But to shew Mercy to the Vanquished is purely the Effect of Wisdom.” We read in Curtius 31, “Tho’ Alexander had just Reason to be angry against the Authors of the War, yet he forgave them all.”

VIII. As to Persons who are killed accidentally, and not on purpose, we are to remember what we said above, that if not for Justice, yet for Pity, we must not attempt any Thing which may prove the Destruction of Innocents, unless for some extraordinary Reasons, and for the Safety of many. Polybius is of the same Opinion, who, in his first Book, thus speaks, 1 “It is the Part of a good Man not to prosecute a War to the utmost, against those that are wicked, but only to far, till they have made Satisfaction for, and amended their Crimes, and not promi-

cuously to involve the Innocent in the Punishment of the Guilty, but, for the
Sake of those Innocents, even to pardon the Guilty.”

IX. 1. These general Principles being laid down, it will not be difficult to infer more particular Rules. 1 Tender Age must excuse the Child, and her Sex the Wo-

Man, who has not Children but when pressed with extreme Hunger, as an antient Naturalist observes. Et ubi jussi [Less] Ot. PLINT. LIB. VIII. CAP. X. XV. Horace representing Achilles, as a Warrior void of Pity, that did not spare even Infants, without excepting those in their Mother’s Womb; professes by a lively Exclamation, that he looks up on this as an horrible Excess of Fury.

Sed palam captis graviss. haer nefas haer! Nefcis furis pueros Achivi

Uteret flammi, etiam latentes

Matris in abo.

Lib. IV. Od. VI. ver. 17. & seq. An antient Scholiast observes upon this Passage, how much the Poet expresses his Distique of such Barbarity, [HEU NEFAS] Dolenter exclamavit in fæstio Achilles, qui fi per Apollinem vitam laxaret, adeo facere oris, ut nec infantibus, nec in utero gestantibus pararetur. PULCHROTHEJews, that it was a Rule of War, of which he, in his Nation, to relate the Maids and Wives taken Prisoners, without doing them any Hurt, and he gives this Reason for it; that it would have been great Inhumanity to have destroyed the Men that Sex, which their natural Womb made incapable of War. De Princip. condit. (p. 734. A. B. Edit. Paris.) He observes elsewhere, that be-

tween Persons at Years of Discretion, a thousand specious Reasons may be found to justify Quarrels and Emnity; but that as to Infants lately come into the World, Malice itself cannot make those inno-

cent
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man, (fays Seneca, in his Books againfl Anger). GOD himself, in the Wars of the Hebrews, even after Peace offered and refused, would have Women and Infants spared, (Deut. xx. 14.) only some few Nations excepted by a special Command, against whom the War was not a human War, but a War of GOD, as it was commonly called. And when he ordered the Midianitih Women to be slain for their own personal Crimes, he yet excepted those that were pure Virgins. (Num. xxxi. 18.) Nay, when he denounced fearful judgments on the Ninevites, for their enormous Sins, he was pleased to delay the deferred Vengeance, in Composition of so many thousands, who could not distinguish between Good and Evil. (Jozab. iv. 2.) Like to which is that in Seneca, 5 Can any one be angry with Children, whose Age as yet understands not the Difference of Things? And in Lucan, 6

Crimine quo parvi caedem potuere mereri?

How could young Infants ever merit Death?

If then GOD, who, as the Author and Lord of Life, may, without Injustice, take it away when he pleases, and without any other Reason, from Persons of whatsoever Sex or Age, has, nevertheless, commanded, and acted himself towards Women and Children, in the Manner we have now seen; what ought Men (to whom he hath given no other Right over their Fellows, than what is necessary to preserve the Safety and Society of Mankind) to do in this Case?

2. We might add here, first, in Regard to Children, the Judgment of those Nations and Times wherein Justice most prevailed: 4 We carry Arms (says Camillus, in Livy) not against that tender Age, which is spared, even at the taking of Cities, but against those who are in Arms. He adds, that this is one of the Laws of War, that is, one of the Rules of natural Right, which take Place here. Publick, treating on the same Subject, tells us, 5 Good Men observe even some Laws of War. Where, pray observe, he faith Good Men, that you may distinguish this Right from that allowed by Custom, and which only implies a bare Impunity. So Florus 6 says, it cannot in Fact be otherwise. And Livy has it in another Place, 7

cent Creatures guilty of any Thing, with the least Appearance of Reason. De special. Leg. Lib. II. (p. 795. D.) Jouter was speaking of Menehotemon, who, after taking the City of Thasos, spared not even the Infants, calls that the utmost Excess of Cruelty and Barbarity. That Ulperer, adds he, treated the People of his own Nation in a Manner that would have been unpardonable, even that he had had to do with conquered Strangers. Antiq. Juid. Lib. II. (Cap. XI. p. 320. D.) The same Jewish Historian informs us, that Judas Maccabaeus having taken the Cities of Ibyra and Ephra, put all the Males to the Sword, with all those who were capable of bearing Arms. [ibid. Lib. XII. Cap. XII. p. 417. B. G.] In another Place he calls the Fury of Alexander, faminated the Thracian, an inhuman Revenge, in causing the Wives and Children of the Foes to be put to Death with them, and before their Eyes. [Lib. XIII. Cap. XXII. p. 461. C.] Agathias makes this Reflection up-on the Romans, whatever just Reaon they might have for punishing the Miletians, they were inexcusable, for having been so unmerciful to murder the Children at their Mothers Brasts, and who, consequently, could have no Share in their Father's Crimes; Nor did such Cruelty remain unpunished. (Lib. IV. Cap. VI.) Nicetas, or the Peron who continues his History to the Reign of Henry, condemns to Threnody a like Excess of Holiness, committed by the Scythians, in taking the City of Svara. They spared, fays he, not even Infants at the Breast; those young Plants were cut down like Grapes, or tender Bottons, by those merciless Viaduras, who did not know that it is furting against Nature, and violating the common Right of Men, to extend Rage beyond Victory, and to act with Fury against a reduced Enemy. (In Vit. Bal- duin. Cap. IX.) See also what Brutus says, Lib. II. Cap. XX. concerning the Cruelty of Coriolanu, and the merciful Orders given by Queen Elizabeth, according to Camden, upon the Year 1596. (p. 668.) Simler recites a good Law inflicted by the Suefts, which prohibits the doing any Injury to the Women, unless a Woman has furnished the Enemy with Arms, thrown Stones, or exercized some other Act of Hostility. De Rep. Helvet. Lib. II. p. 302. Edit. Elsevior. Grotius. 2 Num quis irato est? &c. De Ira. Lib. II. Cap. IX. 3 Pharsal. Lib. II. ver. 108. 4 sunt & bellis. sunt pacis jura, &c. [Lib. V. Cap. XXVII. Num. 7.] 5 Vit. Camillus. p. 134. B. 6 In the Paillage of that Historian, which our Author has in View, the Reading is integra digni- tate. The Whole is as follows. Rwm namque viri sanætis, & fapiens verum se habet victoriam, que, falsa fide, & integra dignitate, pareret; Lib. I. Cap. XII. Num. 6. It relates to Camillus alio, who would not take the Advantage of a School- master's Treachery. 7 Pudicis, ut saltum parcerent, arae infantibus, a qua strate etiam hujus irrita obloqui. &c. Lib. XXIV. (Cap. XXVI. Num. 11.)

S A Which
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Which Age the Enemy, the highly provoked, should spare. And again, 8 Their savage Cruelty and Rage reached even to barren Infants.

3. There is no Exception here with Respect to Children, who have not as yet the Use of Reason. But as to Women, the Thing takes Place only in general, that is, unless they have committed some Crime which deserves a particular Punishment, or have usurped the Offices of Men. For that is, as Statius expressly it,

9 Sexus rudis infestisque Belli,

A Sex unskill'd, and ignorant of War.

The Prefect in the Tragedy, replies to Nero, calling Othavia his Enemy,

—— Femia hic nonem capit?

10 Can a Woman deserve that Name?

And Alexander, in Curtius, 11 I use not to make War with Captives and Women. He must be in Arms that I take for an Enemy. So Grypus, in Jufkin, 12 None of his Ancestors after Victory did ever, in all their Wars, either foreign or home-fight, show Cruelty to Women, whom their very Sex did fully secure from the Hazards of War, and the Fury of the Conqueror. And another, in Tacitus, 13 That he never made War against Women, but only those that were actually in Arms against him.

4. Valerius Maximus 14 calls the Behaviour of Munatius Placcus against Women and Children, a barbarous Cruelty, and not fit to be mentioned; Diodorus 15 tells us, that the Carthaginians, at Scilinus, killed old Men, Women, and Children, without any Manner of Compassion. And in another Place he calls this Act a savage Cruelty. Latinius Paccatus 16 cited Women, A Sex which the Wars spare. And did Statius of old Men.

17 — Nullis violabilis armis
Turba fenes —

X. 1. What we have said (of Women and Children) may be generally said of all Men, whose Manner of Life is wholly averse to Arms. 1 By the Laws of War, only those that are in Arms, and do reffile, are to be killed, according to Livy, that is, that Law which is agreeable to Nature. So says Iugis, 2 It is just that they should suffer from Arms, who have taken up Arms, but the Innocent should not be

8 Trucidant inermem justa atque armatas, feminar paletur ac viro, utque ad infinitum cadem ira crudelis personar. Lib. XXVIII. Cap. XX. Num. 6.
9 Lib. I. Syl. VI. ver. 53; 10 Ner. Quadr. parvis bofis. P. R. Femia hoc 

num capite? Ov. (var. 864). For this Reason Tracta and Traren were for thinking out of the 

Amid, the Veris where Rama deliberates whether he shall kill Helen. GROT. 

The Passage begins at the 567th, and ends at the 

388th Verse. / Jamque ades feper enm. enim, &c. Tabis fantebant & furtato nume ferbo. The Reader may see the Notes of Father Catrou, the 

last French Translator.

11 Bellum cum captivis & feminam gessere non fo- 

la: Aetmatus fit sportus, quem eter nim. Lib. IV. 

(Cap. XI. Num. 17.)
12 Contra Grypus arenae, &c. Lib. XXXIX. 

Cap. III. Num. 7.
13 The Historian makes Arminius say this in Regard to Women with Child. Non enim se prodi-

14 Effratae crudelitatem fomam, &c. Lib. IX. 

Cap. II. Num. 4.
16 Et in sexum, cui bella peruenit, in pae fa-

vium, (Cap. XXIX. Edit. Coler.)
17 Thuc. Lib. V. ver. 258, 259. 

X. (1) Aque nonem tenens loftium, &c. Lib. 

XXXVIII. Cap. XXIII. Num. 1.
2 This Reflection the Jewish Historian ascribes to Vespasian and Titus, who, notwithstanding the 

Influences of the People of Alexandria and Antioch, 

would not deprive the Jews festeled in those two 

Cities of the Rights and Privileges they had en-

joyed till then. Thoso of that Nation, said they, 

who took up Arms against us, have been sufficiently 

punished by the unfortunate Event of their Re-

bellion: For the Rest, who have done no Ill, it 

would be unjust to deprive them of what they po-


through.
touched. When Camillus had taken the City of Vei
tius, he ordered, that they should not hurt those that were not in Arms. In the first Rank of these to be held, those who are engaged in holy Things. For as it was in all Ages the general Custom of Nations to excuse them from bearing Arms, so were they excused also from the Violence of Arms. Thus the Philippians, who professed Enemies of the Jews, spared the College of Prophets at Gaba, as you may find, 1 Sam. x. 5. and 10. And to another Place where was a like College, as it were set apart and privileged from all Violence, did David flee with Samuel, 1 Sam. xix. 18. Plutarch informs us, when the Cretons were engaged in Civil Wars, they mutually forbore all manner of Violence to the Priests, and those who had the charge of burying the Dead. To this we may apply the Greek Proverb, 

Not a single Priest escaped.

3 Strabo observes, when all Greece was up in Arms, the Eleusins, as sacred to Jupi
ter, and those that sojourned among them, enjoyed a secure Peace.

2. They also have justly this same Privilege, as the Priests, who have embraced a like Sort of Life, as Monks, and Lay-Brothers, that is, Penitents, whom the Ecclesiastical Canons, according to natural Equity, would have spared equally as Priests. To these we may justly add those who apply themselves to the Study of Sciences and Arts beneficial to Mankind.

XI. Next to these, the Canons privilege Husbandmen. Diodorus Sisulus XI. And also highly commends the Indians, In their Battles they kill one another (without Mercy) Husbandmen.

4 This merits particular Observation. The Security of Persons of this Kind, and of all others, whose Manner of Life has in itself no Relation to the Bufiness of War, is founded upon the Suppo
tition that they act nothing in any Manner against an Enemy. But if an Ecclesiastic abandoning his Prayer Book, to enter into the Councils of Prin
ces, if he is the first Promoter of a War, and even takes the Field, and commands Troops, either di
cerely or indirectly, he deserves to be spared the jeep, as he acts contrary to the Engagements of his Character. See Feldeni s Nulla upon this Place, and what is observed above, concerning the Canon prohibiting Ecclesiastics to carry Arms. B. I. Chap. V. § 4. Note 2. and B. II. Chap. I. § 13. Note 5.
5 The Rabbits say, that Hyrcanus, at the very Time he beheaded Jerubbaal, led Victins into the Temple. Procopius praises the Gabs, for hav
ing spared the Priests of the Churches of St. Paul and St. Peter, which were at some Distance from Rome. Gothic. Lib. II. (Cap. IV.) See the Supplement of Chalernagnae to the Laws of the Bavarians and Lombards, Lib. I. Tit. XI. Num. 14. Grotius.
6 Sulpici. Grac. XXI. p. 256. C.
7 Sertorius informs us, that in Italy they paid this Regard to Priests and Prietelles, as well as to old Men, Qua vatem. Nam eam defuntam a bellis, si non ano, falem religi Sacretas. Ad Annid. Lib. VII. (ver. 442.) Grotius.

The Punishment of Sertorius does not relate to the Safety of Priests in Time of War; but he means that their Character excuses them from being con
cerned in Affairs of War. The Reader need only see the Sequel of the Diffcource in the Verities of the Poet, to be assured that this must be the Commen
tator s Sense. As to the Greek Proverb, which our Author repeats, he took it from Suidas, at the Word τήνα. According to that Lexicographer,
but they do not Harm to the Husbandmen, as being necessary for the publick Good. Plutarch says of the ancient Corinthian and Megarani, None of them would in any wise hurt the Husbandmen. And Cyrus sends to the Assyrian King, He was disposed that Husbandmen should be secure and indemnified. And Suidas says of Beliarus, He was so favourably inclined to Husbandmen, and took such a particular care of them, that whist he was General, there was no manner of Violence done to them.

XII. Next to thele the Canon [includes] Merchants, which is not to be understood only of those who joyn a Time in an Enemy's Country, but also such as are natural and perpetual Subjects, because the manner of the Life they use is entirely averse from War. And under this Denomination are comprehended all Sorts of Mechanics and Tradesmen, who make Interests them more inclinable to Peace than War.

XIII. That we may come to those that bore Arms, I have already mentioned that of Pyrrhus in Sessa, who said that Honour, that is, a regard to Equity, does not permit us to take away the Life of a Prisoner. We have quoted a Saying of Alexander to the same Purpose, who allows Captives the same privilege with the Women. We may add that of St. Augvilin, In fight we ought not to kill the Enemy but through Necessity, and against our Will. But as Violence is allowable against one that is in Arms, and in a Case of Resistance, so is Mercy due to the Vanquished, or Captive, especially where there is no danger of the Disturbance of the Peace thereby. Xenophen reports of Aegisthus, He ordered his Soldiers not to punish their Prisoners as Malefactors, but to preserve them as Men. And we find in Dio- dorus Siculus, All the 4 Greeks in general engaged stoutly against those that resisted, but showed Mercy to the Vanquished. The same Author also informs us of the Macedonians under Alexander, They were more fierce to the Thebans, than the Laws of War allowed.

2. Sallust, in his History of Jugurtha, speaking of young Men, who were put to Death, after they had surrendered, says, it was done against the Law of Arms,
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that is, against the Law of natural Equity, and the known Practice of all civilized Nations. And we read in Lactantius, 7 They spare the Vanquished, and even in Arna there is room for Mercy. Tacitus commends Prinus Antonius and Varus, two Generals of Vespanian. That after the Battle was over, they excercised no Cruelty to any. So Aristeides 8 says of the Lacedemonians, that They fought vigorously against those who rebelled, but showed Mercy to them when conquered.

The Prophet Esdrael asks the King of Samaria this Question about Prisoners of War. "Will thou kill those whom thou hast taken Captive, with the Sword, and with thy Bow?" 2 Kings vi. 22. In Euripides, 9 when one asked in the Heralclade,

"Does your Law forbid the killing of an Enemy?"

The Chorus answers,

"Yet; when taken Prisoner in a Fight."

In the same Author Euryphleus the Captive says,

"My Murderer shall be rank'd among the Guilty."

In Diodorus Siculus, 10 the Byzantians and Chalcobians, because they had slain many of their Prisoners, were branded with this Character, They committed Acts of abominable Cruelty. The same Author in another Place calls 11 to spare Captives, The Laws of Nations. And they who transgress this Law, he says, without doubt, are guilty of a great Crime. Equity teaches us to be merciful to Prisoners, as we mentioned before out of the philosophical Treatises of Seneca 12. And Historians 13 highly commend those who, when the Multitude of their Prisoners has been so great, that the Number would be either chargeable or dangerous, have chose rather to send them all away freely, than to kill them.

XIV. 4. For the same Reasons, 7 they that either in a Battle, or a Siege, shall demand Quarter, are to be accepted. Wherefore Arrianus 2 says, that the Thebans killing of their Prisoners that had yielded, was not done according to the Grecian Custom, in ελληνικον σωφρονε. Likewise Thucydidus, 3 in his third Book, You received us unto Mercy, who voluntarily, and with Hands lifted up, creaved a Surrender. And it is the Custom of the Greeks not to put such to Death. And the Syracusans Senators, in Diodorus Siculus, 4 tell us, It is the Part of a great Soul to spare a Sapiunt. And Sophist 4 says, It is the Law to preserve Suppliants in the Wars.

2. In besieged Towns, the Romans observed this Custom before the battering Ram struck the Walls. Caesar 6 declares to the Aquatici, he would save their City,

of the Duke D'Anguen, who after the Battle of Cerjades released all the Prisoners, to rid his Camp of old Men, that continued his Provisions; and required only from them, that the Spaniards should return into Spain, and the German into Germany by the Way of France. Hist. Lib. XLIV. feu ult. circa init. p. 267. Vol III. Edition. Balf. 1556.

XIV. 4. The Romans informed the Persians belonged in the Citadel of Petra, that resolved as they seemed to perish, they chose rather to preserve their Lives, out of a Complaining worth of Romans and Chriftians. PRORC. GORTICUS. Lib. IV (sea Hist. Mijel. Cap. XII.) See SERANUS in the Life of Petrus I. and in that of Scaucus GORTICUS.

2. De Expedit. Alexandr. (Lib. I. Cap. IX.)


4. Lib. XI. in fin.

5. Παρ' ρυθ. επολεον ετειν οι των αιχμαι

6. Ad hac Caesar respondit, Si magis confutum

7. άν άνθιαν κατα τον πολιομον.

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if they surrendered themselves before the Ram touched the Wall; which is still observed, viz. in weak Towns, before the playing of the Batteries; and in fortified Cities, before the giving of a Storm. But Cicero 7 considering not so much what is done, as what ought in Equity to be done, gives his positive Opinion thus: As we ought to take Care of those we conquer, so we should take them into our Protection, who laying down their Arms, surrender to our Generals, tho' our Rams have battered their Walls. The Hebrew Expeditors 8 observe, that it was a Custom among their Ancestors, when they laid Siege to a Town, not to encompass it quite round, but to leave one Place free for them to escape, that defied to flee, that they might have les Occasion to shed Blood.

XV. The same Equity commands us to spare those, who surrender to the Conqueror without Conditions in a flippant Manner. To kill those that have yielded, (lays Tacitus) is barbarous. And Salutius 9 relating how Marius put to Death the young Men of Campaia, who had surrendered, calls it, An Act against the natural Right of War. And the same Author in another Place, He put to the Sword not those that were in Arms, and in Battle, by the Right of War, but the very Suppliants that cried for Mercy. And as (I beforementioned) in Livy, 3 Killing of armed Men, and those that refi, is allowed by the Right of War. And the same Livy again, 4 He made War upon those that had submitted, against all Equity and Justice. Nay, the chief Business of a General should be rather to force his Enemies thro' Fear to a Surrender, than to put them to Death. It was highly commendable in Brutus, 5 He suffered not his Men to fall on the Enemy immediately, but surrounding them with his Horse, bid his Soldiers spare those who shortly would be their own.

XVI. 1. Against these Rules of natural Right and Equity, some Exceptions are to be made, no way juft, viz. If it be done by way of Retaliation; if by way of Terror, to frighten others; or if they have been obdinate in their Refistance. But no Man can look upon this enough to justify a Slaughter, who has seriously weighed what has been said before of the just Cautes of killing Enemies: For there is no Danger from Prisoners, or from those who have actually surrendered themselves, or desire to do it. That they may therefore be justly put to Death, there ought to be a previous Crime, and that such a one, as an impartial Judge shall think Capital. And so we sometimes see Prisoners, and those that have surrendered themselves, put to the Sword, and their yielding upon Condition to have their Lives spared, not accepted; if they be famished of the Injustice of the War, 1 have still continued in Arms; if they have 2 abused the Conqueror with fanderous Reproaches, if they have

7 Et cum iis, quis vi desideris, confuusdum est, &c. De Offic. Lib. I. Cap. XI.

8 See on that Head the Passages cited by Sleu- der, De Juris Nat. & Gent. secundum disjefpl. Hebr. Lib. VI. Cap. XV. in fn. Our Author observes here in a Short Note, that Scipio Eminen- ams, at the Time he was preparing to destroy Cor- nathus, made Proclamation, that whoever would, might quit it with Safety. He cites Polybius to prove this in general, without referring to any Pas- sages. But I can find nothing like it in that Hi- storian, and am very much mistaken, if our Author had not in his Thoughts what he had read in Flow- rus, upon the Summons made to the Carthaginians, when the Romans had resolved that they should quit their Country: Tum eos cosatis principiis, fi solvi essent, ut migraretis finibus, imperatum, Lib. II. Cap. XV. Num. 8. And perhaps his Memory at the same Time had recalled a confident Idea of the Proposals, Scipio caused to be made to tribute by Gulafer, as POLYBIUS relates, Exercit. Peires. p. 178. from whence arose this mixture of two Facts, and the confounding of two Authors.


2 The Passages is cited in Note 6. upon § 13 of this Chapter. The other which our Author cites is: Alia societate not armatus, neque in peacis belii jure, sed poleta sopphificis, per summam suscis in- terfectis. Orat. de Rep. ordin. Cap. XXXVI. Edit. Wafl.

3 In the beginning of § 10.

4 Quo [C. Popillius] deditis, contra jus ac fas bellum interfuit, &c. Lib. XLII. Cap. XXII. Num. 3.

5 Fit. Brut. p. 936. A. I do not know, why our Author translates the Word regnavisse by equissus circumdatus. It only signifies, that Brus- tus rode about on all Sides to give Orders to his Troops not to charge the Enemy, and not that he invaded them with his Cavalry.

XVI. (1) Our Author here had ALEXANDER GENTILIS in View, De Jure Bell. Lib. II. Cap. XVIII. where that Lawyer adds some other Cases.

But I find no Example of this, unless that of Subjects, who have unjustly taken Arms against their lawful Sovereign, without any plausible Reason whatsoever, may be intended. See below, Obst. XIX. § 6. Num. 1. It was principally for this Reason, that in the War of the Peasants of Germany, which began in 1524, Count Tuchis punished with an ex- emplary Death most of the Rebels, whom he had reduced to surrender. See the History of that In- furrection by Porter Gnodat, p. 292. & seq. Edit. Bofl. 1570.

2 As the Thebans did when belighted by Alexan- der the Great, (Diod. Sicul. Lib. XVII. Cap. IX. and XIII) and the Athenians, belighted by Sylla. PLUTARCH, De Gerrallites, Vol. II. p. 2 75.)
have broke their Faith, or any other Law of Nations, as the Privilege of Ambassadors; or if they have deserted their Colours.

2. But Nature doth not allow Retaliation, unless against the personal Offenders; neither is it enough to pretend, that the Enemies are but one entire Body engaged against us, as may easily be understood from what hath been already said concerning the Communication of Punishments. We find in Arifides, Is it not perfectly absurd, to imitate as just, what we ourselves condemn as wicked and unjust? Wherefore Plutarch 7 blames the Syracusians, for putting to Death the Wives and Children of Micetas, purely because Micetas had before killed the Wife, Sister, and Son of Dion.

3. The Benefit which may follow from hence, by striking a Terror for the future, does by no Means give a Right to put to Death. But if we are otherwise authorized to put to Death, this Consideration may engage us not to abate of our Right.

4. Further, an eager Desire to maintain our own Party, if the Cause itself be not absolutely dishonest, cannot really deserve Punishment, as the Neapolitans argue in Prsepinus; or if there were any Punishment due, it could never amount to that of Death, before an equitable Judge. When Alexander had commanded all the young Men 5 in a certain Town to be put to the Sword, because they had made an obdurate Defence, he seemed to the Indians to make War like a Robber; whereas upon the King to avoid for the future such Reflections, showed more Mercy in his Victories. He more honourably spared some Milesians, because they appeared brave and faithful to their own Country, which are the very Words of 9 Arrian. When Ptolemy, Governor of Rhegium, was hurried away to Torture and Death, for stoutly defending his City against Dionysius, he cried out, that he was thus barbarously used, because he would not betray his Country, and that Heaven would quickly revenge his Death. Diodorus Siculus calls it, unjust Punishment. I much approve that Wifh in Lucan 11,

___Vincat, quicunque necesse
Non putat in Viros fescum defringere ferrum
Quoque juss cives, quid signa adversa tulerunt,
Non credit fecisse nefas._—

—May be crown'd with Victory,
Who thinks it base to kill th' unhappy Vanquish'd;
The in the Battle, with Minds truly brave,
They stand against him._—

But we must understand by the Word Cives, not the Inhabitants of this or that Country, but all those who are Members of that great State, which comprehends all Mankind. Much less can the Refentment for a Loss received by War, render the shedding of Blood just and lawful; as we read that Achilles, Aineas, and Alexander, celebrated the Obsequies of their deceased Friends with the Blood of their Prisoners, or those that had yielded themselves; therefore Homer justly expresses it,

13. Kand 5 Cives públos ígya,
And in his Mind did evil Things devise.

505.) Gronovius gives us the first of these Examples. The letter had been cined before by Albertius Guntellus, (ubi supra, p. 377.) where the Reader may find several others. See also Differentation XIX. of Orbecho, entitled, Hybris de Catos, § 24.
3 So Julius Caesar ca\us\d Publius Ligiarus to be put to Death, who was perjured and perfidious. Hurnius, De bello efflatiano, Cap. I. XIV. See other Examples in Albertius Guntellus, p. 379. & seq.
See also Albertius Guntellus here, p. 382.
Examples of this may be found in the same Author, p. 383. & seq.
6 Ver. II. De Pace, p. 75. C. Vol. II.
7 He calls this the most inhuman of Timoleon's Actions, who might if he had pleased have prevented that unjust Punishment. Vit. Timoleon, p. 252. C. See also Dion's Life, p. 983. E. and Diodorus Siculus, Biblioth. Lib. XIV. Cap. XLVII.
9 De Eupol. Alex. Lib. I. Cap. XX.
11 Phanys. Lib. VII. Ver. 312. & seq.
12 Hist. Lib. XXIII. Ver. 176. Servius observes, that the Custom of putting Prisoners of War to Death upon the Tombs of the bravest Warr
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VII. Offenders may be punished on account of their Multitude.

VIII. Hostages to be shared, unless personally faulty.

IX. The crimes are such, as they really deserve Death, yet

The Greatness of a Multitude may be some Plea to mitigate the Severity of the Punishment; a Pattern of which forbearing Mercy we have from GOD himself, who ordered a Peace to be offered to the Canaanites, and their Neighbours, tho' notoriously wicked, with the Promise of Life under the Condition of being Tributaries.

To this agrees that of Seneca, Generals rigorously punish a Soldier, who alone commits any Fault; but where a whole Army is unanimously engaged in a Mutiny, a general Pardon is requisite. What abates then the Anger of a wife Man? The Multitude of Offenders. And in Lucan,

Tot simul infelis juvenes occumbere Lotos,
Sales fames, pelagique furor, subitaque ruine,
At Ceili, Terqueque lust, aut bellica clades,
Nunquam pana fuit.—

At once so many Youths to hurry into Death,
Hunger may do it, or Shipwrecks, or the quick
Amazing fall of Buildings, or pyfand Air,
Or blustering Damps, or War; it can't be Punishment.

Therefore (Cicero tells us) to prevent the shedding of too much Blood, they brought in the capturing of Lots. And Soluf thus addressest Ceasar, Neither does any one provoke you to severe Punishments, or fearful Judgments, which rather tend to depopulate a State, than to correct the Guiltiness.

VIII. 1. From what has been already mentioned, may easily be understood, what is allowable by the Law of Nature concerning Hostages. As it was formerly believed every one had the same Right over his own Life, as over other Things wherein he had a Propriety; and that this Right, by the Consent, either express, or tacit, of the Individuals, was transferred to the State, it was the less to be admired, if Hostages, personally innocent, were (as we read) put to Death for the Crimes of their Country, whether by Vertue of their own particular Confect, or of the Publick, which may be inclusive of their own. But since a truer Wiltom has informed us, that GOD has referred to himself the Power of our Lives, so that no Man can foloely by his own Consent beftow upon another a Power either over his own Life, or that of his Subjects. Therefore (as Agathias writes) that good General Narfes abhored putting innocent Hostages to Death, as a brutifh and cruel Act. So also have others done; witness the Example of Scipio, who used to say that he would severely punifh those who had rebelled, but not the innocent Hostages; neither would he take Revenge of an unarmed Perfon, but of an Enemy actually in Arms.

2. But what our modern Lawyers, and those not inconsiderable, maintain, that

...
fuch Agreements are valid, if authorized by Custom, I allow, if they mean by Right, only an Impunity; which in this Cafe often comes under that Denomination. But if they suppose, that they who take away a Man’s Life, only by vertue of fuch an Agreement, are really blamelefs, I am afraid they are both mistaken, and by their own Authority dangerously mislead others. Indeed, if he that comes as an Hoftage, is then, or was before, a notorious Offender, or has afterwards falsified his Faith given in weighty Affairs, his Punishment may then be juf.

3. Yet when Clelia, who 3 not of her own accord, but by the Order of the State, went an Hoftage, escaped by swimming over the Tybre, 4 The Heturian King not only did her no Harm, but even commended her on account of her Bravery: To ufe Liey’s own Words in the Affair. 5

XIX. This alfo is to be added, that all Combats, which are not of Ufe for the obtaining of Right, or concluding a War, but merely for vain Oftentation of Strength, that is, as the Greeks call it, Rather a fhow of Strength, than a warlike Action, are wholly repugnant to the Duty of a Christian, and Humanity itself. Therefore all Magiftrates ought ftrictly to forbid fuch Things, for they muft render an account for the unneciffary shedding of Blood to him, whose Vicegerents they are; Salluf 5, tho’ a Pagan, commendeth thofe Generals, who purchafe Victory with the leat Blood. And Tacitus 4 writes of the Cati, a People of known Valour, They seldom made Excursions, or bad Skirmifhes with the Enemy. 6

3 Some Persons, who had hid themselves to avoid being fent as Hoftages, were punished for it as nicefias informs us, Lib. II. (Cap. VII. in Vit. Iac. Angel.) Grotius. 7

4 Apud Regem Etruriam, non tuta folum, fed & honuvra virtus fuit: Laudatique virginitate forte ebiorem se donece dixit, Lib. II. Cap. XIII. Num. 2. 8

5. See what will be faid below, Chap. XX. § 54. XIX. (1) There are ariani’s Words, De Ex-


3 Rati excursa & fortunia pugna. German. (Cap. XXX. Num. 5.) Plutarch blames Dem-
naturius, for expofing his Soldiers, rather for the fakes of acquiring Glory by Combats, than any real Ad-

C H A P. XII.

Concerning Moderation in regard to the spoiling the Country of our Enemies, and fuch other Things.

1. That one may destroy the Things of another without the Imputation of Injuftice, one of these three Things should neceffarily go before. 1. Either fuch a Neeceffity as may be fuppofed to have been excepted in the primitive Etta-
bliffment of Property. As when a Man, purely for his own Safety, fhall throw the Sword of another Perfons, which a Madman was going to feize on, into a River; yet in that very Cafe he lies under an Obligation to make Satisfaction for it to the full Value; as I have fowed in another Place, according to the moft reasonable Opinion. 2. Or fome Debt arifing from an Inequality, that fo what is waitfed may be 
reputed, as taken in Satisfaction of that Debt, for otherwise it could not be lawful. 3. Or fome Injury, that may merit fuch a Punishment, or which fuch a Punishment does not proportionably exceed. For as a judicious Divine well ob-
erves, there is no manner of Juflice, that a whole Kingdom should be laid waste, for the driving away of a few Cattle, or the burning of fome Houses. Which is also allowed by Polijbus, 1 who would not have the Rigour of War be exerced without Controul, but just fo far, that Wrongs and Punishments may be equally balanced: And for thefe Reafons, and with thefe Limitations, it may be done with-
out Injuftice.

1. (1) Our Author has already recited the Paffage of that Historian, which he has here in View, in the preceding Chapter, § 3.

8 C 2. But
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2. But unless it be for some Advantage, it would be very foolish to do another a Damage, without any Profit to ones self. Wherefore wife Men always propoce to themselves some Advantage thereby, the principal whereof Onsgander has observed, 3 Let him destroy, burn, and lay waste his Enemy's Country: For the want of Money and Provisions shortens the War, as Plenty lengthens it. To which agrees that of Proclus, 4 It is the Duty of a good General to Sustain his Enemies as much as possible. And thus says Curtius of Darius, 5 He expostled that he should be overcome by Fame, having nothing to falsify him, but what he could get by Spel and Plunder.

3. And that Waffe and Defolation cannot be condemned, which quickly forces an Enemy to Peace: This way of making Wars did Halyatter ufe again the Milfijans, the Therians again the Byzantians, the Romans against the Campanians, Captains, Spaniards, Ligurians, Nervians, and Menapians. But if we rightly weigh the Matter, such Things are for the most Part managed rather out of Spite than wife Counsel: For very often either thofe inducing Reafons ceafe, or there are others more powerful, that advife to the contrary.

II. 1. This happens firt, when we have got fuch Poftleffion of a Thing belonging to the Enemy, that he cannot any more enjoy the Fruits of it. To which the divine Law 6 does properly refer, which allows Wild Trees and unfruitful to be cut down, to make Fortifications and Engines of War; but thofe that bear Fruit to be preferved for Subfiftence, giving this Reafon, becaufe Trees cannot, as Men may, rise up in Arms againft us. Which 7 Phile, by a Parity of Reafon, extends also to fruitful Fields; and by a paffenger Fiction introduces the Law itself thus speaking to thofe who ought to observe it. Why are you angry with Things inanimate, particularly

3 Strategem: Cap. VI. (p. 15. Edit. Rigalt. 1590.) GROTTUS.

The Reader upon this Paffage of Onosander's may fee the Note of John Chorier, p. 18, 19. of his Edition in 1610. but actually the firt Part of January's Differences to be omitted; as a Supplement to the Edition of Regault in 1604. with this Title: Vatis disjectis, non prolixiores Commentario ad aliquam subgigna loco Taciti anque Onosandri. Our Author perhaps might have made Use of this Collection: For almost all the Paffages which he cites in this Chapter, are in it, (p. 158. & fqq.) with others in a much greater Number than in Almericns Gentilis, De Jure Belli, Lib. II. Cap. XXIII.

3 Phile Jufius infifts that it is effemary to invade the Lands of the Enemy, that the Want of Neccessaries may reduce them to furrender. De Viti. contempt. (p. 891. D. E.) The fame Author speaking of the Ravages occasioned by an Irruption of the Enemy, says it is a double Miffortune to thofe who are expofed to it, as their Friends on the one Side suffer by Fame, and the Enemy on the other profit by the abundence of Provisions he carries off. De Diris. (init. p. 930. A. Edit. Paris.)

4 Quippe credibilior [Darius] impudiculius poft nihil beantierm ufqu quid respondent cepiffa, Lib. IV. Cap. IX. Num. 8.

II. (1) There is great Reafon to believe, that this Law regards only the Siege of the Cities, which were in the Land of Capoana, intended for the Abode of the Ifraelites, as Mr. L. C. C. W. obferves. So that it was not out of Consideration for the Conquered, that the Law-giver prefcribed the Moderation here meant; fince the Conqueror not only might, but was bound in Duty to put all to the Sword, without Diffinction of Sex or Age, in the Cities of the seven Nations devoted to utter Extirpation; and in regard to the more remote Places, all the Favour the Belonged had to hope for, was that their Women and Children fhould be referved for Slavery: Befides, it is doubtfull, whether the male Infants were not included in the general Term of Males, for whom there was no Quarter, Ver.

13. What Probability is there then, that God fhould have in View any repect to the Goods of thofe People, over whole Lives he had given the Ifraelites such Power. This does not hinder however, in my Opinion, but that a good Argument might have been obferved from a wift and prudent Man, For if the Creator and supreme L ORD of Mannkind did not approve, that the Ifraelitifh fould lay Waffe without Necefsity the Lands of the People, againft whom he had armed them in an extraordinary Manner, and had made it as well as the Executors of his terrible Judgments; much more would he not approve our doing fo in ordinary Wars, often unjust, and undertaken without much Neceffity, and wherein the Party, who boas the molt of the Justice of his Caufe, is sometimes in the wrong.

2 De creation. Magistrat. (p. 734. C.) There is another Paffage of that J ewifh Author, which the 2° long, merits a Place here. Moses, fays he, Extends Modernities and Lenity fo ftr, that he fct to rational Creatures he makes Benif the Object of 1°, and after them, even Plants; of which we might now fpeak, as we have sufficiently explained what regards Men and all animates Being. The Lawgiver then forbids the cutting down of any Fruit Tree, the reaping of Fields of Cereals before the Sowing, in a Word the flooding of any of the Fruits of the Earth: And that in order that Mannkind might have not only abundance of Food, and Things necessary for Life, but alfo of thofe for Pleasure. The Prohibition of Grain is indeed fecreary for the Subtance of Men, and the infinite Fertility of Fruits, which the Whole bear, contributes to his Delight: Which Fruits alfo at certain Times of Years, may fupply the Place of the fruit neceffary Aliments. But Moses goes farther: He even forbids wavishing the Lands of an Enemy. He enjoins us to obtain from cutting down the Trees among them, holding it unfit to deftroy and Refentment, with which we are animated against Men, upon Innocent Things. Befides which, it was his Design to teach us not only to think of the profit, but extend our Views to the futures, and to confider that in the Futureways, to which all human Things are liable, it might easily happen, that those who are in Day our Enemies will be tomorrow our Friends, and vice-versa, by the Effect of an happy Conference. Now in this
Chap. XII.  

WAR and PEACE.

31. Why thefe that are mild, and yield grateful Fruit? Do they, like Men, discover any bafe (or disobligeing) Intentions againft you? Do they deferve to be entirely rootet up, for what they do, or threaten to do againft you? But they are very benevolent to the Conqueror, and afford a large plenty of Things immediately neccesary, and even contribute to their Peace; Men do not only pay Tribute, but even Trees, and that of more Value in their proper Seafons, and also fuch as Man cannot live without. And Ἰοσήπhus 3 to the fame Purpofe fays: If Trees could speak, they would cry out, and reproach us with Injustice, for making them fuffer the Punishment of War, who were no Occafion of it. And hence it is, in my Opinion, that the Pythagoreans have derived their Maxim, 4 That we ought not to deftroy or hurt a cultivated Plant or Fruit-Tree.

2. And Porphyry 5 describing the Manners of the Trees (in his fourth Book of not eating living Creatures) eftemating their Catum to be (I fuppofe) the bell Interpreter of their Law, enlarges it even to all Beasts serviceable to Husbandry, for he fays Mojes commanded to spare all thefe in War. But their Talmud Writings, and Hebrew Interpreters extend it yet further, 6 declaring that this Law ought to reach to every Thing that may be deftroyed without Cause, as the burning of Houfe, the foiling of Eatables and Drinkables. The wife Moderation of Timæus the Athenian General agreed with this Law, who (as Polyebus 7 relates it) would not deftroy a Houfe or Village to be deftroyed, or a Fruit-Tree to be cut down. There is a Law allò in Plato, 8 in his fifth Book De Republica, forbidding to defteat Lands or burn Houfes.

3. Much lefs ought it then to be allowed after a compleat Victory. Cicero 9 blames the deftroying of Carthi, though they had in a gros Manner abufed the Roman Embaffiators. And in another Place 10 he calls that War, horrid, abominable, and fpitefully malicious, which was made 11 againft Walls, Houfes, Pillars and Gates, wherein no other Wood could be found for forming the neceffary Machines of War. Antii. Jud. Lib. IV. Cap. VIII., § 98. B.


6. On the contrary, they are for havest this Ex- ception added: Unleff the Fruit Trees are in a Suburbs, or hinder fhooning and throwing Darts againft the Enemy. GrOToUS.


12. There is a remarkable Letter of Belñiri on this Subject to Tertull., Goetick. III. It was for- merly femeen d as the Witdom and Genius of great Politicians, to raise noble Structures; a d to de- ftray them after they were built, the Par of Poets, not blocking to tranfmit to Pofpery Tokens and Monuments of their Paf. It is manifef, that Rome is the biggest and moft beautiful City of all the World (or that the Sun beholds) and that it could not arrive to that Great- ness and Splendor, by the lauer of one single Man, ver in a fhort Time: but many Kings, and Emperors, an infinite Number of Illudious Perfons, many Ages, and a predominating Mift of Tranfmrre, had drawn thilere, as other Things, fo the moft curious Artists in the World. Then Rome was formed by little a d little, fuch as you ro vife it, full of the Monuments which each of these that contributed to its Improvement, has left of his Wit and Ingenuity. Wherefore to ruine or deftray it, would be injurious to Mankind of all Ages.
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Gates. Lib. much commends the Mercy of the Romans, at the taking of Capua, that they did not exerctise their Cruelty 12 on the innocent Houtes and Walls, by burning and demolishing them. Agamemnon says in Seneca,

15 Equidem faciebor (pace disixa loc tua)
Argirae tellus ticeat) affligi Phrygas
Vincine volui: ruere, & aquari folo
Etiam arcuifem.

'Tis true, the Trojans (and I hope my Country
Forgives my Clemency) I thought to conquer;
But to apply th' Extremities of War,
Or raze their City, this I never intended.

4. Indeed holy Writ informs us, that some Cities were by GOD's especial Command entirely razed, 199 but even against that general Law which we have mentioned, the Trees of the Moabites were ordered to be cut down, 2 Kings iii. 19. But that was not done in Hatred to the Enemy, but in just Detestation of their Impieties, which were either publicly notorious, or citemewed worthy of such Punishment in the Sight of GOD.

III. 1. This will likewise happen, where the Possession is yet in Dispute, if there be great Hopes of a speedy Victory, of which those Lands and Fruits will be the Reward. Thus Alexander the Great, as Jaffin relates it, hindered his Soldiers from waltling Afa, 1 declaring to them, that they should spare their own, and not destroy those Things, which they came to possess. Thus Quintius, when Philip overun Thebady, waltling it with Fire and Sword, exhorted his Soldiers (as Plutarch informs us) to march thro' the Country, as if it were now entirely their own. Crefius advising Cyrus not to give up Lydia to be plundered by his Soldiers, tells him, You will not ruin my Cities, nor my Lands, they are no longer mine, they are now become yours, they will destroy what is yours.

2. Who they do otherwise, may apply to themselves the Words of Jocasta to Polynices in Seneca's Thebais.

4 Patriam petendo perditi: Ur fiat tua,
Vis effe nullam: Quin tuve causa noceat
Ipham loco, quid armis uris infestis plam
Segetque adultis fcnris, & tatae jugum
Edis per agras: Nemo fic safat jiaa.
Que corripi ige, que meti gladio jubes,
Aliena credis.

You ruin your Country whilst you seek it; to make it yours
Its Being you destroy; it defeats your Claim

XXVI. Cap. XVI. Num. 11, 12.
13 Tread. Ver. 276. & seq.
III. (1) cite bofetm petens milites, &c. Lib. XI.
Cap. VI. Num. 1.
3 HERODOT. L. I. Cap. LXXXVIII.
To the same Sense are the Words of Curtius, Whatever they did not waste, they owned to be their Enemies. Agreeable hereunto is that which Cicero, in his Letters to Atticus, says against the Design that Pompey had formed of taking his Country by Famine. Upon this account Alexander the Isian blames Philip (in the 17th Book of Polybius) whose Words Livy has thus rendered: Philip dared not engage in a fair Field-fight, nor come to a pitched Battle, but fly ing away burned and plundered Cities; so that the Conquered rendered yealess to the Conqueror's what should have been the Remompence of Victory. But the old Kings of Macedon did not use to do so, they used to come to a fair Engagement, to spare Cities as much as possible, that they might have the more wealthy Dominion. For it is not a strange Conduct, to make War in such a Manner, that at the same Time, we dispute the Possession of a Thing, we leave nothing for ourselves but War.

IV. 1. In the third Place, this happens, if the Enemy can be supplied elsewhere, either by Sea or Land. Arbiscinam in Thucyldid's, in his Speech to diuade his Subjects the Lacedemonians from a War with Athens, puts this Query, What Hopes had they to succed in the War, whether, because they excelled in Number of Soldiers, they pretended to waste the Athenian Lands? But confider (says he) they have other Countries under their Dominion, (meaning Thrace and Ionis) and they might easily supply themselves by Sea, with whatsoever they wanted. Wherefore in that Café it were best to protect Hubbandry even in the Frontiers of each Side: Which we have lately seen practized in the Wars of the Low-Countries, by paying Contributions to both Parties.

2. And this is agreeable to the antient Cutfom of the Indians, among whom, as Diodorus Siculus relates, Hubbandmen are indemnified and as it were sacred, so that they follow their Labour even close by the Camp, and near the Troops. And he adds, They do not burn the Enemies Lands, nor cut down the Trees. And again, No Soldier will willingly among Hubbandmen, but esteem them as common Benefactors, forbear doing them any manner of Injury.

3. Xenophon informs us, that it was agreed between Cyrus and the Assyrian King, That the Hubbandmen should enjoy Peace, and that War should be made only against those that were in Arms. Thus Timoleucus, as Polybius relates, Let out the fruitfullest Lands of the Country where he had entered with his Army: Nay, (as Aristobul adds) fold the very Corn to his Enemies, and with that Money paid his own Soldiers. Which Vitrius also practised in Spain, as Appian witnesseth. And this very Thing we have seen done in the aforesaid Low-Country War, with great Prudence and Prift, to the Admiration of all Foreigners.

4. These Cutfoms do the Canons, which are full of Lessons of Humanity, pro-pole to our Chriftian Imitation, as being obliged to, and profcribing more Humanity than others; therefore they enjoyn us to put not only the Hubbandmen beyond the hazard of War, but also their Cattle with which they plow, and their Seed which they carry to the Field; it is undoubtedly for the fame Reason that the Civil Law forbids to

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5 Nullum deforatissim illorum magis indictum off, quam quasi usque, quaerat qui teneat: Quodque non corrupientit legumen off. conf. Lib. IV. Cap. XTV. Num. 2.
6 In bello non congrui [philippum] aequo campo, etsi. Lib. XXXII. Cap. XXXIII. Num. 11. 12. IV. (3) Lib. I. Cap. LXXI.
9 Strang. (Lib. III. Cap. X. Num. 9.) Plut. Acrel. says the fame Thing of the Megarians, Quod. Grée (XVII. p. 295. B.) Tsielis, when he marched to besiege Rome, hurt none of the Pea- fans of Italy: On the contrary he commanded them to till the Land as before, paying him the ordinary Contributions. Procop. Gothic. Lib. III. Cap. XIII. Cassiodorus says, it is the highest Praife to those who defend a State by Arms, to act in such Manner during a War, that the Hubbandmen should not discontinue their Labours in the Field: Defenfiorum maxima laud sit, &. Var. Lib. XIII. Cap. V. Grotius.
11 See the Canon cited at the End of § 10. in the preceding Chapter.
12 Besides the Advantage of Agriculture, Regard was had also to the Intereff of the Revenue, which required, that the Debtor to it should not be rendered incapable of paying the Taxes in due Time: Esquire, a quocumque judice datur, ad exigenda debita.
V. If the Things be of no Use for War.

VI. This especially ought to be taken in Things sacred, or there being valuable.

VI. That is, this Maxim ought to be observed in regard to publick Ornaments, for the Reason aforesaid, so more especially in regard to Things dedicated to sacred Uses, for, although thefe afo (as we have said elsewhere) are in some Sort publick, and therefore by the Law of Nations may be damaged or destroyed with Impunity, yet if no Danger can arise from the preferving of fuch Buildings, and their Appurtenances, the Reverence due to holy Things may be a sufficient Plea, especially with thofe who worship the fame GOD according to the fame Law, tho' they may differ in Opinions and Ceremonies.

debito ea quae civiliter pofcerant, fervos aratorum, aut boxos aratorum, aut ferramentum aratorum, pigiras crucis de paffionibus non abhorrant, ex quo tribuitur illos reiuarant. Cod. Lib. VIII. Tit. XVII. Quae res pignori obligant, &c. Leg. VII. See Cujus, Oftr. IV. 20.

S. Efanor. Var. Hist. Lib. V. Cap. XIV. See alfo COLUMELLA, De Re Rust. Lib. VI. Princi. Populi R. E. De non ofa Aqul. Lib. II. (p. 173, & feg.) This was also the Cultum in Pela- ponnis, as V A R R O informs us, De Re Rustica. Lib. II. (Cap. V.) In regard to the Romans, see PLINI. Hist. Nat. Lib. VIII. Cap. XLV. VEGETII, De arte Veterinaria, Lib. III. GRATIIUS.


2 The Paffage will be cited below, at the End of § 7.

3 Iapua adfisfitis ambo, &c. In Verr. Lib. IV. Cap. IV.

4 Apud eos autem quos, &c. Ibid. Cap. LX.

VI. (1) It is, according to POLYBIUS, a Sign of exceflive Folly to infult the Divinity, because you are angry with Men. Excert. Peiri. That Author is in the Right: For, as the Emperor ALEXAN- der Revanus faid, it was better to pay the Divinity a religious Worship, whatever it be, in a Temple, than to give the Place to People, who make a Victualling-house of it: Quum Christiani pandetae facrorum, qui publica sacra usque profcupit, contra Pofinarum averterent, omni alio absurdo, referrefigi, Modius cete, ut quomodoqure ille Deos colaret, quam Popinariorum deharet. LAMPRID. Alex. Secur. (Cap. XLIX.) The famous Hannibal spared the Temple of Dana at Saguntum, out of Respect for Religion: Cacl [Templo Diana Sagunt] persever, religiones, indus- tus, Hannibal, &c. PLINI. Hist. Nat. Lib. XVI. Cap. XL. APPIANUS Alexandrinus makes Brutus faid, that it was the Cultum of the Romans to leave even their foreign Enemies the Temples of their Gods. De Bell. Civ. Lib. III. (p. 516. Edit. H. Stegb.) PLUTARCH relates, that the Apparition objected to Sylla's Manner of treating them, the Moderation of Flaminius, Marcus Aqui- lius, and P. Ennius, the thirt of whom, when he had drawn Antichus out of Greece, and the two others, after having conquered the Kings of Maced- onia, not only spared the Greek Temples, but adorned and enriched them with magnificent Pre- fents. Vit. Syll. (p. 459. C. D.) The fame Author praiseth Aquilius for a like Respect for Sacred Places: And before him, the Latin Author, who had writ the Life of that famous King of Macedon- nia, affirms the fame of him, and alfo that he held it Sacred to hurt thofe who had taken Refuge in Temples, and thereby impiroyed the Protec- tion of the Gods: Tamen anus tilar ia religionem.

Itaque praedidit, mirari, ne facrificium nume- ros hauerit, qui fapfificati Deorum usque profcapit: aut non praedidit, paras in orbem, qui religiones non defendit: aut quam qui sani profcapit. [CORNELIUS NEPOS, Asyl. Cap. IV.] See alfo VITRUVIUS, De Ar- cihite. Lib. II. (Cap. VII.) DION CASSIUS, Lib. XXII. PLUTARCH, Vit. Cefar. (p. 720.) BIBLIUE, De eff. Lib. V. (Cap. XXIX.) Gabon, King of the Moors, tho' Pagan, dif- proved the Conftitut of the Vandals, who profanated the Churches of the Chriftians, and made them fake Amendments for their Irreverence. He hoped, that the Impolicy of thofe People would be punifhed by the God of the Chriftians, whoever he was; as PROCOPIUS informs us, Vandals. Lib. I. (Cap. VIII.) Chosraus, King of Perfo, tho' no more a Chriftian than the other, spared the Church of the
The name Livy 5 tells us, it was objected to Q. Fulvius the Centurion, That he had involved the People of Rome in the Crime of Sacrilege, by the Destruction of Temples, as if the immortal Gods were not the same in all Places, but that they of one Place should be honoured, and adorned with the Spoils of those of another. But Marcus Philippus being arrived at Dius, cauèd the Troops to encamp near the very Temple of that City, in order to secure it and all that was in it from Hostilities. Strabo 6 writes, that the Teuthones, who with others had robbed the Temple of Delphos, to appease the injured God, did consecrate those Spoils, with some Addition, when they returned Home.

3. To come now to the Chriftians. Agathias relates, that the Franks spared the Temples of the Greeks, as being themselves of the same Religion with them. Nay, it was customary to save the Perfons of Men in respect to Churches, which (not to quote Examples of Heathen Nations, whereof there are many, for Writers 6 call this Cuffed, A Law amongst the Grecians) St. Augiitlin thus commends 7 in the Goths, when they tooke Rome. The 8 Churches consecrated to (the Memory of) Martyrs and Aposles, in that general Devotion, secured all those that fled to them for

The Christians at Antioch: Idem, Perfo, Lib. II. (Cap. IX.) The Emperour Justinian, having found amongst the Spoils taken from the Vandals, the Things which Petosiris had formerly taken out of the Temple at Jerusalem, and Gaisiris had afterward carried from Rome into Africa, did not dare to keep them, and sent them back to Jerusalem to be placed in the Church of the Chriftians. Idem, Vandalic, Lib. II. (Cap. IX.) The Rabbi Benjamin, in his Itinerary, relates the Respect which the Mahometans have retained for the Place where the Bones of Ezechiel, and the three Companions of Daniel were buried. Grotius. I do not find in any Part of Polybius, the exact Words cited by our Author in the beginning of this Note. But there is the fame Sense in two Passages of the Epitaph Pervicius, p. 66. and 169. 2 Lib. IV. Cap. XXVII. 3 Temples taken Deim (in aemid editum ab Reges fuerunt) temperatum 99, Lib. I. Cap. XXIX. in fin. 4 Punic. Lib. XIII. Ver. 316. & seq. Edit. Deebnagor.

5 Be olympica religione Populum, &c. Lib. XII. Cap. III. Num. 9. 6 Diod. Sicul. Lib. XIX. Cap. LXXII. p. 765. Edit. H. Steph. 7 Tiflantici hoc Martyrum loco, & Pafifica Apollinaris, quae in illa votificationibus ad je confignitaris, sanctam receptavit. Huncique eructum sanctum et inimiicus: hoc accipienda letimim tradi- darum fuerit: illa ductabant a miferarumibus huiusquaequis, [seq.] no doubt undoubtedly be read in this Place: For St. Austin distinguishes between those, who were moderate, and the left merciful; and Origen, who relates the fame Fact, Lib. VII. Cap. XXXVIII. confirms this manner of reading:] Etiam extra illa loca pepercamur, ne in eis incorrupte, qui similem misericordiam nun habeant: Qui tamen ipsi alibi truces, atque adftrahere more fortientes: Quis popumque ad illa illa omnium, qui fuerunt interdum, quod alibi jure bellum haftum, tene facrando refquassatur immortalis, & conspiciendi cupiditas frangescat. De Civ. Dei. Lib. I. Cap. I. Isidorus has copied this Passaige in Chronic. Goth. upon the Year 447. The Fact happened under Marcian, an Arían Prince, of whom Cassiodorus has preserved another memorable Action, by which he signalized himself upon the same Occasion. It was this; when the confequed Veneti taken out of the Church of St. Peter were brought to him; he asked what they were, and upon being informed, he ordered them to be carried back into the Church by the fame Perfons, who had taken them out of it: Nam, quam Rex Alaricvs, &c. Var. Lib. XII. Cap. XX. Grotius. If Grontius may be believed, whole Note the Reader may see, there is nothing to be corrected in the Paffeage of St. Austin.

8 The Goths, who besieged Rome under King Vitiges, spared also the fame Churches, as Procopius informs us, Gothi. Lib. II. Cap. IV. Even the Barbarians, not Christians, found an Atium in these sacred Places. See Zosimus, Lib. IV. Cap. XI. in regard to the Tumiani. The Swifs have a good Law upon this Head, rected by Similar, De Rep. Helvet. (p. 322. Edit. Elzev.) See also Nicetas, in the History of the Emperor Alexis Cannabos, (Cap. IV.) and the Place where that Historian blames the Sicilians for having profaned the Churches of Antioch. In Andronic. (Cap. IX.) Grotius.
Of the Rights of

 Refuge, whether Natives or Foreigners. So far the Rage of the Enemy extended without Control, but here the Fury of Slaughter slept; to those Places did the compassionate Soldiers convey their Prisoners, whom they had spared even without the Bounds of these Sanctuaries, from the Fury of their own Companions, that had left Tenderness than themselves; and they who otherwise were inhumanly cruel, as soon as ever they came near any of those Places, where they were forbid to use of their Right of War, immediately restrained their Eagerness to kill, and their Desire of making Prisoners.

VII. 1. What I have said of sacred Things, the same may also be understood of Sepulchres, and even of Monuments that have been erected in Honour of the Dead. For even those (tho' the Law of Nations hath not exempted them from the Fury of the Conqueror) cannot be violated without Breach of common Humanity. The Lawyers maintain 1 that whatever engages a religious Respect to burial Places, ought to be of very great Weight. There is a pious Saying of Euripides in his Troades, in regard to Sepulchres, as well as to sacred Things,

2 Μη λαμβάνεις τά τάφια, ἢ τά ταφών, ἢ τά ταφών, Τὸν δει νῦν αἰώνα, οὐκ ἔχει τάφον, ἢ τά ταφών, ἢ τά ταφών, ἢ τά ταφών, whoever ravages the silent Dead,

Or impiously profanes their sacred Urns,

Unwise I'll call him, for he ne'er reflects,

That his own Dust may once be so disurb'd.

Apollonius Tyanaus 3 thus interpreted the Fable of the Giants fighting against Heaven, of the that were in the of in a manner, says Appian, 4 Except those who had profane the Temple of Apollo. The Trophy erected by Mithridates, Cesar (as Dion 6 relates) durst not demolish, as consecrated to the Gods of War. Marcus Marcellus 7 (as Cicero observes in his fourth Oration against Perres) would not out of Conscience touch those Things which Victory had rendered profane. And the same Author 8 adds, that there were some Enemies, who in War observed the Right of Religion, and of Customs. And he in another Place calls the Acts of Hostility which Brennus excercised against the Temple of Apollo, an 9 abominable War. Livy 10 calls the Action of Pyrrhus in plundering the Treasure of Priapea, vile and infolent against the Gods.

So does Diodorus 11 that of Himilco, of that is of the

VII. (1) Nam summam off retinere, quem pro religione factis. Dig. Lib. XI. Tit. VII. De Religione & simplicius funerum, &c. Leg. XLIII.

2 Ver. 95. & seq. 3 Philostrat. De Vit. Apoll. Tyana. (Lib. V. Cap. XVI. Edit. Olear.) Thus Diodorus Siculus explains another ancient Fable in this Manner, I mean that of Epopea. Grotius.

It was in the Excerpta, published by Henry de Valvis, our Author found the Paflage he speaks of. But the Fable, which the Hilarionian explains, is not there: He only relates that Epopea, King of Sicily, destroyed Temples and Altars: And he calls that, making War upon the Gods. The Paflage is:

'Orις Καμαριτος ουκείοις, &c. p. 221.

4 Precipuo quam sacrilegus [Hannibal] face misfit arcos

Hydai [Haccrius]

Syv. Lib. IV. Syv. VI. Ver. 82. Our Author, who does not mark the Place from whence he took these Words, probably quoting by Memory, changes

arcos into aras, and makes the Poet say: Deim face mifit aras.


6 Lib. XLII. 7 The Paflage has been cited above, Chap. V. of this Book, § 2. Note 2.

8 A little before: Que [sedes Minorum] ab eo [Verses] [et] ista atque eadem, nam ut ab hostibus, qui tamen in bellis, religious & confuetudines jura renovet, jid ut a barbaris praeludii usque offe videatur. In Ver. Lib. IV. Cap. LV.

9 Quondam commissi Brennus dicitur, ejusque Gallicae epist. quam sum Apollonius Didymius nequum bellam intulit. De Divinat. Lib. I. Cap. XXXVII.

10 Qui [Pyrrhus] quam ex Sicilia redens Locros effe praeerubertas, inter aliis se fuderet—fascina

—thesaurus quoque Procrisine intactus ad sam diem, superest—que tantum clade edidit, tandem Das effe prohiflismo Rex, pametiam omnium conscius

in thesaurum Procrisine referri jussit, Lib. XXIX. Cap. XVIII. Num. 4. 6. 11 Lib. XIV. (Cap. LXIV. p. 430. Edit. H. Steph.)
The Plunder'd still have desolate Arms.

The Plerom'd still have desolate Arms.

For tell us, when the Gaul's had taken Rome, their chief Commanders would not let the Havils be hurt, nor what they had plundering of the Town might be a Pledge to be by the Mills of the Belgians. We were as happy at the City of Amy's in the School, as they were at the Mirror of Mars. His Country, as long as he would not be free, he would not be plundering. Philo speaks of the Plundering of the City, immediately after the Greeks did, who are in it, and the Romans, who were with him (in Greece) adds this, do not gape at the Thermopylae, but do as the Romans did. The Thermopylae were the Achaeans remaining. Philo speaking of the Plundering of the Romans, immediately after the Greeks did, who are in it, and the Romans, who were with him (in Greece), do not gape at the Thermopylae, but do as the Romans did. Philo speaking of the Plundering of the Romans, immediately after the Greeks did, who are in it, and the Romans, who were with him (in Greece), do not gape at the Thermopylae, but do as the Romans did.

And therefore, when we are to reason and to judge of the right of any Country, we are to judge of it in the same manner we were to judge of any other things, to gain the advantage of them, who are to judge of them, and to gain the advantage of them. Philo speaking of the Plundering of the Romans, immediately after the Greeks did, who are in it, and the Romans, who were with him (in Greece), do not gape at the Thermopylae, but do as the Romans did. Philo speaking of the Plundering of the Romans, immediately after the Greeks did, who are in it, and the Romans, who were with him (in Greece), do not gape at the Thermopylae, but do as the Romans did.

[Further text]
the Conduct of Cerealis, against Civiils the Batavus, and his Associates; Because beyond their Expedition, they had lost nothing of their Goods, submitting to his Obedience, they furnished him with 70,000 Men well armed.

3. Contrary Counsels have met with contrary Success. Livy 10 gives an Instance in Hannibal, Giving himself up to Covetousnes and Cruelty, he destroyed what he could not keep, that he might force nothing to the Enemy but wasted Lands. And this Counfel was erected both in the beginning and in the End. For be not only lost the Affections of those whom he thus barbarously used, but of all others also, who were afraid of being expo'd to the like Defilation.

4. I readily agree to what has been observed by some Divines, that it is the Duty of supreme Powers, and of Commanders who desire to be thought Christians by GOD and Man, to prevent the merciless plundering of Towns, and the like Acts of Hopeity, as cannot be done without infinite Loss to Multitudes of innocent People, and be but of little Advantage in regard to the principal Affairs of War. Such Sort of Violence is almost always contrary to Christian Charity, and commonly to Justice itself. There is certainly a greater Bond among Christians, than there was formerly among the Grecians, in whole Wars it was enacted by a Decree of the Amphictyones, 11 that no Grecian City should be pillaged. And some antient Writers 12 affirm, that Alexander the Macedonian repented of nothing more than his destroying of Thebes.

Lib. XXVI. Cap. XXXVIII. Num. 3. 4.
11 This the Orat. Achines informs us: De Conqueror, p. 671. B.

C H A P. XIII.

Moderation about Things taken in War.

I. 1. BUT the taking away of our Enemies Goods in a just War, is not to be reputed wholly innocent, or clear from the Obligation of Restitution. For if we respect that which is done rightly, it is not really lawful to take, or keep from the Enemy more than may be justly due from him, except what Things (beyond the fame due) we are obliged to detain for our own necessary Security; but when the Danger is over, they are also to be restored, either in Kind, or to the full Value; according to the Principles we have laid down in the second Book, Chap. II. For what we may lawfully do with the Goods of those that are at Peace with us, we may do it much more to those of our Enemy. This then is a Sort of Right to take, without a Right of acquiring.

2. But since a Debt may arise to us, either from the Inequality of Things, 3 or by way of Punishment, we may on either of these accounts seize on the Goods of the Enemy, but with some Difference; for as we said 4 before, from that former Obligation, not only the Goods of the Debtor, but also those of his Subjects by the allowed Law of Nations (as by way of Suretyship) stand engaged; which Law of Nations we look upon to be of another Kind, than that which consists in a bare Impunity, or of which the Ue is maintained and authorized only externally, by the Effect of a Sentence, whether just or unjust. For as by our own personal Consent, our Dealer does not only acquire an external Right, but also an internal one; (that


This was Pope Innocent VII. whose Nuncio's declared in his Name at Trent, that the Emperor Sigismond, having been the Aggressor in the War with the Greeks, and the Venetians at great Expenses to support that War; the latter had a Right to keep two Forts, which they had taken from the Emperor: But however, that the Holy Father prayed the Senate of Venice, that they would consent to restore those Places, to avoid giving Occasion for a Rupture between the Emperor and the Holy See, &c. Hist. Venet. Lib. I. Fol. 12. Ed. Venet. 1551.

2 The Romans condemned Proclus, King of Bithynia, not only to make Attalus, King of Pergamus amends, but to pay him a Sum of Money, by way of Penalty. Appian. Alexiad. De Bell. Mithridat. (p. 172, 173. Edit. H. Steph.)
is, which he may in Consequence make use of.) So also by a certain general Contenf, which virtuoufly comprehends in it, the Conennt of each Individual. In which Senfe the Law is called 3 without evident Name, A general Convention of the State. And it is the more probable, that it was thought proper by Nations, that in such a Cafe, fuch a Right might be allowed, because this Law of Nations 4 was intended, not only to prevent greater Mifchiefes, but alfo to enable every Perfon to recover his Duc.

II. But if the Prince's Debt be penal, I do not fee that by the Conennt of Na- tions, fuch a Right is allowed on his Subjects Goods. For fuch an Obligation upon another Man's Goods is odious, and therefore not to be extended beyond the manifeft Intention of thofe who authorifie it. Besides, there is no Reafon of Utility fo weighty, as could have induced Nations to eftablısh in regard to the latter Sort of Debt, what they eftablıshed in regard to the former. For that which is due to us on account of any Damage, makes Part of our Goods; but not that which is due to us in form of Punishment; fo that the Proeeution of the latter may, without any Damage, be omitted. Neither does what I have already 5 mentioned of the Attic Law at all contradict it: For in that Cafe Men flood engaged not strictly be- caufe the State could be punifhed, 6 but only to force the State to do what it ought to do; that is, to judge the Guilty: Which Obligation founded on a Duty, has Re- lation to the former Sort of Debt not to the latter. For it is one Thing to be obliged to punifh, and another Thing to be liable to Punishment. Tho' this is commonly the Conquence of an Omiflion about that; but still they are two different Things, in the one is the Caufe, and the other the Effect. Therefore the Goods of the Enemies Subjects cannot be acquired under the Notion of Punishment, but only thofe of Offenders themselves, among whom are included the Magiftrates, that do not (according to their Duty) punifh Offences.

III. Moreover, the Goods of an Enemy's Subjects may be taken and acquired, not only to reinfenture ourselves of the primary Debt, which was the Occasion of the War; but alfo to make Satisfaction for the Subsequent Charges, according to what we have faid in the beginning of this Book. And thus we must underfand what some Divines have written, that Things taken in War are not to be compen- dated by the principal Debt. For this is to be understood, till, according to found Judgment, Satisfaction be made for the Damage done in that War. Thus in the Treaty with Antiochus, the Romans (as Livy 7 relates) judged it equitable, that the

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3 See above, B. II. Chap. XI. Num. 5.
4 We have flown above, Chap. II. of this Book, § 2. Note 1. that this is founded upon Rea- fons independent of this Conennt of Nations, which is fpoufed.
5 (1) Thefe Reafons would only prove, that fo much Rigour ought not to be used with regard to the Subjects for the latter as for the former Sort of Debt. For if there be any just War merely penal, as our Author acknowledges there is, and that in fuch War, there be no Means of getting Satisfaction for the Offence received, or the Crime committed, without having recourse to the Effects of the Sub- jects themselves, who have no Share in it, and without keeping thole Effects; I fee no Reafon, why the Subjects in that Cafe should not answer for the Fact of the State, as well as upon Refud of what is Due, for Influfce, by Virtue of a Treaty. The Reafons, which I have alluded elsewhere, fount- ed upon the Conftitution infel of Civil Societies, (Chap. II. of this Book, § 2. Note 1.) fubfift in this Cafe in all their Force, and that without having Occaion for a tacit Conennt of Nations.
6 But even by feizing thefe Perfons, it was fpoufed at leaft, that the State might render itself culpable by a Refud to do Justice, without which it would not have been fufficient to have proceeded so far. Besides, when the State had actually refufed to punifh or deliver up the Murtherer, and had thereby rendered itself worthy of Punishment, with- out doubt the Perfons, who had been feized on that

Account, were not releafe: Otherwife to what Purpoe would they have been feized? Why then might the Liberty of the Subjects be anfeerable for the Crime of the State, rather than their Effects? Are the latter fuperior to them than the former? It is in vain to fay, that the Subjects were only deprived of their Liberty for a Time, that is, till the State had done what it ought. For it might easily happen, that the Prifoners might die before that: And it will be faid alfo, in regard to Goods, that they are feized till the State has made, either out of its own Effects or otherwife, a Satisfaction anfeerable to the Punishment it deferves.

III. (1) En. que Legato magnas ad pocen imper- trandum confiantur, parvo Romani vix. Nam 26 impendia, quae in bello foler offit, omnem pra- flarem Regum aequum comendunt; cuius rationem loquum ex- citatum offit. Lib. XXXVII. (Cap. XXXV. Num. 8.) POLIBUS mentions this, Except. Legat. XXIII. The People of Asia were condemned to the fame Thing by Sylla, as APOLLONIUS ALEXANDRINUS re- lates, De Bell. Mithridat. (p. 237. Edit. H. Steph.) The King of Poland alledges this Cufom in his Favour. THUANUS, Hist. Lib. LXIII. upon the Year 1591. The Scholaf of HOMER explaining wherein the Amendments demanded by the Greeks from the Romans for the Expenes of the War confiffed, makes it the Moiety of the Riches of the City. In Iliad. Lib. III. (Ver. 286.) GROTIUS,

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Of the Rights of Book III.

King should bear the Charges of the War, who by his Fault had been the Occasion of it. So Justin calls it a reaonable Condition. The Samians are condemned in Thucydid: 3 To bear the Charges of the War. And elsewhere we find a great Number of the like Examples. But whatsoever is justly imposed on the Conqueror, may be exacted in a just War.

IV. 1. But we must observe, which we have elsewhere mentioned, that the Rules of Charity reach farther than those of Right. He that abounds in Wealth is guilt of gross Inhumanity, if he strip his poor Debtor of all that ever he is worth, by the Rigour of the Law, to satisfy his own Debt; but more particularly, if that Debtor contracted that Debt by his Kindness to another; as if he had engaged for his Friend, but had received none of the Money to his own proper Ue. 3 Perry miserable is the Condition of a Security, says Quintilian the Father. Yet such a hard hearted Creditor acts nothing against Right, properly so called.

2. Wherefore 4 Humanity requires us to spare the Goods of those who are in no Fault concerning the War, and who are no otherwise concerned than by Way of Suretyship, which we may better be without than they; but especially if it appear, that they shall receive no Reparation for them from their own State. Agreeably to this, said Cyrus to his Soldiers, at the taking of Babylom, 3 What ye get (from your Enemies) is justly your own, but if you leave them any Thing, it will be an Aed of Humanity.

3. This is also to be observed, since this Right of feizing the Goods of innocent Subjects is but Subsidiary, or by Way of Suretyship, as long as there are any Hopes of recovering our own from the principal Debtor, or from those who, by refusing to render Justice, make themselves Debtors, to prosecute those who are wholly innocent, tho' it does not contradict the Rules of strict Justice, yet it is far distant from the Rule of Humanity.

4. Examples of this Humanity are very frequent in History, especially the Roman; as when, upon conquering the Enemy, their Lands were returned to them, 4 upon this Condition, that they should from thenceforth belong to the conquered State. Or when a small Part of those Lands were, for Honour's Sake, 5 left to

2 Imposibis bellis leges jusfa seipserupserat [Perfeus] Lib. XXXIII. Cap. 1. Num. 5. So our Author cites this Passa, I know not from what Edition: For all that I have seen, say without any Variety of Reading whatsoever: Leg. VICTI. That is to say, according to the Condition generally imposed on the Conqueror by the Victor.

3 Lib. I. Cap. CXVII. Edir. Oxon. IV. (1) Etiam quem quid probum periculum ejf Sponfori, miserabili ejf: Bonitate honesta, in the Life of Demetrius, (p. 87.) A. The Jut Words of which Passa are cited above, in in Chap. XI. of this Book, § 6. Num. 2.) See also what Sarno, King of Navarre did, in Mariana, H.I. Lib. XI. Cap. XVI. GROTIUS.

5 THBOMON, De Gyri Jijlib. Lib. VII. Cap. V. § 9. Edir. Oxon. IV. (4) Et terrae ait ait, qui seipsum devicit ea conditione concussi, et ut in civitatem senetern, habere adulationem, neque eft limitatum, &. DIGLIT. Lib. XVI. Tit. 11. De subi. rerum Domin. Leg. XVI. The Lands spoken of in this Affidgment, were not purely and simply restored, but upon Condition of paying a certain Tribute, which was exacted from the Body of the conquered State, and not from every individual; for which Reason the Lands are said to be given to the State. See the Notes on the last Mr. Goes upon the Author's Rei Agrariae, p. 198.

5 Item si forte aget fuli, &. DIGLIT. Lib. VI. Tit. 11. De Rei vindicat. Leg. XV. § 2. It relates to some private Perons, to whom this Mark of Distinction was given, when the Rest of the Lands were divided amongst the Soldiers. An antient Author speaks of it thus. Nec tamem animus perfons uelitis abstii fori agri: Nam quae suas dignitas aut gratia, aut amicitia, uidem dum novit, ut eis concederat agris facer. SICULUS FLACCUS, De conditioni. agrar. p. 16. Edit. Gent. See CnJUS, upon the Law here quoted, Recit. in Diglit, p. 275, 279. Edit. Fabrart.

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the antient Possiflors. Thus Livy tells us, that the Vetentes were punished by Ro-

mulus, with the Loss of part of their Lands only. So Alexander the Macedonian reftored their Lands to the Usii under a Tribute. Thus we often read that for-
rrendered Cities were not pillaged. And we faid before, * that not only the Perfons, but alfo the Goods of Hufbandmen, were by a lawful Custom, and conforrnable to the Canons, fpared, at leaft with a Tribute laid upon them; and a Liberty of Trade was allowed to Merchants, upon their paying Custom for their Commodi-

ties.

6 Appianus Alexanderinus fays in general, that the antient Romans acted in this Manner, with Regard to their conquered Enemies. De bell. Civil. Lib. II. (p. 516. Edif. H. Steph.) We find in History, that the Vandals obferved the fame Maxim in Africa, and the Goths in Italy. Gro-

tius.

CHAP. XIV.

Of Moderation concerning Captives.

I. In what Places the taking of Men Prisoners, and making them Slaves, is yet allowed, if we repect Internal Justice, it is to be thus limited; that is, it may be fo far lawful, till Satisfaction be made for the Debt, either principal, 
or accefory; unlefs it fhould happen, that the Perfons taken be guilty of fuch Crimes as may juftly forfeit their Liberty. Hitherto therefore, and no further, he that wages a juft War, has a Right over the Subjects of his Enemy taken Prisoners, and a Power to transfer it firmly to others.

2. But we are taught by Equity and Humanity to put the like Differences, as before * obferved, when we treated concerning killing our Enemies. Demofhenes, in his Epitile for Lycurgus's Children, highly commends Philip of Macedon, be-

cause that he did not make all that were found among his Enemies Slaves. * For he did not think to use all alike, either juft or benef; but duly weighing the Merits of each Perfon, he acted rather the Judge (than Conqueror).

II. But * we muft obferve again here, that the Right which arifes, as it were, * from Suretyhip for a State, is not of fo large an Extent, as that which is derived from the perfonal Offences of thofe that are made * Slaves of Punifhment, as they are called. * Whereupon a certain Spartan * faid he was a Prisoner, but not a Slave.

I. (1) (P. 734. Edit. Bagl. 1572.) Alexander the Great, that Prince's c` consequently, excepted out of the Number of Prisoners that were to be made Slaves, the Priests, and fuch as had not given their Consent to the publick Ordinances made againft him. Which Plutarch tells us in his Life. (p. 670. E.) Gro-

tius.

II. (1) There is here, in the Original: Sed pri-

nominatum altis, &c. In the firft Edition this was amended to Nam. 2. of the preceding Para-

graph; the Author added afterwards what follows, without obferving, that he had left a Connexion here, which did not agree to what was put be-

tween. Thus I have altered, and take Notice of it, as an Infufce of the small Amendments it was ne-

ceffary to make in feveral Places, which it would have been too tedious to specify.

2 See the foregoing Chapter, § 1, and 2.

3 Servi poena. A Term of the Roman Law, for which this is the Reafon and Foundation. It was of old the Privilege of all the Roman Citizens, as fuch, not to be deprived either of their Lives or Liberty, but by their own Confeft. The Abuse of this Privilege, having produced great Licenciousnefs and horrid Disorders, Means were found to eiate it by a Fiction of Right. When a Roman Citizen had committed a Crime that merited Death, or fome other Punifhment, amounting to a Privation of Liberty, he was not condemned as a Citizen, but before Condemnation declared to be no longer a Citizen; he was considered as a Slave, and had the Sentence executed upon him accordingly. See the Probabilis Juris of Mr. Noot, Lib. III. Cap. XII. and the Observations of Gronovius, Lib. I. Cap. VIII. p. 77. &c.

4 Plutarch, Apologiae. p. 234. C. Vol. II.

5 Plutarch. Author's Narr. p. 470. E. Edit. Peric.] 8 F

Thus
Of the Rights of a Slave.

For if we rightly consider the Thing, this general Right over Prisoners in a just War, is not greater than what a Lord hath over his Slaves, who by Reason of Poverty have sold themselves to him; excepting, that the Cafe of those is far more deplorable, who are brought into this Condition, not by their own proper Fault, but by the Fault of their Governors. It is a dreadful Thing (says Ida-

crates) to be made a Slave by the Right of War.

2. This Bondage then is a perpetual Obligation to serve the Master, for a perpetual Maintenance. Clysseus's Definition does very well agree with this Sort of Slaves, A Slave is a perpetual Hiring. And the Law of the Hebrews does directly compare him to a Hiring, who compelled by Necesity, has sold himself for a Slave, Dent. xv. 18. Levit. xxv. 40. 53. and will have his Ransom paid by his Labour, 7 just as the Fruits of Land fold, shall redeem it for the ancient Owner, Lev. xxv. 49. 50.

3. There is then a vast Difference between what may be done to a Slave by the Law of Nations, and what by natural Right. As we have it in the afore-quoted Place of Seneca, 9 'Tis it be lawful to do any Thing to a Slave, there is something which the common Right of Animals foroids to be done to the Man. So in Philo-

mon,

9 καὶ διὰ τοῦ ἐὰν τις ἐὰς ἔδωκεν, διπτηρὰς ἀνθρωπος ἐὰς ἐὰν αὐτὸν ἔκλεψεν.

What tho' in Servitude, my Master,
He is still a Man as much as ever.

So Seneca, in another Place, 10 Are they Slaves? Yet they are Men. Are they Slaves? Yet our Companions. Are they Slaves? Yet our Friends. Are they Slaves? Yet fellow Slaves. And what we read in Macrobius 11 has the same Meaning with that of St. Paul, Coloff. iv. 1. Masters, render to your Servants what is just and right, knowing that you yourselves have a Master in Heaven. And in another Place he advises Masters not to terrify them with Threatnings, for the fame Reason before-mentioned; Because we have also a Master in Heaven, with whom is no Respect of Persons. Ephel. vi. 9. In the Constitutions attributed to Clemens Romanus, we are advised, Be not too 12 severe to thy Man or Woman Slave. Clemens Alexander-

nus 13 would have us use our Slaves as our second Sons, being Men as well as we; in imitation of that wise Hebrew, 14 If thou haft a Servant, use him as a Brother, for he is such a one as thyself.

Thuc Theodecles, an antient Poet, makes Helen say,

Τίς οὖν ἄριστος ἄριστον ὀνείρω, Τίς ἂν προπόστατον ἀξιότερον λάδιον.

Dared they presume to call a Woman Slave,
On both Sides sprung from Gods—

GRATUS.

These two Verses are preferred in Aristotel, Politic. Lib. i. Cap. VI. But they should be read in the Beginning, Ovian 4 a't', &c. according to the Paris Edition, and that of Daniel Heinsius. 5 Ov. Nat. Plut. p. 300. A. Edit. H. Steph. 6 Sertes, ut placet Crysippus, perpetuo mercenarius est. De Benefic. Lib. III. Cap. XXII. 7 That is to say, no Regard was had to the Years which had elapsed since the Slave had fold himself, because the Slave was deemed to have gained by his Work for his Master's Benefit, the Value of what his Master had given him for that Time: So that no more was reckoned than what the Slave might gain in the Years to come, till the Sabbatical Year, or Jubilee, which restored Slaves to their Liberty, without their being obliged to pay any Thing. In like Manner as Lands returned to their ancient Owners, in the Year of Jubilees, if the Perfon, who had fold his Field, would redeem it be-

fore that Time, as he might, the Value of the Produce only for the Years which remained to the Jubilee, was reckoned. See the Passages cited in the Text.

8 Chap. X. of this Book, § 1. Num. 3. 9 Apyd Stoicmum, Tt. LXII. Some learned Men are for reading ἐν ἀγαθῷ, and in the second, ἐν ἀγαθῷ, &c.

10 Servi sunt? Immo barbati. Servi sunt? Im-


11 Et ut primo de seors usuquam, quae in a ferio patas off buuimun genus, quod Doli immutat, nec cura fact, nec providentia, dignatur? An forti serios in buuimun numera off non pateret? Saturn. Lib. i. Cap. xi. The Reader may see the Rest of the Chapter, in which the Author expatiates very much upon this Subject.

12 Lib. vii. Cap. xiv. There is the same Thought in the Letter of St. Barnabas, where he says, that he who treats his Slave with Cruelty, fhews, in doing fo, that he does not fear him who is the God of both. GRATUS.


14 The Author of Ecclesiasiam, Cap. XXXII.

III. The
III. The Power of Life and Death which is ascribed to a Master over his Slave, gives to the former a Sort of domestic 1 Jurisdiction; but yet that Power is to be
managed with the same Moderation, as do the publick Magistrates. This was
Senec's Meaning, when he said, 2 In thy Bondman confider, not what thou mayest
injuri him with Impunity, but what thou mayest do in Equity and Conscience, which
requires that we should be merciful to our Captives and purchas'd Slaves. And in
another Place he says, 3 What signifies it what Government one is under, if he be un
der a Supreme? In which Place he compares the Subject with the Slave, and says,
the y be under different Titles, yet the 4 Authority over them is the same; which is
certainly very true, with Respect to this Power of Life and Death, and other
Things that resembfe it. And again, the same Senec, 5 Our Ancfetors reputed
every Family a little Commonwealth. Alfo Pliny, 6 A Man's House is a certain Re-
publick, and as a State to his Slave. And Plutarch 7 tells us, that Cato the Con-
for would not punish any of his Slaves; no not for the moft heinous Offences, unlefs
he were found guilty by his own fellow Servants. To which agree the Words of
Job, Chap. xxxi. Ver. 13. and fo on.

IV. But as to other Punishments, ait. Blows, &c. Equity, and alfo Clemency is
to be thowered to Slaves. 1 Thou fhalt not opprefl him, nor rule over him with Ri
gour, says the Divine Law concerning a Hebrew Slave, Lev. xxv. which, as the
Title of Neighbour is not now confined to one Nation only, should extend to all
Slaves, Dent. xv. 12, &c. On which Place thus 8 Philo, Slaves indeed, as to Fortu
ne are Inferiors, but as to Nature equal with their Masters; and, according to the
Law of GOD, the Rule of juft is not what comes from Fortune, but what is agree-
able to Nature. Wherefore Masters ought not to use the Power they have over their
Slaves, to gratify their Pride, Inflence, and Cruelty: For these are not the Signs of
a meek and peacable Spirit, but of a passionate and tyrannical Dispoftion. Seneca

III. (1) It is not as Master that he has this Pow-
er of Life and Death, but as Father of a Family. The reciprocal Engagement, which there is between
the Master and the Slave, does not imply this of
itself, whether the Slave has lost his Liberty, or has been deprived of it by a Confequence of the
Right of War. The perpetual Service, to which the Prisoner of War engages himself, is a fuffi-
cient Reward for the Life which the Conqueror spares.
The Confent of the Slave, either tacit or express,
is necessary to the Master's having a Right of Life and
Death over him; and this tacit Confent is pre-
fixed with Reafon, when the Cution is fuch, as it
took Place formerly, not only in the Independence of
the State of Nature, where every Father of a
Family was a Kind of Sovereign in his own Hoth;
but even in Civil Societies, as long as the Laws
left to the Masters this Right over their Slaves.
2 The Pfalme has been cited already, in Chap.
X. of this Book, § 1. Not 8.
3 Si non dat benefici Servus Domini; nec Regi
quiquam fars, nec Ducis fui Miliam? Quis enim, in-
terpre, qualis quis tenetur imperio, fi hanc tenetur? 9 De Benefiz.
Lib. III. Cap. XVIII.
4 Nam fì fero quinum in nomen, &c. Ibid.
5 Et Domui laplam Renpublicam efj Judicpline [majores nofitl]. Epiff. XLVII.
6 Nunc foris publica quaedam, & quae civitas,
Domus eff. Lib. VIII. Epiff. XVI. Num. 2.

V. (1) Thefe Words, Thou fhalt not opprefl
him, are ill applied. For, in the seventeenth Verse,
from which our Author took them, there is, Thou
foon not opprefl one another. And this does not re-
gard Slaves, but the perpetual Alienation of Lands,
which the Legiflator forbids, under any Pretex
whatsoever. The Author cited Deuteronomy in
this Place also for Levitans: From whence it appears,
that all this was writ barely in the firft Edition,
without having ever been corrected in the Revivals
of other Editions.

II. Excerptae, juxta电动车———iuuu
v. 3^3? d egentia + Servitutis (fo it must be read, instead of d'udvens) daterc4 d'equitum bonum. De Legib. Speciaib. Lib. II. (p. 738.
D. Edit. Paris.) St. Cyprian expreffes himself
very strongly upon this Head; he maintains, that
thefe who exercise fo tyrannical an Authority over
their Slaves, do not acknowledge GOD for their
Lord and Master. Tamen nifi fibi pro arbitrio tuo
servitutis, nifi ad voluntatem objegnum parerar, in-
perifigs & minimus servitutis exsultati, fulgertas, verbe
ras, utnam fii, nudata, fero frequenti & curreo,
offugas, & cruticas, & non adolescent maier Dominum
DEUM tussam, quam fæ exercis in ipse in bominum
Brem.) See Moses de Cozey, Præcept. Lib. CXVII. CL.XXV. CLXVIII. and the Com-
parifon between the Roman Laws and the Laws of
Moses, Tit. III. Priscus, in the Excerpta Lo-
ginationes, where he prefers the Manners of the
Romans of his Time to thofe of the Barbarians, ob-
erves, to the Advantage of the former, that they
treated their Slaves with much more Humanity.
They behave, says he, towards them, as if they were
their Fathers or Preceptors. They only chaffife
them to prevent their doing any Thing difhonofed,
according to their Notions, and that as if they were
their own Children; fo that they have not a Power
of Life and Death over them, as Masters have a
amongt the Sylphids. Besides, with the Romans,
Masters have Power to make their Slaves free, as
they of ten do in different Manners, not only du-
ing their Lives, but at their Deaths; that last
Will being regarded as a Law. (p. 47. Edit. Hofi-
cheb.) See also the Laws of the Wifsagatu, Lib.
VI. Tit. I. Cap. XII. Grotius.

puts
Of the Rights of

V. 1. But we are also to enjoin them Labour with Moderation, having a Respect to their Strength and Constitution. To which, among other Things, the Hebrew Law pointed in the Institution of the Sabbath, viz. that all might have some Rest from their Labours, Exod. xx. 10. xxiii. 12. Dent. v. 14. And the Epitaph of C. Pliny to Paulinus begins thus, I see how gently you treat your Servants, wherefore I will more freely confess to you with what Tenderness I live mine: Always remembering that Expiation of Homer, Like a Father he was indulgent to his Slaves, and this our Pater-Families, the Father of a Family.

2. Seneca 

3 takes Notice of the Humanity of the Antients, in using that Word, Do you not observe how careful our Forefathers were to prevent all Occasion to Envy to Maf ters, and Reproach to Slaves? When they called the Mafter-Pater-Families, the Father of the Family. And his Slaves Familiars, Domesticks. Dion Phan. 4 describing a good King, says, He is so far from taking a Pleasure in being called Lord and Master of his free Subjects, that he does not willingly receive that Title with Respect to his Slaves. Ulyses declares in Homer, That those Slaves whom he found faithful, should be regarded by him as the Brothers of his Son Telemachus. And in Tertullian, 4 The Name of Goodness is more glorious than that of Power, and to be called the Father than the Mafter of a Family. And Hieron, or Paulinus, thus speaks to Celantia, So govern and order your Family, that you may seem defirous to be accounted, rather the Mother than the Mifrefi, and engage your Servants to respect you, rather by Kindness than Severity. And St. Augustine 6 makes this

1 Nic. Lib. I. cap. XI., etc. Epit. XLVIII.
2 Virid. gram. voliter tus, etc. Lib. V. Epit. XIX. The Verfe of Homer is in the Odyssey, Lib. II. ver. 47. and 234.
3 Nymphid. aqua regia, etc. Epit. XLVIII. This has been copied by Macrobius, in the Place already cited, Saturni, Lib. I. cap. XII. p. 235. Edit. Gr. Our Author observed here in a little Note, that Epicurus called Slaves the Mafter's Friends, and cites Seneca to prove it, Epist. CVII. But, on the contrary, Friends are put there in Opposition to the Slaves he mentions, who had run away. The Paffage is in the Beginning of the Letter, where that Opposition immediately appears, though there is otherwise some Corruption in the Text.
4 Dei Tit. 45. 6, libri. Lib. XXI. ver. 58. & 60.
5 Sed & gratia nonem, etc. Apolog. Cap. XXXIII.
7 Domitia fac a fyllus, etc. De Civis. Dei. Lib. XIX. Cap. XVI. What St. Augustine says here of the Motives which Religion supplies, he repeats elsewhere, and remarks, that Slaves, for the fame Reason, on the other Side ought to obey their Masters with the greater Alacrity. Tu Dominus meus non tantum omnium necessitarum, quam ef fi delectatione dotes adheres. Tu Dominus fer vis,umni Dei fidicet, commone Domini, confidere ratione placabilis, & ad confidemum, quam ad iurem. preponires fetus. De Moribus Eccles. Cibac. Lib. I. cap. XXX. St. Cyprian had before said, in a Manner, that Masters are enabled to use their Slaves, when converted to Christianiety, with more Favour. Testimon. Lib. III. (§ 82. p. 85.) Which he proves by the Paffage in the Epistle of St. Paul to the Ephesians, v. 9. Lac. Can. xv. 1. Nectum of the Equality of Christians, as such; for which Reason they all call one another Brethren; extends that Appellation even to Slaves, who, tho' of a different Condition, in Regard to the Body, are, as to the Mind and Religion.

3 Nymphid. aqua regia, &c. De Clement. Lib. I. cap. XVI.
4 Bodon frutix quaun in jumentis & caebus, &c. Ibid. Cap. XVII.
5 Philo says, that the Mafter is hereby punished doubly, as he lothes both the Slave's Service, and the Money he gave to purchase it. A third Punishment, adds he, and one full more morifying than both the former, is the being himself compelled to do the greatest Good to a Person whom he hated, and desired perhaps to have Power to infect perpDat. The Slave, on the contrary, is dooly made amends for the Injuries he has suffered, as he not only recovers his Liberty, but is also delivered from the Yoke of so cruel a Master. De Leg. special. Lib. II. (p. 808. A.B.) Grotius.

V. (1) See Chopp. XIV. of the Letter of the Bishops to King Lewis, inquired in The Capitulary of Charles the Bald. The Abbeins treated their Slaves with great Humanity, as Xenophon observes to their Honour, in his Description of the Republick of Abins. Seneca blames those who work their Slaves too hard, as if they were Beasts of Burden, and not Men. Aliae interm crudelissima & inhumanissima praebuit, quod non tamquam hominum spes, sed tamquam jumentis puderum, libro vivendi, oblivione, &c. Epist. XLVIII. Grotius.
this Observation, Good Parents formerly so managed their Families, that as to temporary Things the Children had the Advantage of the Servants; but as to Affairs of Religion, there was no Distinction. Whence it came to pass, that every Master was called Pater-Familias, which in Time became so customary, that even severe Masters affected that Title. But they who are true Fathers of Families, do take the same Care of their solew Family, in regard to the Worship and Service of GOD, as of their own Children.

3. The fame Tendersinc Servius 9 observes to be in the Word Children, by which they meant Slaves, in his Remark upon that of Virgil,

Cjadite jam rivos Pueri.

And thus did the Heracleote 10 call their Slaves Mariandyn, Carryes of Prefents; abating the Harshness of the Name of Slave, as Callithratus, an old Interpreter, observed on Aristophanes. Tacitus 11 commends the Germans, who treated their Slaves like Husbandmen. And Tbeona, 12 in an Epistle, says, The right using of Slaves is not to over-work with hard Labour, nor enfeeble them for Want of necessary Sustenance.

VI. 1. As I said before, we are obliged to maintain our Slaves for their Work. Cicero says, 13 We are to use Slaves as Mercenaries, by making them do their Work, and paying them their Due. And in Agricola, 14 A Slave's Wages is his Maintenance. And Cato advises, 15 Provide carefully for your Family, that it be not starved with Cold or Hunger. There is something, says Seneca, 16 that a Master owes to his Servant, viz. Food and Raiment. Donatus 17 writes, that a Slave was allowed four Bushels of Corn every Month, for his Maintenance. And Martius the Lawyer informs us, that a Master is obliged to provide his Slave 6 Cloaths, and the like. 7 The Sicilians are blamed in Histories for cruelly starving the Athenian Prisoners.

2. Seneca

region, Brothers, even of their Masters; and Servants of one common Lord. Dict. aliquis: Nunc sunt omnibus ani- bos, &c. Infilt. Divin Lib. V. Cap. XV. See also Isidorus, Poliph. Lib. I. Epist. CCCCLXLI. Grotius.

The Paffage cited here by our Author, as Saint Cyril's, is only the marginal Summary, which answers to the Citation of the Paffage in Saint Paul.

9 Our Author gives this as said upon the famous Verse of Virgil, Claudite jam rivos, pueri, &c. Eclog. III. ver. 86. But there is nothing like it there. It is on Eclogue VI. that Servius remarks barely, and without adding any moral Reflection that relates to the present Subject, that Dometicks were called Children. Utsum ergo utatue Puerus an ministros & familiaris familiae eumque Puerum vocare? In ver. 14.

10 It is Atheneus 6 who relates this, Lib. VI. Cap. XVIII. But the learned Gronovius is of Opinion, that the Word οὐκ ἐνυπέροχος signifies rather Doves, or Tribunors, and that their being called so is founded upon the Work which they do, either for their own Masters, or such as hire them, being a Kind of Tribune, which is looked upon as a Pretence. The grammatical Analogy favours this Explan.

11 Fragmenti medicus Dominus, aut pater, aut avo, ut Celius injungit: Et fons helenus parer. German. Cap. XXV. Num. 2.

12 She says at the same Time, that it is the Manner of gaining the Friendship of Domestics, which is not bought with them: And gives for the Reason of the Humanity with which they ought to be treated, what has been mentioned upon this Head more than once, viz. that Slaves are Men as well as their Masters. Fragment. Pylagoras. in Opusc. Mythologica. Phyl. Ethic. &c. Amstel. 1688. p. 746, 747.

VI. (1) Quibus [Servis] non male præcipiunt, qui ipsi pauperi sint, ut mercenariis: Operam exigamus, juxta precepta. De Offic. Lib. I. Cap. XIII.

13 Oeconomic. Lib. I. Cap. V.

14 Familia male ne fet, ne alget, ne sfratia. De Re Rutil. Cap. V.

15 Et aliquid, quod Dominus praebere forum debuit, ut clarum, ut sublimarium. De Benef. Lib. III. (Cap. XXIX) Familia victoriam petit aissunqu. De Tranquill. Anim. (Cap. VIII.) The Romans, believing by the Gods, and prefied by Fa- mine, told Biffus and Conus, who commanded the Army of the Begegers, "If you would have us surrender ourselves as Prisoners of War, give us Provisions, if not so much as we stand in need of; at least enough to keep us from starving." Procopius, Gothic. Lib. III. (Cap. XVII.) St. Christsophor contiders the Obligation of Masters to provide his Slaves with Food and Clothes, as a Kind of Servitude; because, if he does not discharge that Engagement, the Slaves are discharged from theirs, and no Law, in such Cases, can compel them to serve. In Epic. v. 2. Grotius.


17 Those Things, for that Reason, were not deemed to be a Part of the Slaves pecunia, which belonged to his Master, tho' the Slave possessed it as distinct Effect. Si vero tamen, aut aliquis infelic, quod ei Dominus necesse haber præscrips, non esse pecuniam. Digest. Lib. XV. Tit. I. De Pecu- nia, Leg. XL.

18 The Cruelty of the Emperor Iacques Angelos to
2. Seneca also, in the fore-mentioned Place, proves, that in Regard to certain Things a Slave has the same Rights as if he were free, and that he may even become a Benefactor to his Master, by doing for him something beyond the Services he owes him, provided he therein Acts, not through Fear and Containment, but of his own free Will, and out of Affection; which the Philosopher explains at large. So likewise, if a Slave, (as it is in 9 Terence) have any Thing out of his own Belly, or earned ought in his spare Hours, that properly is his own. Theophilus justly defines the Peculium, *servum personam*, 10 a natural Patrimony, as if you should call the Copulation of Slaves 11 a natural Marriage. Ulpian expressly calls the Peculium a small Patrimony 12. Nor does it import much, that his Master may, at his own Pleasure, take it away, or diminish it; for if he does it without Cause he will act unjustly. By a Cause I mean, either by way of Punishment, or for his Lord's Necessity. For the Interest of the Slave ought to give Place to that of the Master, even more than the particular Interest of Subjects to the Interest of the State. Agreeable to this is that of Seneca. 13 It does not therefore follow that a Slave has nothing, because he cannot enjoy it unless his Lord pleases.

3. Hence it is, that the Master cannot demand again any Debt due to his Slave, in the Time of his Slavery, which he pays him after his Release. Because (as Tryphonius 14 says) in a personal Act, the Confideration of a Debt, or no Debt, is understood naturally. And the Master may possibly be a Debtor naturally to his Slave. Therefore, as we read that Clients have contributed something to the Use of their Patrons, and Subjects to the Use of Princes, so have Slaves 15 to the Use of their to the Sicilians, whom he had made Prisoners of War, is also confurred by Nicetas, who recites a Letter writ by the King of Sicily to the Emperor, upon that Subject. Vit. Ikon. Ang. Lib. I. Cap. III. Grotius. 8. Et in perduram fororum, &c. De Benefic. Lib. III. Cap. XIX. and XXI.


10. Infiltr. Lib. IV. Tit. VII. Quod cum ex qui in ali. p. &c. § 4. HOMER makes Eumaeus say, that if Ulysses had returned to his Houfe, he would have given him a Houfe, an Inheritance, a desirable Wife, in a Word, every Thing that a good Master could give a faithful and affectionate Domestic.

"ος καθαιρετις, &c.

Odyss. Lib. XIV. (ver. 62. & seq.) Ulysses himself makes a like Promise to Eumaeus, and the other Shepherd Philistion, Lib. XXI. (ver. 244, 215.) VARRO advices Masters to treat their Slaves with Humanity, to supply them plentifully with Food and Raiment, to give them Relaxation from Labour, and fuffer them to feed them Cattle of their pecudium, in their Grounds, in Order to encourage them to work with the more Zeal. Stidhibera ad opus juri, &c. (De Re Rhtic. Lib. I. Cap. XVII.) Grotius.

The learned Citizen FRANCIS HOTHAM observes, that the Word Peculium is derived from the Cufom of giving Slaves some Hands to feed, as their own Property, Riches confifting at firft in Cattle. And he cite upon it, (Comm. in Tit. Digeft, De Pecl. § 2.) this other Passage of Varro. Tu, inquire, tibiern non folum adminus Dominum pecudium, fed etum Sedus Peculium, quius Dominum, dont ut pafcent, &c. De Re Rhtic. Lib. I. Cap. II.

11 See above, B. I. Chap. III. § 4. Num. 1. 12 Peculium dixit id., quous pecudio pecudio, fue patrimonium pofsimus. Digeft, Lib. XV. Tit. I. De pecul. Leg. V. § 1. Very well: But this Patrimony, according to the Principles of the Roman Law, did not ceafe to belong entirely to the Master. (Infiltr. Lib. II. Tit. XII. Quibus non est pecuniam placet Tychamen, princ.) The Slave did not posses it by a civil Right. Et Peculium, quod Servus civiliter, quidem poftere non poftet, fed naturaliter tenet, Dominus creditor poftere. Digeft, Lib. XII. Tit. II. De adquir. vel amitt. Poffèssionis, Leg. XXIV. And he might make himself guilty of Theft, in Regard to his own Stock: Quam autem Servum non fum pecuniam, forandi conatus natus. — Si tuus tenditor, futum faciet. Istum. Lib. XLVII. Tit. II. De Partis, Leg. LV. § 3. All Acquisitions came also to the Master, Istit. Lib. II. Tit. IX. Per quos perfusos nos acquirere, § 3. So that a Slave is conspicuous, and therefore laid sometimes to have a Kind of Patrimony. See the great CUSIA, in his Work Ad Aequitatem. Tractat. II. upon Law CVII. § 1. Digeft, De Legat. I. Our Author seems here to have had that Pallage in View. See also LAURENTIUS PIGNO- RIANUS, De servis, p. 4. Edit. Patav. 1656.

13 He had just faid, that tho’ the Peculium and Perdon itself of the Slave, belonged to the Master, the Slave, however, might make his Master a Pre- fent, Num quid dixit id., &c. De Benefic. Lib. VII. Cap. IV.

14 Si quod Dominus servit, &c. Digeft, Lib. XII. Tit. VI. De conditione indet. Leg. LXIV.

15 The Example of Contributions for the Portion of a Daughter, or the Ransom of a Son taken Prisoner, is indeed confirmed in Regard to Clients, by the Authority of DIONYSUS HALECABRAS- SENSIS, in the Place quoted in the Margin: But in Relation to Slaves, I am very much mistaken if our Author had any other Authority than what we read in the Scene of a Comedy in Terence, from which he has cited something before. Nite 9. We there fee a Slave makes a Present to the Pride his Master’s Son had married, out of his Savings. He that speaks, who is himself a Slave, believes, that his Friend will be obliged to do as much when his Mithreis shall be brought to bed, on the Child’s Birth-
their Masters. As if a Daughter were to be portioned out, or a Son to be ransomed, or something like it should happen. Pliny, as he himself relates in his Epistles, allowed his Slaves the Privilege of making a Sort of Will, that is so far as to distribute, to give, or bequeath within the Family. Among some Nations we read, that even a fuller Right of acquiring Things was allowed to Slaves, as we have before explained, that there are different Degrees of Servitude.

4. And even the Laws among many Nations have reduced the external Right of Masters unto this internal Justice, of which we are now treating. For among the Greeks it was lawful for Slaves, if they were hard used, "To demand that they might be sold." And at Rome, to fly to the Statues (for Refuge) or implore the Affittance of the Governors of Provinces, in Cases of Cruelty, Hunger, or intolerable Wrongs. But a Master is not obliged in Rigour to make his Slave free, after a long Service, or a Service whereby the Slave has done for him something of great Importance. If then he grants him his Liberty it is a Favour; tho' this Favour may be sometimes due by the Laws of Humanity and Beneficence. After that Bondage, Las, prevailed by the Law of Nations, the Benefit of Res-lease likewise was allowed. We have an Example of this in Terence, &c.

Birth-Day, and that of his being in certain Mysteries.

Nam breviem filium ejus ducesse audio.

Ueum: Eit, creda, manus bos conditur.

Paro autem Gerisit.

Fovetur ali manure, ut iber pheroperizit.

Paro autem ali, ut eis pueris natialis dict,

Iti initiantur, &c.

Phormio. AE. I. Scen. I. ver. 5, 6, 12. & seq. For he was surprized that our Author forgot one Thing in this Place, which makes very much for his Subject; that is, that amongst the Romans, a Slave might ransom himself by an Agreement with his Master, to whom he gave, as the Price of his Liberty, either what he had laid up by his Savings, or received from the Liberality of others, or got in any other Manner. This Custom was introduced early, as SERECA not only speaks of it, (Pseudolium, juud, commodum vectre fragrunt, pro capita numerunt, &c. Epit. LXXX.) but there are also Proofs of it in Plantina, (Andal. Act. V. ver. 8, 9. Caffius. Act. II. Scen. V. ver. 6. & seq. Roodert. Act. IV. Scen. II. ver. 23, 24.) The Emperors Marcus Antoninus and Faustina, confirmed afterwards the Validity of such a Convention, in giving the Slave Power to complain juridically, and obliging the Master to infranchise him; in Default of which the Slave was declared free, as appears by the Digest, Lib. V. Tit. I. De judicid. Leg. LIII. and LX. Lib. VI. Tit. I. De manumissionibus. Leg. IV. V. &c. See JACOBUS RAVANUS, In Digest. Reg. Fortis, Leg. XVI. (p. 174, & seq. Edit. Wechel. 1632.) JUSTUS LIPSIUS, upon TACITUS, Annal. Lib. XIV. Cap. LXII. CIUSIS, Recit. in Digest. Vol. IV. Opp. Edit. Fabrit. p. 164., and the President BRISSON, De Formulis, Lib. VI. p. 559.

16 Altarum, quam permutit, &c. Lib. VIII. Ep. XVI.

17 See POLLUX, Lib. VII. § 13, and the Commentators upon it.


19 Sed potius quam juris Gentium Servitis invent, iugum eft beneficium manumissionis. DIGEST. Lib. I. Tit. I. De Jusfit. & Juris. Leg. IV.

20 (Andr. Act. I. Scen. I. ver. 10, 11.) I read ferobsis in their Verbes, after the Manuscripts, and not ferethes. Varro informs, that in Feronis's Grove the Romans used to lay to their Slaves, Let thieves who have deserved well, fit down Slaves and rise up Freedmen. It was customary in some Places to give Slaves their Liberty, when they had earned eighteen Times as much as they had cost their Masters. GROTIUS.

What our Author observes here upon VARRO's Authority, he certainly had from SERVIO: But that Grammarians lays it of his own Head, in speaking of the Goddes Demetria's Temple at Terracina: For the was the Goddes of Freedom, and there was there a Stone Seat, where the Slaves were made to sit down, when the Cap was given them, as a Sign of their being made free. The Words in Question were cut on this Seat. Hoc estiam (Fe-

VII. Libertorum Dei, in capite Temporis, in capite pilitum excipiant. — In lapide Temporis Terracinae solida lapidum fuit in quo hic verus institut erat: Bene meriti Servi sedentur: Surgant Liberi. — In Anicet. VIII. ver. 564.

Our Author's Mistrake arose, from the Commentator's giving VARRO's Etymology of the Name of the Goddes, immediately after the Pageage cited. Quam VARRO libertatem [libertatis should be read] Deam dicit Feronium quam Fidonia. The Reader may see further, concerning this Goddes, the Notes of FORBINIUS upon HORACE, Lib. I. Sat. V. ver. 22. The learned JAMES GODFREY, proves from the Pageage of SERVIO, and other Authorities, that amongst the ancient Greeks and Romans, the freeing of Slaves was often performed in the Temples consecrated to the fale Divinities, and that it was from this Custom the Emperor CONSTANTINE took the Manner of infranchising in Churches, which he established by a Constitution, come down to us. But this great Citizen (in Cod. Theod. IV. 7. De Serviis. in Excl. L. uniu. p. 355. Vol. I.) quotes PLAUTUS, in the Life of Publicius, where I can find nothing that makes for the Subject. And in the Citation from Livy, Lib. II. is quoted probably for Lib. XXII. Cap. I. towards the End. Which may be observed by the Way.
Of the Rights of

Feci e servo ut esse Libertas mibi, Propter quod serviebas liberaliter.

When you were my Slave, I freed you, Because you serv’d me with Integrity.

Sakkian 21 declares that it was daily practised, that Slaves, tho’ none of the best, yet if they were not arrant Knaves, were presented with Liberty. And he adds, they were allowed to carry away what they had got in the Time of their Service; of which Generosity in Masters we have many Examples in the Martyrologies.

And here I must commend the Lenity of the Hebrew Law, Deut. xvi. 13, which absolutely commands, that a Hebrew Slave having served out such a certain Time, shall be let free; 22 and that he should not go away empty; the Contempt of which Law the Prophets grievously complain of. Plutarch 23 blames Cato the Elder, that he sold his Slaves when they were old, forgetting the common Nature of Mankind.

VII. Here arises a Question, whether it be lawful for a Captive taken in a just War to be set free; I do not mean him who for some personal Fault had deferred that Punishment, but who, by the Fact of the State, has fallen into that Misfortune. According to the most reasonable Opinion he ought not, because, as we have said elsewhere, he is engaged, as a Member of the State, and in its Name, by Virtue of the general Convention among Nations; which yet is so to be understood, unless an intolerable Cruelty has forced him to it. You may see the Answer of Gregory Neesefariensis concerning this Affair. 24

VIII. Whether they are born of Slaves are obliged to the Master, and how far? 25

VIII. 1. We have 26 in another Place debated the Question, whether, and how far, the Children of Slaves are engaged to the Master by internal Right, which, on the Account of the particular Relation it has to Prisoners taken in War, ought not here to be omitted. If the Parents for their own personal Crimes have deferred Death, their Children, for the SAVING of their Lives, are obliged to serve, because otherwise they had not been born. For Parents have a Power to sell their own Children for Bondslaves, when they are not able to maintain them, as we have remarked in the famous Place. Such a Right did GOD himself give to the Hebrews, over the Potestate of the Cannanites, (Deut. xx. 14.)

2. But for the Debt of a State, Children already born, as being Members of that State, may be obliged, no less than the Parents themselves. But this Reason cannot hold for those that are yet unborn, but some other is required; as the express Consent of the Parents, joined to the Impossibility of having otherwise wherewith to keep the Children that are born to them, on which Account they are even authorized to render them Slaves for ever. There may be also a tacit Convention between them and their Master, grounded on the Master’s finding Virtuus for the Children that are born: But in that Case they engage the Liberty of their Children only till the latter have, by their own Labour, satisfied for those Expenses. If any Right beyond this be allowed to the Master over them, it seems to be granted by the Civil Laws, which sometimes give to Masters more than Equity permits.

IX. Among those Nations where this Right of Bondage over Captives is not practised, the best Way will be to exchange Prisoners; and, next to that, to release them for a moderate Ransom. Neither can one positively rate the Sum. But common Humanity teaches us, that it should not be so extravagant, as not to leave the ransomed Person the Necessaries of Life. For the Civil Law allows this even to those, who, by their personal Act, are fallen into Debt. In some Places the Price is determined by Cartels, or regulated by Custom, as formerly among the Greeks, the Ransom was a 4 Mina, and in our Days


VII. (1) Or rather by Virtue of the Convention, express or tacit, which he has made with the Conqueror, for sparing his Life. See what I have said above, Chap. VII. of this Book, § 6. Not. 2.

IX. (1) That is to say, about ten Crowns of French
Chap. XV. War and Peace.

669 Days a Month's Pay. Plutarch 3 tells us, that the Wars between the Corinthians and Megarics, were waged mildly, and as became Kinmen. If any one were taken Prisoner, he was entertained by his Captor as a Guest, and, upon his bare Word for paying his Ransom, he was sent Home: Whence came the Name of hospes, a War Guest.

2. But more heroick is that of Pyrrhus, highly applauded by Cicero 4.

Nec mi auror paco, nec mi pretium dederitis, Forro, non aura vitam cernamus utrius. Quorum virtutis belllfortuna pepercit, Eorundem Libertati me parere certum est.

No Gold I seek, no Ransom shall you pay. The Sword alone our Difference shall decide: But those who Valour the Lot of War respect, I am resolved their Liberty to spare.

No Doubt Pyrrhus thought his War just, yet looked upon himself obliged to restore them their Liberty, whom pliable Reasons had engaged against him. Xenophon commends the like Act in Cyrus. And Polybius, that of Philip the Macedonian, after his Victory at Cheronasa. Curtius, that of Alexander to the Scythians: And Plutarch observes, of King Ptolemy and Demetrius, that they trove who should prevail in Civility to the Prisoners, as much as in Battle. And Dromichetes, King of the Getes, 5 having taken Lygmaclus Prisoner, entertained him as his Guest, and thereby engaged him, being an Eye-Witnefe of both the Poverty and Civility of the Getes, ever after to desire such People for his Friends, rather than Enemies.

French Money. Our Author has probably taken this from Aristotle, who however does not ascribe this Custom to the Greeks; he gives it only as an Example of Things arbitrary in themselves, which are regulated in a certain Manner, by the Laws and Customs of States, but does not say amongst which it was established. Ethic. Nicomach. Lib. V. Cap. X. And that the Ransom of a Prisoner of War was not fixed at a Mine, according to the Custom of the Greeks, I find a clear Proof in Demosthenes: For, in speaking of some Greeks taken by Philip of Macedon, he says, that one of those Prisoners borrowed for his Ransom three, another for, Mine, and others more or less, according to their Ransom was rated. Orat. de nul. obit. Igantion. p. 222. A. Edit. Bofil. 1572.

2. In the War made by the French against the Spaniards in Italy, the Ransom of an Herfman was a fourth Part of his Year's Pay, but the Captains, and other superior Officers, and Prisoners taken in a Battle, or a Siege, were not included in this Rate. This MARIANA tells us, Lib. XXVII. Cap. XVIII. Grotius. 3 Quaest. Graec. p. 295. B. Vol. II. Edit. Wachol. (De Offic. Lib. I. Cap. XII. Tiberius, the Christian Emperor, acted with the like Generosity in regard to the Persians, and MENANDER, the Pretor, prays him for it. (Cap. XVII. p. 141. Edit. Huschef.) MARIANA prays SIBDIUS for the fame Conduét, (Lib. VI. Cap. III.) as also SANCHE King of Кафила: De rebus Hispanic. Lib. XI. (Cap. V.) Grotius.

CHAP. XV.

Moderation in obtaining Empire.

If there be some Rules of Equity which we cannot dispence with, and some Acts of Humanity which we laudably exercise towards private Persons, tho' not bound to it in Rigour, we are so much more obliged to observe the former, and it is so much more commendable to practice the latter, towards a whole Nation, or part of one, as the Injury done to a great Number of People is more enormous, and the good done to a Multitude is more considerable, than that which we do to a single Person. As other Things may be obtained in a just War, so the Right of

1. How far internal Peace allows the gaining of Empire.
Of the Rights of

the Sovereign over a People, and the right which the People themselves have, in Regard to the Sovereignty, may be acquired; but only so far as the Degree of the Punishment due to their Crimes, or the Value of any other Debt, may justify. To which we may also add, the Necessity to avoid some extraordinary Danger. But this last Reason is for the most part joined with the other two, which yet, either in making Peace, or in managing a Victory, is chiefly to be considered. For in other Caves we may abate of our Right, from a Principle of Goodness and Indulgence, but in a publick Danger it is a cruel Compasion to truft too much to a conquered Enemy. Thus Jacorates addresses Philip, 'It will be necessary for you to far to subdue the Barbarians, as to secure your own Country from all Danger.'

2. Agreeably to this our Christian Disces teach us, that the End of War is to remove those Things which disturb Peace. Before the Days of Nims, as we have before observed out of Trogus, the Custom was rather to defend the Bounds of a State, than to enlarge them. Every one's Dominion was limited within his own Country. Kings did not seek for Empire to themselves, but Glory to their People; and contenting themselves with the Victory, would not rule over the Conquered. To which State St. Augustin would reduce us, if possibly he could. Let them consider, says he, that it does not belong to good Men to endeavour at the enlarging their Dominion: To which he adds, It is a greater Happiness to have a peaceable Neighbour, than to subdue an ill one in War. And the Prophet Amos, (Chap. i. ver. 23.) highly blames the Ammonites, for their eager desire to enlarge their Borders, by encroaching on their Neighbours.

III. The prudent Moderation of the old Romans comes very near to this exemplar Innocence of the primitive Times. What would our Empire now have been? (says Seneca) if a sound Policy had not intermixed the Conquered with the Conquerors. Our Founder Romulus, (says Claudius, in Tacitus) was so wise, that he made those that were his Enemies, the same Day Citizens; and he tells us, That nothing so much contributed to the Ruin of the Lacedemonians and Athenians, as their excluding the Conquered as Strangers from the common Rights of their Citizens. Livy highly praises the Roman Republic was aggrandized, by giving the Freedom of Citizens to its Enemies, after they were conquered. Histories give us the Examples of the Sabins, Albans, Latins, and other Italian Nations; till at last, Cesar led the Gauls.


This Passage is in Herodian, Hyl. Lib. VI. Cap. II. Num. 9. Edit. Becher. I see no Reason for our Author's having put in the Beginning of it, ex eo fine idoneum, instead of ex eo quo fuit invenit. The Correction is not at all necessary, admitting our Author had believed the Reading faulty.

III. (1) Quid belli effet imperium, nisi falsa prorsus praesidium velit, pacemque fit alterius? De ista, Lib. II. Cap. XXXIV.

2 At Cesar noster Romulus tandem sapientia victorit, ut plurimos populos eis diis fictis, dein civitatis, babuiscer. Annal. Lib. XI. Cap. XXIV. Num. 7.


4 Fultis, eximia moximur, angere Romam, utique in civitatis accipientes? Lib. VIII. Cap. XIII. Num. 16.

5 Gaius Cesar in triumphant ductum, idem in Car- rion. This is a Kind of a Song, made by Perions discontented with the Government, as Sueton- us informs us, in the Life of Julius Cesar, Cap. LXXX. from which our Author took this Verse.
War and Peace.

in Triumph, and then introduced them into the Senate. Cæresalis, in Tacitus, 6 thus addresses the Gauls, You yourselves generally command our Legions, you govern these, and the other Provinces; you are denied or debased nothing: And he adds, Wherefore have Peace, and reverence a City where you enjoy the same Right as the Conqueror. Lastly, what is very admirable, all within the Compas of the Roman Empire, by the Decree of the Emperor Antoninus, 7 were made Citizens of Rome, which are the very Words of Ulpian. After that, as Modejnius 8 observes, Rome was the common Country of all that were under its Dominion. And thus said Claudian of it,

9 Hujus pacisæ debeat maribus annes, Quod cum illi gens una finitum.

We owe this Union of so many States To her pacific Maximus.

IV. 1. There is another Kind of Moderation in Victory, to leave to the Conquered, either Kings or People, their own Government. Thus Hercules to Priam,

Vitam parvi viæs lacrymis, Suecip, dixit, Reo tor lobenas, Patroque fade celius falto, Sed jeostra fide meliore tene.

Win by the Tears of a disabled Enemy, Once more (says he) receive the Reign of Empire, Fill once again, the Throne of your Progenitors; But keep your Faith with more Integrity.

The fame Hercules having conquered Nebus, gave his Kingdom to his Son Neftor. Thus the Perjim Monarchs left their Kingdoms to the conquered Kings. So did Cyrus to the King of Armenia, and Alexander to Porus. This 2 Seneca much commends, To take nothing from the vanquished King but Honour. And Polybius 3 admires the Moderation of Antigonus, that when he had Sparta in his Power, he left it to the Citizens, Their ancient Government and Liberty. Which Act, he says, acquired him great Praife throughout Greece.

2. Thus the Cappadocians were permitted by the Romans to ufe what Form of Government they pleased; and several other Nations, after the War, were left free.


7 In Orbe Romano qui sunt, ex Constitutione Imperatoris Antonini, circa Romani officii sunt. Digidet. Lib. I. Tit. V. De Statu Romanorum, Leg. XVII. This was the Emperor Caracalla, and not Antoninus Pius, as is said in Novell. LXXVIII. of Justinian, Cap. V. nor Marcus Antoninus, to whom Aurelius Victor attributes the Confitu- tition in Qufition, De Caesaribus, Cap. XV. Num. 13; upon whose Authority Grotius seems to determine in Favour of the latter Emperor, in his Sparsiores Forum ad jus ius Justiniani, p. 75. Edit. Angil. Neither was it from a Motive of Moderation, or good Policy, that Caracalla made all the Subjects of the Empire, who were FREEMEN, Citizens of Rome; but to encreas his Finances, by multiplying the Profits and Exchequers, which he de- rived only from Roman Citizens, upon Occasion of several Things that Strangers had no Share in. This the Learned have long ago observed, chiefly from the express Words of Dion Cassius, Except. Periöse. p. 744. And after them the late Baron Spanheim has exhausted the Subject, in his excellent Work, entitled Orbis Romanus, Deiftills li. Cap. I. & seq. 

8 Roma communis sustra patria, & &c. Di- gedit. Lib. L. Tit. I. Ad Municipalum, &c. Leg. XXXIII.

9 In fæcundum Confalut. Silil. ver. 154, 159. IV. (1) Troad. ver. 725. & seq.

2 Si verum solumnum quaeque fuum tuto reliquit apud cum patriam, reponique ex unde deciderat: Ingenti inceramento fugiunt huius ejus, qui contentus fuit, ex Rege visiis nullis, posteri grauis, famine. De Clement. Lib. I. Cap. XXI. The whole Patfage is well worthy of being read: Especially what follows immediately, where the Philosopher fays, that to act fo is to triumph over Victory itself, and to flew in, the most evident Manner, that the Victors found nothing amongst the Vanquished worthy of him. Hæc etiam ex victoria fui triumphare, et harumque, ntilis, quod dignum effe victoria, apud victores invenire. Pumpe the Great le fignose, King of Armenia, Part of his Dominions, as Eutrophius informs us, Bvrcas, Hjfi. Roman. Lib. VI. Cap. X. Grotius.

3 Lib. V. Cap. IX.
Of the Rights of Book III.

Carthage was left free, to be governed by her own Laws, as the Rhodians pleaded to the Romans, after the second Punic War; and Pompey, (fays Appian) Of the conquered Nations be left some free. And Quintius answered the Athenians, crying out that there could be no firm Peace, till Philip the Macedonian were driven out of his Kingdom; they had perfectly forgot the Cufmum of the Romans, to spare those they had conquered; adding this, That a great Soul was always the moft mercifull to the Vanquished. And Tacitus informs us, That nothing was taken away from Zorines when he was conquered.

VI. Or by Tributes, and the like Impositions.

V. Sometimes by placing of Garrisons.

VII. Profits arising from this Moderation.

4 This the Embassadors of Rhodis paid to the Roman Senate, "Ne alius populos enumerans, Carthago libera cum suis legisbus sit." Livy, Lib. XXXVI. Cap. LIV. Num. 25. See what is remarked upon this Liberty, left by the Romans to conquered Kings and States, Book I. Chap. III. § 21. Note 21.

5 Bell. Mithridat. (p. 257. Edit. H. Stob.) To underhand the Condition of those free States read Polybius, Exerc. Legat. Num. 9. and Suttorius, in the Life of Julius Cesar, (Cap. XXV.) There are also some Things well worth reading upon this Head, in Francis Guilliam, De Rebus Helvetiorum, (Lib. I. Cap. VIII.)

Grotius. 6 Lib. XXXIII. Cap. XII. Num. 5, and 9.

7 Sic Zarfin vatis nihil crepatam. Anna. Lib. XII. Cap. XIX. Num. 3.

8 Pejin left the Crown to Attalbus the Lombar. Grotius. 9 King Pejin had neither in the first nor second Expedition he undertook against Attalbus, made himself Master of all that the Lombards possessed in Italy. He had only besieged Pavia, the Capital of their Kingdom. It is true, that as he came into Italy, at the Solicitation of Pope Stephen, he was inclined with demanding of Attalbus, by the Treaty of Peace, the Restitution of the Exarch of Ravona. See Eginhard, De vita Caroli Magni, Cap. VI. with the Note of the last Edition; as also the Authors cited by Father Daniel, Hist. de France, Tom. I. p. 371. & ssq. Edit. Anglat.

V. (1) Or rather by the ten Embassadors, sent by the Romans to conclude a Peace with Philip, "Pufebrum hic decretum est," &c. Livy, Lib. XXXIII. Cap. XXXI. Num. 2.

2 But the fame Flaminius afterwards gave up this Article, as Polybius informs us, Exerc. Legat. Num. 9. and Plutarch, Vit. Tit. & Flamin. (374.) Grotius.


2 Porari finguia audiverunt focius putionis quam univerfa teni poft. Lib. XXXVII. Cap. XXXV. Num. 6.

3 Upon Occasion of Alexander the Great, who after having conquered a great Part of the World, at the Age of thirty-two Years, was in Pain about what he should do afterwards. Appollon. p. 267. D. So Dion Cassius obintus, that Augustus was praited for his Moderation, in containing himself with the Dominins he possessed. Grotius.

The Pagell of Dion Cassius is in Lib. LIII, except
Darius’s Embassadors tell Alexander, * A foreign Empire is dangerous, it is hard to hold what one cannot grasp. It is easier to conquer some Places than to keep them. How much more easily do our Hands take than they can hold!*

2. Which *Calanus the Indian, and before him Oebarus, * Cyrus’s Friend, explains, by the Comparison of dry Leather, which when pressed down with your Foot on one Side, rises up on the other. And *T. Quinctius, in Livy, * by the Similitude of a Tortoise, who when he draws himself into his Shell is safe from Harm; but as soon as ever he peeps out, is presently in Danger. Plato * in his third Book of Laws, thus applies the Saying of Hesiod, *Omnim dimidium plus, One half is better than the whole. * And Appian * observes, that when some Nations desired to be admitted under the Roman Government, they were refused; and to some Nations they appointed Kings. In the Opinion of Scipio Africanus, the Roman Empire in his Days was so large, that to desire more would be but Covetousness; to keep quietly what they had, would be sufficiently happy. Wherefore that Prayer in which, at their Solemn Purgations, the Romans used to intreat the Gods to prosper and enlarge their Empire, *he thus amended, that they would prefer it in perpetual Safety.

VIII. The Lacedemonians, and in the Beginning, the Athenians, never pretended to any sovereign Power over conquered Cities, they only insisted that they should use the same Form of Government with themselves. The Lacedemonians being under an Aristocracy, and the Athenians under a Democracy, Thucydides, Herodotus, and Demosthenes inform us, and also Aristotle himself, in his eleventh Chapter of his fourth Book, and seventh of the fifth of the Republick; to which very Thing, Hecatus, a Writer of those Times, makes this Allusion in his Comedy,

*Graecia antiqua, aperueut Seuera*

except the first Words, which our Author adds to it, *no Doubt, from quoting by Memory,* and which exprefs the Approbation given by the Publick to the Moderation of Augustus. The Historian relates only that what Emperor believed his Duty to do, and the Advice he gave to the Senate upon it. p. 622. C. Edit. H. Steph. But Tiberius, his Successor, praled him for that, amongst other Things, in his funeral Oration, Lib. LVI. p. 624. E 625. B. See also p. 678. A.

4. In the Paffage cited by our Author in this Place, and which he takes from Quintus Curius, there is not per commendum, but prae-gravers, that is to say, too weighty an Empire. Petrarca 4 praegraphus imperium, Difficile est conti-

5. By this Comparison the Indian Philosopher intended to signify, that Alexander ought not to remove from the Midst of his Dominions; for in treating upon the Extremity of the Leather the Moment was occasioned, which caused when he put his Foot upon the Middle of it. Plutarch, Vit. Alex. p. 701. E.

6. Our Author cites nobody here, but he took this Fact from Aristotle, which he relates in his Ele-

7. Case the same Tidings, (Cf. Lib. XXXVI. (Cap. XXII. Num. 6. 7.) Plutarch has the same Tidings. (Vit. Flamin. p. 378. D.) Gro-


9. He says, that he himself was witness to the Embassadors of Nations which were rejected. Pra-

10. Cf [Africanus posterior] quam Aufanum con-

11. Plutarch has the
Tactitus mentions the same Thing done by Artabanus, in Regard to Seleucia; he established Aristocracy for his own Interest, because popular Government comes nearer to Liberty, and the Dominion of a few Nobles some what resembles arbitrary Power. But whether such Alterations make for the Security of the Conqueror, it is not my Business to determine.

IX. But if it be not perfectly safe to leave to the Conquered their entire Liberty, yet it may be so moderated, that some Part of the Government may be left to them, or their Kings. Tactitus tells us, that it was the Custom of the Romans, to make even Kings Instruments of Subjection. So Antiochus is called, The richs of all the Kings that were subject to them. Kings, Subjects of the Romans, in the Commentaries of Mufonius. And in Strabo, about the End of the sixth Book. Thus Lucan,

5. Atque omnis Latit, quae servat purpura sermo.

And every Prince that serves the Roman State.

Thus the Government continued among the Jews, in the Sanhedrim, even after Archelaus had been stript of his Kingdom. And Evagoras, King of Cypris, as Diodorus relates said, he would obey the King of Perseia, but that as one King did another. And Alexander offered to Darius, after he had overcome him, that he should rule over others, provided he would obey him, his Conqueror. We have already treated of the Manner how a Government may be mixed. Sometimes conquered Kings had Part of their States restored to them, and at the same Time, Part of the Lands was left to the ancient Possessors.

X. Yet when all Sovereignty is taken from the conquered, there may be left to them their own Laws, about their private and publick Affairs, of small Moment, and their own Customs and Magistrates. Thus Pliny's Epistles tell us, that in Bithynia,

2. Id major acciderat, &c. Annal. Lib. VI. Cap. XLIII. Num. 3.

3. They may certainly be very much to his Prejudice, on Account of the particular Genius of every People, and their Attachment to that Form of Government to which they have been accustomed.


3. By Pollio Valerius.


5. Phæræt. (Lib. VII. ver. 228.) See also the Panegyrick in Honour of Maximinianus, (Cap. XV.) Grotius.

6. That is so far, they judged according to their own Laws, as did most of the People dependent upon the Roman Empire. For the Rest, before Archelaus was banished to Pergamum, the complex Sovereignty was no longer in the Traged Nation. See the Note of Gronovius upon this Place, and what is said above, Book I. Chap. III. § 22. Note 3.

7. It was upon those Conditions he concluded Peace. Bibl. Hist. Lib. XV; Cap. VIII. p. 482.

Edit. H. Step. See a little above, in the foregoing Chapter, and same Page.

8. In the same Manner the Great King, or King of Perseia, had other Kings under him, as appears by this Verse of Eschylus,


Bæotiae bæotian: οἰκογενέως.

Kings subject to a greater King.

In Perseia. There were antiently such Kings, dependent upon other Kings, in Italy, as Servius observes on B. X. of the Aenid, (ver. 655.) And there are still few amongst the Turks, as Leunclavius relates, Lib. XVIII. Grotius.


X. (1) The Emperor Augustus, as Philo the Jew observes, was as careful to preserve and confirm the Laws of every Nation, as to maintain those of the Romans; in Legat. ad Cajum. (p. 1014. B. Edit. Parif.) Grotius.

Mr. Byner, in the ninth Chapter of his Difertation upon the ninth Law of the Digest, De Lege Rhod., (p. 90.) is for translating here, in stead of The Laws of each People, as our Author renders it, the antient Estabishments of each People: But he confesses at the same Time, that this principally
Chap. XV.  War and Peace.

Bithynia, a Proconsular Province, the City Apamea was indulged to govern their State as they pleased themselves. And in other Places, the Bithynians had their own Magistrates, and their own Senate. So in Pontus, the City of Amisus, by the Favour of Lucullus, was allowed its own Laws. The Grecs left their Civil Law to the conquered Romans.

XI. 1. Another Right which ought to be allowed the Conquered, is the Exercise of their ancient Religion; unless they themselves, being convinced, are devisous to change it; which Agrippa, in his Oration to Caius, (which Philo gives in his Relation of his Embassay) proves to be both very agreeable to the Vanquished, and not prejudicial to the Victor. And in "Josephus, both "Josephus himself," and the Emperor Tiberius," objected to the rebellious Jews at Jerusalem, that, by the Favour of the Romans, they might use their own religious Ceremonies with so much Liberty, that they might drive away Strangers from their Temple, even at the Peril of their Lives.

2. But if the Religion of the Conquered be false, the Conqueror ought to take Care, that the true one be not opprest; which Conjunctive did, by weakening Licinius's Party; and after him the antient Kings of France, and of other Nations.

XII. 1. The last Advice is, where the Empire is entirely and absolutely obtained, there we should treat the Conquered with Gentleness, and in such a Manner that their Interests may be blended with those of the Conqueror. Cyrus bid the conquered Abyrians be of good Courage, telling them that their Condition should be the same it was before, except it be, that they should enjoy their Houses, Lands, their Authority over their Wives and Children, as before; and if any one wronged them, he and his would take Care to see them safe.

We read in Salut. 1. The Romans chose rather to gain Friends than principally regards the Laws. For the Reft, the Reader may fee, and examine what the same Author advances in this Chapter; that the Nations, whom the Romans permitted to retain their own Laws, had this Liberty only so far as their Laws inculcated nothing contrary to the Roman Laws.

2. Habuife [Apameus] prævaluit & exteffimus, arbitor ex rempublica absumus. Epit. LVI. The City of Sippe, tho' dependent upon the Persians, was governed democratically, as Appius Alexander informs us, Bell. Mithrid. So the Greeks, after their falling under the Dominion of the Romans, retained a Shadow of their ancient Liberty. Jubaus [Athens & Lacedemoniis] reipub licum uberrim, & reliquiam libertatis

XI. 2. If it be better that they should have some Kind of Religion than none at all, as we have observed above, in giving the Words of the Emperor Scipio, (Chap. XII. of this Book, § 6. Note 1.) The Grecs declared of old, that they would compel nobody to embrace their Religion. Procopius, Grotius, Bell. II. (Cap. VI.) Grotius. Dr. Bill. Taf. Lib. VII. Cap. X. Grotius, p. 949. Grotius.

3. Provided it be done by lawful Means, that is to say, without having Recourse to Violence, except to oppose those who use it first, to establish or advance their Religion; Otherwise, all Methods but that of Persuasion are unlawful, both by natural Right and revealed divine Right.

XII. 1. Al hic Populo Romano, jam a principio, insip, mitii viuer, animos quam servos, sanctos, tutique rights, voluit, quibus quam cures, impietatis, (Bell. Jugurth. Cap. CIX. Edit. Wolf.) The Lacedemonian Embassadors say in the Cyrus, that the Method of extinguishing the Ani moity which subsists between two Enemies, is not for the Victor to abandon himself to his Temperament, and to make the utmost of his Superiority over the Vanquished, but to be reconciled with the latter, and to establish the Peace: Conditions; for then, being gained by the Victor's Generosity, he believes himself obliged in Honour to shew his Gratitude, and is far from having any Thought of violating his Engagements. Lib. IV. (Cap. XIX. Edit. Osm,) Grotius.

The Collection of Grotius, already quoted, may be seen again in this Place. Part II. Chap. 56. & seq., where, upon a Paflage of Tacitus, he cites a great Number of Authorities, which confirm the Reflections of our Author.

Slaves,
Slaves, and thought it fæfer to govern by Love than Fear. In the Days of Tacitus, the Britons readily made their Levies, paid their Tributes, and performed all Duties enjoined them by the Romans, whilst they were not ill-treated; but they could not easily bear Wrongs, being so far conquered, as to be Subjects, not Slaves.

2. The Princian Embassador being asked in the Roman Senate, what Sort of Peace the Romans might expect from them, replies, If you shall grant a good Peace, it will be firm and lasting; if a bad one, it will not hold long. And he gives the Reason. Do not think that any People, or single Person, will ever continue longer in a Condition that be does not like, than be is absolutely forced to it. So said Camillus, That Empire is most secure, which is agreeable to those over whom it is exercised. The Scythians told Alexander, There is no true Friendship between the Lord and the Slave; and, in the midst of Peace, the Rights of War remain. And Hermocrates, in Diodorus, It is not for glorious to overcome, as to use the Victory with Humanity. In Order to make a right Use of Victory, the Saying of Tacitus ought always to be remembered, that We cannot finish a War in a more happy and glorious Manner than by pardoning the Vanquished. "Julius Cæsar, in a Letter he wrote when DiCator, says, Let this be the new Way of conquering, to secure ourselves with Mercy and Liberty.

2. Iff Britanni seleptum, &c. Vit. Agricol. Cap. XIII. Num. 1. 3. It is not he who gives this Reason, but the Senate itself, or the Majority of the Senate, who generously took in good Part, and considered as Sentiments worthy of a brave Man, and a Freeman, what some amongst them had confided as too bold, and tending to excite other Nations to Rebellion. Vide fi pacem inquit [Consul] remittat, &c. Lib. VIII. Cap. XXI. Num. 4. & seg. What follows will confirm our Author's Position. In pacem eft fidam, ubi voluntarii pacati sunt; neque e loco, ubi feruitudini eft volenti, fidam sperandum eft.

C H A P. XVI.

Moderation concerning those Things which, by the Law of Nations, have not the Benefit of Pofliminy.

1. HOW far Things taken in a just War may be the Captors, I have declared above, from which are to be deduced, what are recoverable by the Right of Pofliminy; for these are to be esteemed as not taken. But Things taken in an unjust War, I have already said, are to be restored, not only by the immediate Captors, but by others also, who shall happen to be possessed of them on any Account. For no Body can make over to another more Right than he has himself, say the Roman Lawyers; which Seneca briefly explains, No Man can give what he has not to give. If the first Captor did not become lawful Proprietor of them, according to the Rules of true Justice, then he cannot possibly be fo, who derives all the Title he can have from him. Therefore the Right of Property which the second or third Poeflefor may have, is what we call external, that is, he is entitled to Defence by all judiciary Power and Authority, as if he were the right Owner; yet if he makes Use of this Right against him from whom the Things were unjustly taken, he acts didiously.

2. For what some eminent Lawyers have decided concerning a Slave, who being taken by Robbers, afterwards fell into the Hands of the Enemy, that he was to be considered as a Thing stolen, though he had been Slave to the Enemy, and returned by Right of Pofliminy. The fame may be


2. Quamvis nemo potest, quod num habet, dare. De Benefic. Lib. V. Cap. XII.

3. The Law is cited above, Chap. IX. of this Book, § 16. Note 3.
svered from the Law of Nature, concerning him, who being taken in an unjust War, and afterwards, by a just War, or some other Accident, comes into the Power of another. For by internal Right, there is no Difference between an unjust War and downright Robbery. And Gregorius Neo-Cæsarianus, being consulted, made a correspondent Answer, when some of the Inhabitants of Pontus 4 had recovered some Goods taken away by the Barbarians.

II. 1. Therefore Things so taken, ought to be restored to them from whom they were taken, which we frequently done. 5 Livy, relating how the Volsci and Aqui were overcome by L. Lucertius Tricipitins, says, That the Spoil was exposed for three Days in the Field of Mars, that every one might have that Time to come and acknowledge his own, and freely take it away. And the same Author in another Place, speaking of the Volsci, defeated by Pofhumius the Dicitator, says, 6 Part of the Spoil was restored to the Latins and Hernici, upon their owning of it, of another Part be made Pofcake. And again, 7 Two Days were allowed to the Owners to come and claim their Goods. And the same Author, speaking of the Samnites Victory over the Campanians, tells us, 8 It was a most joyful one to the Conquerors, for they had retaken 7400 Prisoners; a vast Booty for their Confederates; and the Owners weresummned by Proclamation, to own and take their Goods by a certain Day. And a little further he gives us the like Account of the Romans 9. The Samnites endeavouring to take Interannna, a Colony of the Romans, but not able to hold it, they plundered the Country, and carrying off a great Number of Men, Cattle, and other Things, they accidentally fell into the Hands of the Roman Conful, returning Conqueror from Luceria; nor did they lose only their Booty, but, being encumbered with their heavy Baggage, were themselves routed and slain. The Conful, by Proclamation, summing the Owners to come to Interannna, to fetch their Goods, leaving his Army there, went to Rome, on the Account of charging Officers. The same Author also, in another Place, speaking of the Booty which Cornelius Scipio had taken at Hilpa, a City of Portugal, says thus, 10 It was all exposed to View before the City, and Leave given to the Owners to take their own, the Rest was delivered to the Quo-flor to be sold, and the Money arising from thence distributed to the Soldiers. 11 After the Battle of T. Gracchus at Beneventum, the whole Prey, except the Prisoners, and what Cattle were not owned within thirty Days, were given to the Soldiers: As we read in the same Livy.

2. Polybius writes of L. Æmilius, when he had conquered the Gauls, 12 He restored the Spoils to those that came for them. 13 Plutarch and Appian relate, that Scipio did the same, when at the taking of Carthage, he found there many Things consecrated to the Gods, which the Carthaginians had brought thither from the Cities of Sicily, and elsewhere, (viz. restored them to their first Owners.) And so does Cicero, in his Oration against Verres, concerning the Jurisdiction of Sicily. 14 The Carthaginians had formerly taken the City of Himera, that had been one of the flattest and richest of Sicily; Scipio looking upon it as an Aëthiopian of the People, when the War was ended by the taking of Carthage, took Care that their proper Goods should be restored to all the Sicilians. And the same Author does largely speak of the same Act of Scipio, in his Oration against Verres, concerning Statues.

4 He is followed in this by Pet. Ant. de Petra, De Fatoffectu Principis, Cap. III. Quæst. IV. Bruninouis, De Honetatis, Conclus. CCXII. Grotius. 5 II. (1) Et auget gloriam, &c. Lib. III. Cap. X. Num. 1. 6 Præs. part, fæc. cognoscemus, &c. (Lib. IV. Cap. XXIX. Num. 4.) 7 Bidaum ad reeognosferas res datam demis. [Lib. V. Cap. XVI. Num. 7, where he relates the Defeat of the Tarquiniens.] 8 Et qualis latifamin, &c. Livy, Lib. X. Cap. XX. Num. 15. 9 Altera exercitus Sammites, &c. Iadem. ibid. Cap. XXVI. Num. 16. & seq. 10 Pugnatum hæc procul Hilpa, &c. Iadem. Lib. XXXV. Cap. I. Num. 11. 11 Præs. omnis præterquam, &c. Iadem. Lib. XXIV. Cap. XVI. Num. 1. 12 Lib. II. (Cap. XXXI.) Grotius. 13 Alfo Didoros Siculus, Excerpt. Pirese, and Valerius Maximus, B. I. Chap. I. Num. 6. Alfo the Humanity of the late Scipio Africanus, was eminently famous; for when he had taken Carthage, he sent letters to all the free Cities of Sicily, that they should, by their Embassadors, fetch back all the Ornaments of their Temples, which the Carthaginians had taken away, and to take Care that they were set up again in their former Places. Grotius. 14 Etenim ut final P. Africani, &c. Lib. II. Cap. XXXV. Thus
Thus the Rhodians restored four Ships to the Athenians, which they had recovered from the Macedonians, that had formerly taken them from the Athenians. So Phocas the Aetolian (as Livy 11 says) thought it equitable, that all that had belonged to the Aetolians before the War, should be restored to them. Neither did T. Quinctius deny it, if the Demand had been only of Cities taken in War; and if the Aetolians had not broke the Conditions of the Alliance. Nay, even those Goods which had been confiscated at Ephesus, and which the Kings had afterwards made their own, the Romans 12 restored to their former State.

III. But if such Things should come to one in Way of Trade, may he not charge him, from whom they had been taken, with as much as they cost him? He may, as we have already 6 said, in Equity, so far as the Recovery of the Possession of those desparate Things, 1 might probably cost him, from whom they were taken. If then those Charges may be demanded of him, 2 why may not also our Pains and Hazard be valued, as if a Perfon should recover another Man's Goods out of the Sea, by Diving? Appollite to this is the Story of Abraham's returning Conqueror of the five Kings to Sodom: Moses says, He brought back all those Things, (viz. that they had taken away), as related before, Gen. xiv. 16.

2. Neither can the Offer made by the King of Sodom, Ver. 20, 21, 22, 23, 24. to refute to him the Priifoners, and to keep the Reft himself, as the Reward of his Pains and Hazard, be otherwife applied. But Abraham 1 being a Man not only of a pious Mind,

11 Phaneas & pro seificiell bellis, &c. Livy, Lib. XXXIII. (Cap. XIII. Num. 9. & seq.) Pompy restored Panormus to Arcadi, and Pyliamenis, Eutrophius, Brev. Lib. VI. Cap. XI. By the Treaty of Alliance between the Pope, the Emperor Charles V. and the Republik of Venice, against Solyman it was agreed that each fhould recover what they had been defpoifled of, as we find in Paru- tu's History, Lib. VIII. and, in Vereu of that Claude, the Illand of Cephaleniam, which had been taken by the Spaniards, was restored to the Venetians. There is also a Paffage in Anna Commen- na to the fame Effect, in that Part of his History which treats of Godfrey, Lib. XI. Cap. VI. and Grotius.


III. (1) But see what is said in the Place referred to in the Margin, Note 3. The Truth is, that it is proper to diftinguish, whether a Thing taken in an unjuft War were honestly bought or not; that is to fay, whether the Buyer did or did not know, that the Thing fell into the Seller's Hands, or the Hands of thofe from whom he had it by fuch a Title. If the Buyer knew it, that it did, he poififfes it difpoffeflly, and, in confequencé, ought to make a simple and abfolute Reftitution. If he did not know it, and there was no Reafon to fufpeét it, he has all the Rights of an honurf Possiflor, and confequently he is not bound to reftore, what he believed, and had Reazon to believe, was lawfully acquired, without receiving all he had gi- ven for it of his own; according to the Principles which I have laid down in the Chapter here re- ferred to, and in that of Pufendofe, where the fame Subject is treated. So that the Whole depends upon knowing, whether, in Cafe the Buyer was not ignorant that what he bought was taken in a War, he believed, or had Reazon to fufpeét, that the War was unjuft.

2 Our Author here proceeds imperceptibly to the Application of the Question he treats of, to the Things which the Enemy, from whom they were taken, had himfelf acquired by Arms in an unjuft War. And here it is certain, that tho' in taking fuch Things from the Enemy, they are known to be the Property of another, that does not leffen our Right to demand a Reimbursement from the ancient Proprictor of what it coft us to get Possifion of his Effects; and the Demand being made by the Expences of the Expedition, but allo the Pains taken, and Dangers incurred, to which we were not obliged to expose ourselves, for the Recovery of another Man's Goods. But farther, if the Perfon to whom the Effects be- longed, having Opportunity and Means to endeavour their Recovery, remained life, and caufed to abandon them, and, in Confequencé, the other, who has taken them from the unjuft Possiflor, then acquires them fully and abfolutely. See what I have laid above, Chap. VI. of this Book, § 1. Note 2.

This is what the Rabbi Jacchades remarks, in his Commentary upon Daniel, Chap. V. ver. 17. Sulpicius Severus fays, that the Patriarch, after having given the tenth Part of the Booty to Mifchofed, returned the Reft to thofe from whom it had been taken. Eidequem (Mel- chofedek) decimas prædai donat, quibus quibus operis erant, velludit. (Hift. Sacra, Lib. VI. Cap. VI. Num. 6.) St. Ambrofe, speaking of the fame Thing, fays, that Abraham was rewarded by GOD, because he would receive no Recompence from Men. Ideque quoniam fui mercedem, ab ho- mine non quæsitis, a DEO acceperat. De Abraham Patriarch. Lib. I. (Cap. III.) With this Admonition of Abraham may be compared something like it done by Pitanos, one of the seven Sages. He re- fufed half of the Lands which the Miflilernian of- fered him, after they had recovered them under his Conduct. He believed, as Valerius Maximus fays, that the Greatnefs of the Spoil, fhould he ac- cept it, would leffen the Glory of his Exploits. Acque etiam quonam recuperati agris — de formis judicantis, virtutis gloriae maximum præda minu- ere, Lib. VI. Cap. I. Num. I. conv. Plut- arch, speaking of Timoleon, [who accepted a magnificent Houfe and a fine Estate] obserus, that it is not dishonourable indeed to receive in the like Cafe, but that it is more glorious to refufe flch Offers, and argues the highest Degree of an emi- nent Virtue, which can deny itself those Things which it is lawful to defire. In Vit. Timothei. (in fin. p. 277. B. Vol. I. Edit. Wech.) See what we have laid above, B. II. Chap. XIV. § 6. and Chap. IV. of this Book, § 2. Grotius.
Mind, but also of a heroick Spirit, would take nothing to himself; but of the Booty, (for, as we said before, that is what is meant 4 as being his due, he gave the tenth unto GOD; he deducted the necessary Expenses of that Expedition, and some Part he desired to be given to his Confederates.

IV. As Things (taken in an unjust War) are to be restored to their proper Owner, 1 to a People, or Part of them, are to be returned to their lawful Sovereigns, or even to themselves, if they were free before this unjust Conquest. Thus was Sici

trium retaken, and restored to its Allies in the Time of Cæsu

læ, as Livy informs us. The Lacedæmonians restored the Agis of Meli 2 to their Cities. And the Cities of Greece, which had been oppressed by the Macedonians, were set at Liberty by Flaminia

ius; who, in the Conference with 3 Antiochus’s Embassadors, told them, it is equitable that all the Cities of Asia, which were of Greek Original, should be restored to their Liberty, which Seleucus, the Great-Grandfather of Antiochus, had taken by Force, and afterwards being loit, had been reconquered by this Antiochus: For, says he, those Colonies were not sent into Asia and Ionia to be subjected to the Kings of Asia, but to preserve a Nation so ancient as that of Greece, and to propagate it throughout the World.

V. It has been sometimes disputed, how long a Time is allowed, before this in-
ternal Obligation to Restitution may cease? But this Question, if it be between Subjects of the same State, is best decided by their own Laws, provided those Laws give a true Right, that sets the Conscience at Rest, and not an external Right only; which may be collected by a prudent Searching into the Words and Meaning of those Laws. But if it be between Strangers each to other, it can be decided only by just Presumptions of a tacit Drefsification; of which we have spoken enough in another Place to our Purpose.

VI. But if the Justice of the War be very doubtful, it will be best to follow the Advice of Aretus the Sicynian; who in part put the new Possessors 4 to accept of Money in lieu of them; and in part advised the first Owners rather to accept of the Value of their Lands, than run the Hazard of recovering them.

The Author expresses himself here, in the Original of this Note, as if Timoleon had refused, as well as Pithecus, what was offered him: Faustus Pithecus Timoleon, &c. whereas he did quite the contrary, as I have distinguished by the Words in a Parenthesis; for that Reaion I have changed the Turn of Expression, which conveyed a false Idea.

4 Not that the whole Booty confiscated in this, there were also, no Doubts, Things amongst that belonged to the five Kings.

IV. (1) The banished Segestines were re-es-

tablislis by the Romans, after six Years Absence. [See Livy, Lib. XXVIII. Cap. XXXIX.] The Emperor Marcus Antoninus restored those to Liberty, who had been made Slaves during the War with Avidius Cassius; and caufed also their Effects to be returned to the ancient Proprietors. [Cap-

tolinus, in Marc. Anton. Cap. XXIV.] The King of Cithæ, and other Princes, restored Cala-

trona to the Knights of that Order, whom the Mæri had deprived them of it, as Mari

ana relates, in his History of Spain, Lib. XI. (Cap. XXV.) See what has been said above, Chap. X. of this last Book, § 6. Grotius.

2 It was Lyfander who commanded their Army at that Time. Hift. Græc. Lib. II. Cap. II. Num. 5. Edit. Owen.

3 Si fili Antiochus pulchrum effe, &c. Livy, Lib. XXXIV. Cap. LVII. Num. 10. & seq.

4 V. (1) That is to say, when a Thing taken from one Subject of a State, in an unjust War, on the Side of the Enemy who takes the Booty, is taken into the Hands of another Subject of the same State.
IT may seem needless for us to treat of those that are not engaged in the War, when it is manifest that the Right of War cannot affect them; but because, upon Occasion of War, many Things are done against them on Pretence of Necce-
sity, it may be proper here, briefly to repeat what we have already mentioned before, that the Necce-sity must be really extream, to give any Right to another's Goods. That it is requisite, that the Proprietor be not himself in the like Necce-
sity. When real Necce-sity urges us to take, we should then take no more than what it requires. That is, if the bare keeping of it be enough, we ought to leave the Ufe of it to the Proprietor; and if the Ufe be necessary, we ought not to conf-
fume it; and if we cannot help confuming it, we ought to return the full Value of it.

II. 1. Moses, when he was obliged of Necce-sity to pass with the Israelites through the Country of the Edomites, he first offers to go through the Highway, and not to touch their Fields or Vineyards, and if they should want Water they would pay for it, Num. xx. 17. The fame did the Generals of the most renowned Proibity amongst the Greeks and Romans. The Greeks, in Xenophon, under Clearchus, promife the Perjians to march without doing any Damage; and if they would fell them Provisions, they would not by Force take Meat or Drink from any one.

2. Dereyllides, in the fame Xenophon, led his Army through neutral Countries, without any Injury to the Confederates. Livy 3 tells us of King Pericles, He re-
turned into his own Kingdom, through Phthious, Achaia, and Thelias, without any Damage to the Country. And Plutarch, of the Army under Agis the Spartan, They were a Sight to all the Cities of Greece, marching through Peloponnesus infuf-
fionably, civilly, and almost without any Noise. Thus Velleius says of Sylla, This would think he came into Italy, not as a revengeful General, but as a Peace-maker, be marched his Army fio quietly through Calabria and Apulia, with such particular Care of the Fruits, the Fields, the Cities, and the Men, as far as Campania. And Yally, of Pompey the Great, Whose Legions fio marched into Asia, as not only the Hands of fio great an Army, but not even fio much as their Feet, could be faid to have done the leaf Damage to any one that was peaceable. And Frontinus, of Domi-
tian, When he built Ports on the Frontiers of Ubi, he ordered the Fruits of those Places which he was to intrench, to be appraised and paid for; and the Fame of that particular Act of Justice, gained him the Credit of all Men. And Lampfidius, of Severus's Partition Expedition, He managed it with fio much Discipline, and fio great a Reverence to his own Perfon, that his Men feemed rather Senators than Sol-
diers: The Tribunes fio ready, the Captains fio modell, the Soldiers fio friendly, that whereas formerly they came, the Country People, for fio many and extraordinary Benefits, honoured him as a God. The Panegyrijt speaks of the Goths, Huns, and Alani, that

3 Tristamum, vn plu, &e. Livy, Lib. XLI. Cap. XXVII. Num. 6.
5 Patauus Sullum quosq in Italian, &c. Velle-
6us Patriculus, Lib. II. Cap. XXV. Num. 1.
6 Cojus [Pompeii] legiones fi in Amam, &c. Orat. pro Leg. Manil. (Cap. XIII.) The fame Pompey being informed, that his Soldiers committed Disorders in Sicily, during their March, ordered their Swords to be feized up in their Scab-
bards, and punished those who were found to have broken the Seals. Plutarch, Vit. Pompe. (p. 634. A.) Grotius.
7 Quam in funibus Ubiorum caffillo, &c. Frontius, Stratagem. Lib. II. Cap. XI. Num. 7.
8 Quam [Particam expeditionem] tanta dijsi-
pl. &c. Lampridius, Vit. Alex. Sever. Cap. L.
9 Nullas tumultus, nulla confulta, &c. Latin.
10 Panat. Panegyr. (Cap. XXXII. Paneg. ult. E. XII.) There are many Things in Casiodorus upon the Moderation of the Gods, in regard to the
Law, neither let them grow Infidels, because they are armed; for the Shieldds of our Army ought to protect those who wear none. To which we may add that in the sixth Book of Xenophon's Expedition, 16 We must not pretend to compel a State at Peace with us to give any Thing against their Will.

4. From which Passages we may beft understand that Advice of the great Prophet, even of him that was more than a Prophet, Luke ii. 14. Offer Violence to no Man, neither to no Man falsely, and be content with your Wages. To which agrees that of Aurelian in Vopiscus in the afore-quoted Place, 17 Let him be content with his Allowance, let him live rather on the Spoil of the Enemy, than the Tears of the Provincialls. Neither may any one think that this is only finely spoken, but not to be praefected. For neither would it holy a Man (as St. John) advise, or wife Law-Makers command what they believed not poftible to be done. Lastly, 18 What has been done we must neceffarily own poftible to be done. Therefore we have brought several Examples. To which we may add, that remarkable one 19 which Frontoinus mentions out of Scearuns, that an Apple Tree full of Fruit standing within the Camps of the Ground where the Camp was pitched, was the next Day, after the Army was gone, found with its Fruit untouched.

5. Legi 20 relating how infolutely the Roman Soldiers behaved in their Camp at Acte, and that some of them in the Night-time pillaged the Neighbouring Country that was at Peace, adds this as the Reason, that all Things were done loofely and diforderly, without any regard to military Discipline. There is also another remarkable Place in the same Author, describing Philip's March through the Country of the Denthelates; They were indeed Allies (Eys he) but the Macedonianls being in great Neceffity plundered them, as if it had been the Enemy's Country; for robbing every where, they fiel laid waife great Houses, then fome Towns, to the great Difperlure of the King, who heard his Confederates in vain calling upon the Gods and him for Affijiance. Tacitus 21 says Pellenus very much blift his Reputation, for that he preyed more upon the Allies, than Enemies. And the fame Author obferves, 22 that the Soldiers of Vitellus were scandalously flothful throughout all Italy, and only

Gunter exprefles this Regulation in his Ligerius thus:

Si quis pacifico pelle villae, demotae
Uffort, abrufo fignabitur a qua capellae.

Et pulvis cafiis fui verbera multa recordet.


19 Amennd fad contentus fit. De praeda hujus, non de laudem Provinciolum, habebat. Vit. Auct. Cap. VII.

20 Guicciardini Reafons in this Manner, Hift. Lib. XVI. Grotius.

21 Universi quoque exercitus, &c. Strateg. Lib. IV. Cap. III. Num. 13. See, in regard to Scarunus, who is himself the General and Writer here fpoken of, Gerard, John Voitus, De Hiftoricis Latinis, Lib. I. Cap. IX. The Author refers here to what Spartian relates, of the rigorous Manner in which Pescansus Niger punished the featling of a Cock, Cap. X.

22 Quinna hujus ac licentia militium, nihil in-stitutus ac discipina militium, aut imperium corum quaproecant, guberratur, Lib. XLVIII. (Cap. XXIV. Num. 9.)

23 Saei erant: Sed praper impudic, hard focus
Quant habemus finem Macedoniens populati font. 
Rerum tam fatias, quantum permans dein perjps magis nu-
nos eum eumceuerunt; non fuis magis pudicius Regis, 
quon societatem, necquecumque Deus Socialis nemo 
manca quam implantrant, adserit, Lib. XI. (Cap. 
XII. Num. 10, 11.)

24 Dum fatae magis, quam hujus, praecedat.

et eadem, quam finem abdintigantur, &c. Annal. Lib. 
XII. (Cap. LIX. Num. 2.)

25 Per anna Italic municipia defidec, tamrem 
hostipium metuerem, &c. Hift. Lib. III. (Cap. II. 
Num. 2.)

1 dreadful
dreadful to those that entertain them. And in Cicero's Oration against Verres, one of the Heads of the Accusation was this, 36 You have taken Care to have the peaceable Cities of our Allies and Friends plundered and spoilt.

6. And here I cannot omit the Opinion of some Divines, which I hold to be very right, that the King who does not give his Soldiers their just Pay, stands not only engaged to the Soldiers, but to his Subjects and Neighbours for the

7. Damages consequent thereupon, which the Soldiers, compelled by pure Want and Necessity, have done them.

III. 1. On the other Side, it is the Duty of those that are not engaged in the War, to fit still and do nothing, that may strengthen him that prosecutes an ill Cause, or to hinder the Motions of him that hath Justice on his Side, as we have said before. But in a dubious Cause to behave themselves alike to both Parties; as in suffering them to pass through their Country, in supplying them with Provisions, and not relieving the Besieged. The Corecyreans in Thucidides 2 tell the Athenians, if they would really be Neuters, they should either forbid the Corinthians to raise Men in the Country of Attica, or suffer them to do so too. The Romans 3 objected against Philip King of the Macedonians, that he had doubly broke the Alliance, first that he had injured the Confederates of the Romans, and then that he had affifted their Enemies with Men and Money. T. Quinctius urges the same in a Conference 4 with Nabis. You joy, I have not directly violated my League of Friendship with you. How often would you have me convince you that you have? But to sum up all in a few Words, by what Means may Friendship be broken? Certainly by those two chiefly, if you treat our Allies as Enemies, or if you join our Enemies.

2. Agathias tells us, he is an Enemy who does what pleases an Enemy; and Procopius 5 looks upon him to be in the Enemy's Army, who supplies them with Things that are properly useful in War. Thus said Demosthenes of old, 6 He that invents, or prepares those Things, by which I may be taken, is mine Enemy, tho' he neither strikes me, nor throws a Dart at me. M. Acilius 7 told the Epirots, who indeed had not affifted Antiochus with Soldiers, but were accuftomed of having furnifhed him with Money, he could not tell whether he should account them Enemies or Neuters. And L. Emmillus 8 the Prator complains of the Teii, that they had victuafled the Enemy's Fleet, and promifed them Wine, declaring, that unless they did the like to the Roman Fleet, he should hold them as Enemies. Plutarch mentions a Saying of Augustus Caesar, 9 That City has forfeited her Pretentions to Peace, that entertains the Enemy.

3. It would also bo very advantageous to make an Alliance with both Parties, so as with their full Conftent we might fit still in Quier, and might be permitted to do common Offices of Humanity promiscuously to them both. Livy says, 10 It becomes tho' that are Friends to both Parties, to defire Peace, and not to engage on either Side. Archibamus King of Sparta, obferving the Aeolans inclining to side with the Arcadians, write a Letter to them; with only this in it: It is good to bo quiet.

36 Titu in ejdem locis Legatus Qaefiriuis, &c. In Verr. Lib. I. Cap. XXI. Grotius. The Petitions from Note 22 to this Place are not in the first Edition. On the contrary, as the same Historian makes Queen Amolachia lay in a Letter to the Emperor Tathan, that not only joining a Prince with Arms in the Field, but to supply him publicly with all Necessaries of War, is being a Friend and Ally. Grotius, Lib. I. (Cap. III.) Grotius. Lib. XXX. Cap. XLII. Num. 8.

37 See above, B. II. Chap. XXI. § 2. Lib. I. Cap. XXXV.


Of the Rights of
Book III.

CHAP. XVIII.
Concerning Things privately done in a publick War.

I. 
WHAT we have said hitherto, does most belong either to those who command with an absolute Authority in War, or those who act by Virtue of the Orders they have received from the Sovereign. We are now to see, what may be privately done in War, whether we respect the Law of Nature, of Nations, or the Divine Law. Cicero 1 relates in his first Book of Offices, that the Son of Cato the Censor served in the Army under Popilius the General, and in a short Time that Legion was disbanded; yet the young Man out of a military Inclination still continuing in the Army, Cato writ to Popilius, if he designed to have him still in the Army, to give him a second Oath; adding the Reason, because the former being discharged he could not lawfully fight with the Enemy. He also records the very Words of Cato out of his Letter to his Son, in which he warns him from engaging in Fight, for it is not lawful, for one that is not a Soldier to fight an Enemy. Plutarch much commends Chryantas a Soldier of Cyrus, who drew back his Sword, that he had lifted up to kill his Enemy, upon his hearing the Trumpet found a Retreat. And Senecatus tells us, 2 He is a bad Soldier, who regards not the Signal of a Retreat.

2. But they are mistaken, who think this arises only from the external Right of Nations; for, if you barely consider that, as it is lawful for any one to feize on his Enemy's Goods, (as we 3 said before,) so he may also kill his Enemy, for by that Right 4 Enemies are accounted as if they were not real Percions. What Cato therefore advises, proceeds from the Roman military Discipline, which had a Law 5 (as Modestinus observes) that he who disobeyed, should be put to Death, tho' he had had good Success; but he was underftood not to have obeyed, which without the General's Command, fought the Enemy, as appears from the Example of Manlius. For if such a Thing were commonly permitted, the Soldier would abandon his Post of his own Head, or even Licentioines might in Time proceed to such a Length, that the Whole Army or Part of it would rashly engage 5 in dangerous Fights; which was by all Means to be avoided. Therefore Salust describing the Roman Discipline, says, 6 They were often punished in War, who contrary to Orders had fought the Enemy, or kept the Field after having found a Retreat. A certain Spartian, when just ready to kill his Enemy, flopt his Blow upon hearing the Retreat.

3 Pre nullis habentur, says our Author, applying here what the Roman Lawyers say of Slaves with regard to civil Rights: Quod accidit ad jus civil, Servit pro nullis bonates. Digest, Lib. L. Tit. XVII. De diversis Reg. Jur. Leg. XXXII. But this Fiction, which in some manner excludes Slaves from the Number of Men, in order to rank them amongst the Goods of Fortune, is only founded upon the arbitrary Decisions of a particular Legislator, which can have no Place in the present Question. It was better to give this for the Reason of it; that neutral People, from only continuing such, being bound to regard the Acts of Holitity on both Sides, as equally just; it suflices, with regard to them, that he is a Perion of one of the Parties, who has killed or plundered his Enemy; They have then no Buinefs to trouble themselves whether he, who has committed such an Act of Holitity, acted or not by the publick Authority. For tho' we were to suppose a Law of Nations merely arbitrary, such as our Author imagines there is, as this Right would necessarily turn upon Things, of which the common Interest of Nations required the Observation, there would be nothing in this Cafe that can be referred to it, since it is of no import to Nations, whether private Percions do or do not, act against an Enemy of their own Head, and because the End of the War demands on the contrary, that all tho' one of every Party may take all Occasions to hurt the other. So that the prefent Question can only regard the publick Right of every State. See what our Author observes at the End of this Chapter: 4 In bello, qui rem a Duce prohibitant frct, aut mandata non feruunt capite puniunt cimam ves bene effert. Digest, Lib. XLIX. Tit. XVI. De Re Milit. Cap. III. § 15. 5 Avitius Caius punished some Officers of his Army with Death, who had gone without his Orders with an handful of Men to surprize three Thoufand, tho' they had put the latter to the Sword and returned later with their Spoils. He gave as his Reason for fo severe a Sentence, that there might have been some Ambuscade: Dicem enim praeferr, ut effrtm injicita, &c. Vulciatus Gallican. Cap. IV. Grotius. 6 Cuius in bello foris vindicatur sty in eis, &c. Bell. Caesaris, Cap. IX. Edit. Walf. founded,
Chap. XVIII. WAR and PEACE.

founded, and gave this Reason, 7 It is better to obey our Commanders, than to kill an Enemy. And Plutarch 8 gives this Reason, why a Man diminished from the Service, cannot kill an Enemy, because he is not obliged by the military Laws, which they that are to fight must observe. And Epictetus in Arrian 9 relating the Action of Chrystantus, just mentioned, says, He thought it much better to obey the Orders of his General, than his own Will.

3. But if we respect the Law of Nature and true Justice, 10 it seems lawful in a just War for any Man to do those Things, which may be beneficial to the innocent Party, provided it be within the just Measure of making War: Every one however has not a Right to appropriate to himself what he takes from the other Party, whole Cause we suppose bad, because nothing is due to him: Unless perhaps he may exact a just Punishment by the Common Right of Men. Which lift how it is restrained by the evangelical Law, may easily be understood from what we have 11 said before.

4. An Order then may be either general or special; general, as when the Conflict cried out in the Tumult among the Romans, 12 Let them that wish well to the Commonwealth, follow me. Nay, this Right 13 of killing is sometimes granted to every Subject, even beyond his own Office, when the publick Safety requires it.

If. 1. They may have a special Order, not only who receive Pay, but also they who serve in War at their own Expences, and what is more, they who maintain Part of the War at their own Charges, as they who fit out Ships, and maintain them at their own private Cost; who to reimburse themselves (instead of Pay) are allowed to keep and appropriate to themselves what they take; as we 14 said elsewhere; but how far this may be reconcilable to true Justice, and Charity, may very well admit of a Dispute.

2. Justice either respects the Enemy, or the State, with which we contrav. We have already 15 said, that in a just War the Possession of all Things that can contribute to the Maintenance of the War, may for our own Security be taken away from an Enemy, but even this with a Condition of Restitution; but the Property of those Things can be only so far acquired, as amounts to the Value of what is due to the State, either at the beginning of the War, or in the Prosecution of it, whether the Things belong to the State at Enmity with us, or particular Perfons, that may be of themselves innocent; but the Goods of the Guilty, by way of Punishment, may be taken away, and become the Property of the Captors. Therefore the Goods of their Enemies shall be theirs, who maintain Part of the War at their own Charge; what respects the Enemy, so far, as that the reasonable Satisfaction on which I have mentioned, be allowed, to be adjudged by equal Arbitrators.

III. And as to the State, the very fame will be just, according to internal Justice, if there be an Equality in the Contract, that is, if our Charges and Hazard be equal to the uncertain Hope of the Booty. But if this Hope 16 does far exceed, the Overplus is to be refered to the State; just as if one should buy at a very low Price the calf of a Net, the Success of which, tho' uncertain, promises much, according to all Appearance.

7 Plutarch, Deis. Apoph. p. 267. 8 Liv. II. Cap. XXXIX. p. 274. A. 9 Lib. II. Cap. VI. 10 This indeed proves, that the Enemy is not wronged, when a private Act of Holivity is committed against him; but it does not follow from thence, that in Civil Society a private Perfon can act against the Enemy without the express or tacit Order of those, who are invested with the publick Authority. So that the Question, as we have said, relates to publick Right; And the Law of Nature, upon that Foot, far from leaving every one at Liberty to commit Acts of Holivity of his own Head, requires on the contrary, that in a Thing of so great Importance, and which relates to one of the principal Parts of Sovereignty, nothing should be done without the particular or general Permission of the Sovereign, or his Ministers; since that is a necessary Consequence of the Engagement of a Subject, considered as such.

II. Aut certè si virtus tumulitus, &c. Servius in Aenid. VIII. 1. 11 Declarations of War sometimes not only licent, but order, the Subjects of an Enemy to be attacked wherever they are found. 12 It has been said with Reason, that it is very difficult to make an exact Estimate in this Case; but I do not think it in the least necessary: There is great Reason to presume, that the Sovereign in having authorized Volunteers, Patrifieus, and those who fit out Vessels to make Incursions upon the Enemy, and to keep the Booty for themselves, was also willing, that the Whole, however great it were, should be theirs; unless he had previously reserved a Part of it to himself. These Captures are generally not considerable enough with regard to the State, tho' they are so to the private Persons who take them, and may therefore be left entirely to them, without Prejudice to the Publick.

S M IV. Bul
IV. But it is not enough that we do nothing against the Rules of rigorous Justice, properly so called; we must also take Care that we offend not against Charity, especially Christian Charity. Now this may happen sometimess; when, for Instance, it appears, that such a plundering doth not so much hurt the State, or the King, or those who are culpable themselves, but rather the Innocent, whom it may render so extremely miserable, that if we should use the like Extremity to our own private Debtors, it would be judged barbarously cruel. But farther, if the taking of this Booty neither contributes to the finishing of the War, nor considerably weakens the Enemy, 'tis the Gain arising to himself only from the Unhappiness of the Times, would be highly unbecoming an honest Man, much more a Christian.

V. But it happens sometimess, that from the Occasion of a publick War, there arise a private one; as if a Man should by Chance fall among his Enemies, and be thereby in Danger of losing his Life or his Goods, in which Case he ought to follow the Rules we have given elsewhere concerning the just Defence of ones self. Private Persons are likewise often authorized by the State to act for their own particular Interests; as when having suffered much by the Enemy they obtain Permission to refund themselves out of their Effects. And here we are to regulate ourselves by what has been said above of the Right of Repriels.

VI. Yet if a Soldier, or any other Person, even in a just War, shall burn the Enemy's Haufts, lay waste their Fields, and commit such other Acts of Hooliness, without any Command, and besides when there is no Necellety, or just Cause, in the Opinion of the Divines he stands obliged to make Satisfaction for those Damages. I have with Reason added, what they have omitted, if there be not a just Cause; for if there be, he may perhaps be ananswerable for it to his own State, whose Orders he hath transgressed, but not to his Enemy, to whom he hath done no Wrong. Not unlike to this was the Anfwer which a certain Carthaginian made to the Romans, when they demanded Hannibal to be delivered up to them. The Question is not whether Saguntum was besieged by private, or publick Authority, but whether the Fact were just or unjust? For it is our Business to call our own Subject to an Account, whether he did it of his own Head or by our Order? The only Point to be decided between you and us, is whether the Thing could be done without Prejudice to our Treaties.

IV. (1) Plutarch blames Craflus for this in his Life, p. 543. D. Grotius.

VI. (1) This Passage is quoted above, B. I. Chap. III. § 5 Num. 4.
Xenophon in his Oration concerning Ageleias, says, _So great and noble a Thing it is for every Man, but especially for Generals to be strict Observers of their Faith, and to be so accounted_. And Aristotle in his fourth _Leucippus_ It is in Treaties of Peace and other publick Conventions, that we chiefly know whether those that make them love _justice_. For as Cicero well observed in his fifth Book of Bounds, _there is no Body, but approves and commends that Disposition of Mind, by which not only no Interest is sought, but on the contrary Faith is kept against Interest_.

2. It is the publick Faith, as it is in _Quintilian_ the Father, that procures a Truce between armed Enemies, and prefers the Rights of yielded Cities. And the same Author in another Place: _Faith is the surest Bond of human Things, the Reputation of Faith is sacred among Enemies_ And so St. _Ambr:_. _It is plain that Faith and Justice must be strictly observed in War_. And in St. _Augustine_. _When our Faith is engaged, it must be kept even to our Enemy, the_ at that Time _at War with him_. For their being Enemies, does not make them ceafe to be Men. And all Men arrived at the Years of Difceotion are capable of a Right from a Promife. _Camillus_ declares in _Liv_., _That he bad fuch a Society with the Falifiei, as was established by Nature_.

3. From this Society founded on Reafon and Speech, arises that Obligation from a Promife, which we now treat of. And we are not to imagine that, because it is permitted to tell a Falhood to an Enemy, or because, according to the Opinion of several, there is no Harm in it, as we have observed elsewhere; we may extend such a Permiilion to the very Words we use in treating with the Enemy. _For the_ Obligation to speak Truth ariTes from a Caufe, prior to War, and perhaps may be in some Manifeft annihilated by War, but a Promife of itfelf contains a new Right. _Ariftote_ perceived this Difference, when treating of Veracity, he faid, _I do not speak of him, who fays the Truth in the Conventions he makes, nor what relates to _Justice_ or _Injustice_; for thofe Things belong to another Virtue_.

4. _Pausanias_ faid of Philip of Macedon, _No Body can juftly call him a good General, who has always defpifed his moft feflum Oaths, and has upon the flight of Pretence broke his Faith, the moft of any Man_. And the like fays _Valerius Maximus_ of _Hannibal_. _A profeft Enemy to the Romans, and all Italy, and a greater to Faith itself, glorifying in Lies and Falfhood, as if laudable Virtues_; for refonce it came to pafts, that whereas in might otherwise have left an iluftrious Memory of himself, he was now left it difputed, whether he ought to be confidered as a great Man, or a notorious Villain. In _Homer_, the _Troyans_ pricked in Confedence condemn themselves.

13 ἐνὶ ἄριστῳ ὕπατι
πανόρμινα μακρινα ὑπὶ ἃ νῦ τι κάλλιν ἒσ.

9 Nobis cum Falicias, quod patet fit humana, societas non est: Quam ingenuarum naturae, utique est, eripue. _Liv._, Lib. V. Cap. XXVII. Num. 6. See what I have laid upon _Pufendorf_, Law of _Nature and Nations_, B. VIII. Chap. VII. _§ 2._

10 Ethic. _Nicomach._ Lib. IV. Cap. XIII. See what I have laid upon the _Preliminary Discourses_, _§ 44._ Note 4.

11 In _deinde_, Cap. VII. p. 241. _Ediz. Wch._

12 _Nunne bellum adversus_, &c. (Lib. IX. Cap. VI. Num. 2. _Exem._)

13 The _Paffege of Homer_ cited here is not exactly repeated. The Author truting without doubt to his Memory, has faid, κάλλιν ἒσ, where he fUni- thes the Senfe, but in the Original there is:

—Τά τούτοις καλλίν

That is to fay: _I believe our Affairs will not prosper, if we do not this, or if we do not restore Helen to the Greeks, with all her Riches. In which the Senfe is finer, and conveys another imporatnt Reflection to diffuse from Perfidy._

Unjust
Of the Rights of

Unjust Arms we bear,
Perjury' as we are.

II. The Opinion refuted, that Faith is not to be kept with Pirates and Tyrants.

2 R. Levi
Ben Gerion,
and R. Salono,
and Levit. xx. 10.

II. 1. We have already said, that we may not allow of that of Cicero, 1 There is no Society with Tyrants, but rather the greatest Disgrace: And again, A Pirate is not of the Number of those with whom we make War in form; lb. we ought to be no Faith nor Oath kept with him. Nor that of Seneca 2 concerning a Tyrant, Whatever Engagements I bad with him, they are all void, because he has violated the Laws of human Society. From which Foutian arode that Error of Michael of Ephesus, who lays on the fifth of the Nicomachus, 3 It is no Adultery to decease the Wife of a Tyrant. Which very Thing 4 some of the Jewish Doctors erroneously maintained concerning Strangers, whose Marriages they esteemed void.

2. Yet Cn. Pompey finallizd molt of the pratic War by Treaties, agreeing to save the Men's Lives, and allow them a Place where they might live without robbing. And sometimes Tyrants have restored Liberty on Condition of Impunity. Caesar in his third of the Civil War writes, that the Roman Generals compounded with the Robbers, and Fugitives, that were in the Pyrenean Mountains. Who can say that such a Composition is not obligatory? 5 Indeed such Sort of People have not with others that particular Community, which the Law of Nations hath introduced between Enemies engaged in a solemn and compleat War. But yet, as Men, they are to enjoy the common Benefits of the Law of Nature, as Porphyry 6 rightly argues in his third Book of not eating living Creatures; now it is one of the most inviolable Laws of Nature, that we should perform what we promise.

So Diodoros 7 relates, that Lucullus kept his Faith to Apollonius Captain of the Fugitives. Thus Dio writes, that Augustus paid to Cicero the Robber, who surrendered himself, the Price he had let upon his Head, because he would not break his Word.

II. 1. But let us see if we cannot produce something more plausible than what Cicero has said; and first, they who are notoriously wicked, and Members of no civil Society, may be punished by any Man, according to the Law of Nature, as we have 8 declared above. But they who may be punished even with Death, both their Goods, and their Rights may be taken from them. As the fame Cicero well observes, 9 It is not against Nature to slay him, if we can, whom it is lawful to kill. But among his other Rights, is also a Right derived from Promise, and therefore this too may be taken away from him by way of Punishment. To this I answer, that the Reafon would be good, if we had not treated with him as an Offender; but if we treat with him as such, it is to be understood, as if we in that Respect, remitted the Punishment, because, as we have said 9 elsewhere we are to explain the Sense of a Convention, so as that it may be reduced to nothing.

II. (1) See Pufendorp on this Subject, Law of Nature and Natin, B. III. Chap. 11. 9. and 11. and B. IV. Chap. II. § 8. The Passages of Cicero are quoted in B. II. Chap. XII. § 15. 2 Quaepol erat, qua mibi obseruebat, interjux juris humani Societas abiecit. De Benef. Lib. VII. Cap. XIX.

3 Seneca the Father says also, Non paterni adulterio, non ex Tyriani paupere, non ex pacifidis, Tyrannum occideris. Except. Comment. Lib. IV. Cap. VII. The Lawyer Julius Clarus believed, that Adultery might be committed with Impunity by a married Woman. In § Homicidium, Num. 36. Grotius.


5 Didus was blamed for his shameful Perfidiousness to the Celtebrians, an antient People of Spain, who lived by Rapine. Grotius.

Our Author has in his Thoughts what Titus Didius the Roman General acted in regard to the Celtebrians, settled near the City of Galenda, as Appianus Alexandrinus relates it. De Bell, Hist. p. 312. Edit. H. Steph. For the Rest, I find no where elfe, not even in the antient Geographers, this City of Galenda: Neither does the learned Cellarius in his antient Geography mention it.


III. (1) The Passige is recited above, Chap. V. of this Book, § 1. Note 1.

2 De nominis loci [Tyrannum] &c. L. I. Vol. XXXIV. (Cap. XXXI. Num. 12, 13, 15.) In Terence a Merchant of Slaves says, "Tho' I am a Pimp, the common Bane of Youth, a perjured Wretch, a publick Nulange, yet I never a wronged you!"

Laws, statutes, pertinacious amissad*advertisements, Perjurers, pests: Tamen ibi a multa aext iertia.

Adzph. (Aet. II. Scen. I. Ver. 34.) See the Author, who has writ concerning the Treaty of Peace between the Princes and States of the Empire of Germany. Grotius.
you yourself (O T. Quintius) made a Treaty with me. And again, I had done these Things already, whatsoever they are, when you contrahed an Alliance with me; to which he adds, if I had changed, I ought to give an account of my Inconfinancy; but since you have changed, you ought to give an account of yours. Like to this there is a Place in the Oration of Pericles, recorded by Thucydidis, We shall let those Cities remain free, which were fo when we made an Alliance with them.

IV. That may likewise be objected, which I said 4 before, that he who through Fear has forced a Promise from one, ought in Equity to release the Promiser, because he damned him by Injustice, that is, by an Act both repugnant to the Nature of human Liberty, and to the Nature of the Act extorted, which should have been free. Tho' this (I confess) in some Cases holds true, yet it does not respect all Promises made to Robbers; for that the Promiser be obliged to disengage the Promiser, it is required, that he have extorted the Promiser by an unjust Fear. If any one then, to deliver his Friend out of the Hands of Robbers who have taken him, shall promise to pay a certain Sum of Money, he is bound to do it, because he cannot pretend to have been influenced by Fear, who came voluntarily to make this Contract.

V. Add to this, that he that is compelled by an unjust Fear to make a Promise, may be obliged to perform it, if he has confirmed it by an Oath; for thereby (as I have said 4 before) the Man stands bound, not only to a Man, 2 but unto GOD, in regard to whom Fear can be no Exception. Yet it is true, that the Heir of the Promiser does not stand engaged by such a Bond alone; 3 for those Things only pass to the Heir, which by the original Establishment of the Right of Property, enter into the Commerce of Life; But the Right acquired unto GOD by an Oath, cannot as such be included in these. Again, as we have likewise observed elsewhere, if a Man does happen to break his Faith to a Robber, whether sworn, or not sworn, he shall not upon that Account be liable to Punishment among other Nations; because in Detention to Thieves and Robbers, all Nations by a general Consent are pleased to conbine at any Thing (even tho' ill) done against them.

VI. What shall we say of the Wars 1 that Subjects make against their Kings, or such as have the supreme Authority? Tho' they may possibly have a Caufe not in itself unjust, 2 yet that they cannot have a Right to act by Force against their Prince, I have thought elsewhere. But sometimes their Cause may be so very unjust, or their Resistance so criminal, that it may deserve a rigorous Punishment. Yet, if they be treated with 3 Defectors, or Rebels, 3 and a Promizer made to them; a Punishment, tho' justly due, is not to be pleaded to prevent the Performance of that Promizer, according to what we have now said. Faith is to be kept even with Slaves; and the Monalty of Pagan Antiquity was so pure, as to own 4 the Truth of that Maxim: It being generally believed, that the Lacedemonians suffered a Divine Vengeance 4 for putting to Death some Teutonian Slaves, contrary to their Covenants. And Dietericus Siculus oberves, that the Faith given to Slaves in the Temple 5 of the Pelasian Gods, was never broken by any of their Masters: Neither will any Exception of Fear be allowed in this Case, if the Faith given be confirmed by an Oath.

IV. (1) But see what I have said upon Pufendorf, Law of Nature and Nations, B. III. Chap. VI. § 11. Note 11. 2 V. (1) But we have rejected this Principle, after Pufendorf, in F. II. Chap. XIII. § 14. & seq.

2 See what I have said after Pufendorf, Law of Nature and Nations, B. IV. Chap. II. § 17.

VI. (1) Compare this again with Pufendorf, B. VIII. Chap VIII. § 2.

2 We have also seen in the Notes upon B. I. Chap. IV. how far this Obligation of Non-Reformation extends to judge of it by Principles, that have nothing extravagant either on one Side or the other.

3 This Obligation is the more invariable, as Sovereigns are very apt to treat as Rebellion and Dishonesty a Resistance, by which the Subject only maintains his Just Rights, and opposes enormous Violations of the Engagements of Sovereigns, either as such, or by Virtue of the fundamental Laws of the State. History furnishes but too many Instances of this Kind.

4 This was a terrible Earthquake, which happened at Lacedemon, and threw down the Whole City, five Hours only excepted, as Eelian relates, who Hist. Lib. VI. Cap. VII.

5 In this Passage of Eelian, it is very likely that instead of the Words, which our Author translates Slaves of Temarous, γις εις Τεμάρους δονται, the reading ought to be (and is) according to some Manuscripts, Υς εις Τεμάρους δονται, that is to say, Subjects, as the late Mr. Frizorius observes in his Note upon this Passage.

5 In this Temple Slaves, who were ill treated by their Masters, took Refuge. Lib. XI. (Cap. LXXXVIII. p. 288. Edit. H. Sept.)
As M. Pompónius, \(^*\) the Tribune of the People, being bound by an Oath, thy compelled by Fear, punctually performed what he had promised to L. Manlius.

VII. But a greater Difficulty than any yet mentioned may arise from the Legislative Power, and from that super-eminent Right over the Goods of the Subjects, with which the State is invested, and which the Sovereign exercises in its Name. For that Right, if it reach to all the Goods of the Subjects, why not then to that Right also derived from a Promise made in War? Which if granted, all such Covenants seem to be void, and so all Hopes of concluding a War, but by a compleat Victory, would be lost. But on the contrary we must observe, that this super-eminent Right is not to be promiscuously used, but only so far as the publick Good requires it in a civil Government, which, tho' monarchical and absolute, is not despotic. Now, this general Inteht commonly requires, that such Agreements should be performed: Agreeable hereunto is what we have already \(^*\) said of the Obligation of maintaining the present State of the Government. Add hereunto, where Necessity requires this eminent Right to be used, Satisfaction is to be made, as heretofore shall be more fully explained.

VIII. Moreover Agreements may be confirmed by Oath, \(^*\) not only by King, or Senate, but by the whole Body politick; as Lucryscus bound the Lacedemonians, and Solon the Athenians by Oath to observe their Laws: And left by the Change of the Perfons the Oath should lose its Force, \(^*\) to renew the same Oath every Year. In that Case, there would be no reeding from the Engagement, not even for the publick Advantage. For a State has Power to part with its own Right, and the Terms of the Treaty may be so plain, as to admit of no Exception. Varèlius Maximus thus speaks to the City of Athens, \(^*\) Read the Law which you have sworn to observe, The Romanas \(^*\) called such Laws sacred, which they were obliged to keep by Oath, as Cicero \(^*\) says in his Oration for Balbus.

6 He had sworn to the Son of Manlius, and not to himself, that he would desist from proceeding on the Accusation he had brought against the Father; and he declared in the Assembly of the People, that the Reason of his doing so, was because Titus Manlius had made him swear, by threatening to kill him. Sævea, in relating this Fact, observes, that this young Man was the only Perfon, that found Means to refrain a Tribune of the People with Impunity: juravit Tribunus, nec fæstis; & confam allitionis remigia cunctis redidit. Nulli aliis hic impium verbo promisit ordinem rodgere. De Bene. Lib. III. Cap. XXXV. Grotius.

See also Cicero upon this Fact, Offic. Lib. III. Cap. XXXI.

VIII. \(^*\) See my Observations upon Pufen- dorf, Laws of Nature and Nations, B. IV. Chap. II. § 17. Note. E. Edit. II. 2 See Plutarch upon this Head in the Lives of those two celebrated Legislatora, p. 57. D. E. and p. 92. But there is no mention in that or any other Place, (that I know of,) of renewing the Oath annually. On the contrary it seems, that such renewal was not thought necessary for continuing the Oath in all its Force, notwithstanding the Change of Perfons. I find at least that Dionysius Halicarnasius, a Greek Author, says expressly, that the Oath once taken by the Whole People was sufficient to make a Law irrevocable, even in regard to the Potesty of thofe, who had sworn to observe it. This is where he treats of sacred Laws, of which more will be said in the following Notes. Antiq. Rom. Lib. VI. Cap. LXXXI.

3 LEGE singae Legem, qua te jururandae ab- stricitur tenet. Lib. V. Cap. III. Num. 2. 2. Ex- tern.

4 Gronovius criticizes our Author in this Place. This is not Cicero's Thought, says he. The Orator confines himself to proving, that nothing is sacred but what the People have declared to Sacramentum enim nihil potest esse, nisi quod per Populum Plenam sacramento est. Off. pro Balbo. Cap. XV. So that the Authority of the People was indeed necessary to the making a sacred Law: But every Law, to the Establishment of which the Interposition of the People was necessary, was not therefore Sacred, unless implied, that whoever violated it, his Head should be forfeited to the Gods, so that any other præton might kill him with Impunity: For that is understood by Caput facrum sancere, or confecrare. But this makes nothing against our Author. He never pretended, that the Authority of the People, called Sacratæ, was only because it had been established by the Authority of the People. The Thought is too absurd to have entered into the Mind of Grotius, or for him to have ascribed to Cicero. He says expressly the contrary in his Forum iuris ad ius Fustianum. (p. 25, 26. Edit. Amst.) Erunt autem Leges omnis sancere, sive sanctissimae, et omnium sacrae. After which he cites the Definition of these sacred Laws from Cicero himself, in the fourteenth Chapter of the same Oration: And he adds there Fæstus (on the Words Sacratæ Leges font, &c.) as also the Scholiæ upon the Words of Horace, Sacrumurum inficis Legum, (Lib. II. Sat. I. Ver. 81.) Our Author therefore intended only to say, that the People, in instituting this Kind of Laws, bound themselves to observe them by the Sanction of an Oath, religious obligatur: Words, to which the learned Critic ought not to have attended, and which are taken from the Orafor himself, upon whole Authority he founds his Opinion: Qui, in- juus funt, nullus pacto potest religione obligari. 2dly. And Publica Religionem sancti potius, id aliter. He says a little above, reliquaque fi vides ille Populi, justissimi urbis, sanctissime divinæ ipse, quam aliqve Publico vinculo Religionis tenetur. Lib. I. Cap. XV. So that it is not without Foundation, that our Author makes Cicero say, the People's Oath was necessary in their Sort of Laws. And we find in Dionysius Halicar-
War being many” and nor 691 Chap. Whereas where I fallen Sponfore sequence that whom (Cap. See Life. the and If That Caufe, fiall moreover, tho’ miu in Perjeus fome fays have becauf e (i) I Conclufion, Num. this formally the Sacrata the Chap. ing between Remarks cerning he other nant, Privilege Faft religion, may to lawfully than fon law, having been eftablished by an Oath, which could not be revoked even by thole who had fpown. Dionyfus Halicarnaffiensis thus records it in his fixth Book: 6 Brutus, calling an Assembly, propofed to the People, that the Tribunes might be rendered facred and inviolable, not only by the Law, but also, by a publick Oath, to which they all agreed. Hence this Law was called Sacred. And therefore 7 that Fact of Tiberius Gracculus, in depofing Otho from the Tribunefhip, pretending that the Tribune’s Power derived its Inviolablenefs from the People, but that this Privilege could not take Place in regard to the People themselves, was condemned by all good Men. Therefore (as I have faid) both a State and a King may be bound by an Oath made to their own Subjects.

IX. But farther, a Promife 1 made to a third Perfon, who has done nothing to IX. Or if a Promife be made to a third Perfon. to extort it, fhall be of full Force. But we fhall not examine, wherein and how far that third Perfon fhall f tand interefted in it, being one of the Niceties 2 of the Roman Law. For by Nature it is the Intereft of all Men to confult the Advantage of others. Thus we read, 3 That Philip having made Peace with the Romans, was denied the Power of treating the Macedonians ill, that in the War had revoluted from him.

X. Moreover, as we have 4 already proved that mix Government sometimes x. How the Public State may be changed may become Sovereigns, or at leaft acquire a Part of the Sovereignty with the Right B. 1. Co. 3. of defending it by force of Arms.

XI. 1. But a solemn War, that is, publick, and denounced on both Sides, among other particular Effects of external Right, has also this, that whatever Promises are made in that War, or for bringing it to a Conclusion, are fo valid, that tho’ they were occafioned by a Fear unjustly caufed, yet they cannot be made void without the Consent of him to whom the Promife was made. Because as many other Things, Halicarnassensis, (obi fupra VI. 89.) that the moft Eminent were attended with it; besides the Imprefion againft the Head of all thole who fhould violate them. See also F y s at the Word Sacrafundum. It appears also by what Parrus fays at the Words Sacrate Leges, that even the Antients disagreed concerning this Etymology. The Reader may fee upon this Quetion of Criticifm, the Animadversiones of the late Mr. Perizonius, p. 418, 419, and the Remarks of the fame Learn’d Man upon the Mirrors of Sanctius, p. 761, 762. of the laft Edition.

5 Et quam religione, Gt. Lib. III. (Cap. LV. Num. 7. & fej.)

The learned Gronovius does not think our Author’s Reafon well founded for the Difference between the Tribunes of the People and the Ediles, &c. The Truth is, fays he, that no one could be considered as a facred Perfon (Sacrafundus) according to the Custom of the Romans, unlefs he was formally declared to be by a Law, as the Tribunes had been, according to Livy, Lib. II. Cap. XXXIII. 6 Antiq. Rom. Lib. VI. (Cap. LXXIX.)

7 As reported at large by Plutar ch in his Life.

IX. (1) See above, B. II. Chap. XXV. § 8. Num. 3. and a Difaffion of Or f e h, De Supplex Pacis, § 3. Diff. VII. p. 151, 152.

1 See what the Author has faid above, B. II. Chap. XII. § 18. Num. 1.

2 Perfun thought that the hardeft Condition in the Treaty: Una eun rei, quam vitae, Gt. Livy, Lib. XXXIX. Cap. XXXIII. Num. 6.

XI. (1) It is neceffary in my Opinion to diftinguish here, whether he who has compelled the other to treat by the Superiority of his Arms, had undertaken the War without Reafon, or whether he could allege fome fpecious Pretext for it. If it was without anfwer any Caufe, as Alexander’s going to conquer remote Nations, who had never heard of him, and of Confequence could not have done any Thing against him, nor owe him any Thing; or even if the Caufe alleg’d be evidently a frivolous Pretext in the Judgment of every Man of common Reafon: I do not fee wherefore the Conquered fhou’d be obliged to obferve the Treaty of Peace, any more than a Man fallen into the Hands of Thieves fhould be held to carry exactly, or pay at their Demand, the Money he had promifed them as a Ransom for his Life or Liberty; which our Author himfelf does not pre tend 3 tho’ building upon fome Principles, which we have rejected more than once, he is for having such a Promife.
Things, tho' in themselves not wholly innocent, are yet by the Law of Nations reputed just, so is Fear, which in such a War is occasioned on either Side; for if it were not allowed, such Wars, that are but too frequent, could be neither moderated, nor concluded, which yet are very necessary to be done for the good of Mankind. And this we may reasonably suppose to be Right of War, which Cicero says, must be kept with the Enemy; who also tells us in another Place, that an Enemy retained some Rights in War, that is, not only natural ones, but also some derived from the Confect of Nations.

2. Neither does it from hence follow, that he who has extorted such a Thing in an unjust War, may with a safe Conscience, keep what he has got, or compel the other Party to stand to his Covenants, whether sworn or not sworn. For internally, and in the very Nature of the Thing, it still continues unjust: Neither can this internal Injustice of the Act be taken away, but by a new and entirely free Confect of the Promiser.

XII. Further, whereas I have said that Fear is accounted just, which is caused in a solemn War; it is to be understood of such a Fear as the Law of Nations allows of. For Instance, if any Thing be extorted thro' the fear of Ravishment, or any other Terror, contrary to our Faith given, this ought to be adjudged by the Law of Nature, because the Law of Nations does not extend so far as to authorize any such Fear.

XIII. That Faith is to be kept even with those that are perfidious, I have already said, in treating of the Obligation of Promises in general; and it is likewise the Doctrine of St. Ambrose: Which doubts not extends to Enemies that are treacherous; such as the Carthaginians, whom withal nevertheless the Romans inviolably kept their Faith. Valerius Maximus fays on this Subject, The Senate regarded themselves, not tho' to whom they performed their Engagements. And likewise Salut. In all the Punic Wars, tho' the Carthaginians in Time of Peace, and of Truce, were often guilty of most villanous Pretences, yet they (the Romans) never returned the like to them, when they had an Opportunity.

2. Appian speaking of Servillius Galba, who put the Lyctianians to the Sword for breaking their Alliance, after having deceived them in his Turn by a new Treaty, observes, He avenged one Treachery by another, and to the Scandal of the Romans, imitated the Barbarians. The same Galba was afterwards accused for it by Libo, a

To what I have said may be added the Reason alledged by Pufendorp, Law of Nature and Nations, B. VIII. Chap. VIII. § 1. 2. Eit autem jus etiam bellicum, falsus juris is- rualn Jntcam biter Svirn. De Offic. Lib. III. Cap. XXIX.

3. The Passage has been already quoted above, Chap. XII. of this last Book, § 7. Note 8.

XII. (1) Thus a Promise extorted from an Embassador made Prifoner is not valid, according to the Law of Nations. See Marius, De Rebus Hisp. Lib. XXX. Grotius.

The Spanish Historian speaks of Antony Ausia, Bilhop of Zamarra, whom John D'Albert the last King of Navarre had laid under an Arreft, and afterwards released upon his Promise to return, as soon as required. But that Prifone had not been received as Embassador: And there were good Reasons not to receive him as such, as he had been present at the Battle of Rozanna between the Spaniards and French, which latter were the King of Navarre's Allies. See Chap. XII. and XIX. of the Book referred to in this Note. So that the Maxim, true in itself, is here misapplied. See what our Author says above, B. II. Chap. XVIII. § 5, and 6.

XIII. (3) Quanta autem justitia sit, &c. Offic. I. 29.


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Tribune of the People; which Valerius Maximus  relates, thus concludes it: "Composition, not Equity, pleaded in that Cause; for the Absolution, which his own Innocency could not demand, was granted him in respect of his Children. And Cato  writes in his Originals, he would certainly have suffered, if his Children and Tears had not interceded for him.

XIV. But we must also observe, that there are two Ways, whereby to avoid the Crime of Perfidiousness, and yet not perform the Promise; namely, in Default of the Condition, or by Compensation. The Promiser is not properly discharged for Want of the Condition; but the Event founds, that there had been no real Obligation, since he did not intend to engage himself but upon Condition. To which we may refer this, 1 if the other do not perform what he was bound on his Part to do first. For all the Articles of one and the same Agreement seem to be included one in the other, in the Manner of a Condition, as if it had been thus expressed, I will do these Things thus, provided the other also do what he has promised. Therefore Tullius, 2 in his Answer to the Albanus, calls the Gods to witness, whether of the two Nations had scornfully sent back the Embassadors reclaiming their own, that all the Miseries of War might lie upon them. Ulpian observes, 3 He shall not be held a Confederate, who has renounced his League, because some Condition, on which it was made, is not performed. For which Reason, when it is otherwise designed, this express Clause is usually added, if any Thing be done contrary to this or that Article, yet shall the Rett be in full Force.

XV. We have elsewhere  declared the Original of Compensation, that is, 4 when we cannot otherwise recover what is our own, or what is justly due to us, we may take from him, who either keeps what is ours, or is indebted to us, the full Value thereof in any Thing else; whence it follows, that we may much more keep what is actually in our Possession, corporeal or incorporeal. Whatever therefore we have promised, we need not perform, if it be of no greater Value than that of ours, which the other Part injuriously detains from us. 5 Seeeca says in his sixth Book of Benefits, Thus the Creditor is often cast by the Debtor, when he has been offered some Account taken more than the Value of his Debt. Nor does the Judge only sit between the Creditor and the Debtor, who may say to the Plaintiff, You lend your Money. What then? You now possess Land, which you never purchased, wherefore upon a just Valuation, depart you hence a Debtor, who came a Creditor.

XVI. It will be the same Case, if he with whom I deal owe me as much, or more, upon any other Contract, and I cannot otherwise recover it. Indeed in Courts of Justice, Seeeca  says, certain respective Actions of the Parties are not granted at the same Time; but this is a pure Effect of the Disposition of the civil Laws, to which we are bound to conform. Each Law has its Rights apart, which it has been thought proper not to mingle with those of other Laws; as the same Author observes. But the Law of Nations allows no such Distinctions, there being no other Hopes of recovering our own;

XVII. The same may be said, where he that exacts a Promiée, owes nothing in Consequence of an Agreement, but hath disavowed the Promiser. 6 As the same Seeeca says himself, The Farmer is not bound to his Landlord, tho' his Lease be not con-
Of the Rights of Book III.

celled, in Case he wilfully tramples down his Corn, or cuts down his Trees; not because he has received what he agreed for, but because he has prevented his Tenant's receiving whereby he might pay him. Then he gives other Instances. You have driven away his Cattle, you have killed his Slave. And again, It is lawful for me to compare the good that a Man has done me, with the Hurt he does me, and then declare, whether I am more indebted to him, or be to me.

XVIII. Lastly, whatsoever is also due by way of Punishment, may be balanced against the Thing promised. Which in the same Place of Seneca is at large explained. Thanks is due for a Kindness, and Revenge for an Injury. I neither owe him Thanks nor be Punishment to me, we are fully discharged one of another. And again, By comparing the Benefits and Wrongs which I have received, I shall find whether there does not remain something due to me.

XIX. 1. But as amongst offending Parties at Law, if they have made any Agreement whilst the Suit is depending, none of them can compensate what he has promised, either by the Thing contended for, or the Costs and Damages of the Suit: So during the Continuance of the War, neither can that which first occasioned the War, nor the Damages allowed by the Law of Nations in War, be compensated. For the very Nature of the Engagement, which without that would be reduced to nothing, sweweth, that all the Disputes of War were set aside: Otherwife there could be no Agreement made so firm that might not be evaded. Whereto I may properly apply that Saying, of the same Seneca, whom I have cited so often, Our Anceflors would allow of no Excuses, that Men might be assured that Faith was strictly to be kept. For it were better not to admit of an Excuse, tho' just, from a few, than encourage every one to make them.

2. But what is it then that may be compensated by the Thing promised? That which is due to us by any other Convention made during the War; or on account of the Damage done us by Acts of Hostility in the Time of Truce; or in Consequence of an Outrage committed on our Embassadors, or any other Action condemned by the Law of Nations.

3. But we must observe, that this Compensation be made between the same Persons, and that the Right of no third Person be injured; yet so that the Subject Goods must stand engaged for the Debts of their own State by the Law of Nations,

§ 2.

4. To which we may add, it is the Part of a generous Soul to keep firm to his Treaties, even after Injuries received; on which Account that wise Indian, Jarchas, a highly commended the King, who being injured by a confederated Neighbour, Would not break his Faith given, saying, That he had sworn so solemnly, that he durst not hurt the other, no no after great Provocation.

5. Now what Questions use to arise concerning Faith given to Enemies, may almost all of them be resolved, by the Rules we have established above in treating of the Effect of Promises in general, and of the Oath that accompanies them in particular, of Alliances and publick Treaties, as also of the Right and Obligation of Kings, and the Interpretation of obscure or ambiguous Clauses. Yet that the Use of the Principles we have laid down may be better perceived, and to clear any Doubt that may arise hereafter, I shall not think much to point out some of those special Cases which are most remarkable, and most frequently occur.

2 These Words are in the Passage which I have cited above, § 15. Note 2.  
3 Benefigures multi legi, &c. Ubi supr. Cap. VI. 
18. (1) Dedii beneficium, &c. Ibid. Cap. V. 
2. Peti et comparationes falsa, &c. Cap. VI. 
XIX. (1) Nulam excidatatem recipiant, &c. 
De Benefic. Lib. VII. Cap. XVI.  
2 The King commended by Jarchas was named Gouges, whose Ally is said to have carried his Indis- 
3 Dely to far, as to seize the Perfon of the Queen his Spouse, Philem. Rat. Fit. Apoll. Yan. 
Concerning the publick Faith whereby War is fini shed; of Treaties of Peace, Lots, set Combats, Arbitrations, Surrenders, Hostages, and Pledges.

I. All Agreements between Enemies depend upon Faith, either expressed or implied. Faith expressed, is either publick or private. Publick is either of the supreme or subordinate Powers. That of the supreme Powers, either puts an end to the War or is of Force during its Continuance. Among those Things that conclude a War, some are looked on as Principals, some as Accessories. The Principals are those very Things that fini sh the War, either by themselves as a Treaty of Peace, or by Con vent that it be referred to another: Thing, as the Decision of Lot, the Succes of a Battle, the Judgment of an Arbitrator; whereof the first is purely casual, but in the two others the Chance is moderated by the Strength of the Mind or of the Body of the Combatants, and by the Power given to the Judge.

II. They who have Power to begin a War, have likewise Power to enter upon a Treaty to fin ish it; for every Man is the best Manager of his own Affairs; \\

III. For if a Prince be not out of his Minority, (which in some Kingdoms is determined by Law, in others by probable Conjectures) or be not in his true Senes, he is not capable of making Peace. The same is to be said of a King that is a Prisoner, if his Kingdom had its first Rife from the Con vent of the People; for it is not to be suppos d, that the People would confer the Sovereignty upon one, with a Power even to exercise it at a Time when he is not Master of his own Person. Therefore in such a Case not the full Sovereignty, but the Exercise of it, and as it were the Guardianship is in the People, or him whom they shall delegate. But of those Things which are privately his own, whatsoever a King, tho' a Prisoner, shall Contract, will be valid, according to the Principles which we shall establish concerning private Agreements. But what if a Prince be an Exile, 5 3 is it in his Power to make Peace? Yes certainly, if it appear that he has no Dependence upon any Person. Otherwise his Condition would be little different from that of a Prisoner, for there are Prisoners at large. Regularus refused to declare his Opinion in the Senate, alleging, that as long as he was bound by an Oath to his Enemies, he could not rightly be a Senator.

IV. In an Arbitracy, or Democracy, the Power of making Peace shall be in the major Part: In the one of the Sovereign Council, in the other of the People...
who have a Right to vote according to the Custom of the Country, as we have
said in another Place. Therefore Things thus agreed upon, shall be obligatory
even upon those who disented from them. As in Livy, "When it shall be once
decreed, it must then be maintained as a good and profitable Alliance by all, if all those
who before were against it. Also Dionysius Halicarnassensis, " It must be obeyed as
just, whatsoever the Majority has decreed. And Appian, All are obliged to obey a De-
cree, and no Exeque to be admitted against it. As also Pliny, " What has pleased the
must, must bind the rest. But they may, if they please, make use of the Advantages
of the Peace concluded against their Opinion.

V. 1. Now let us see what Things are subject to such an Agreement. Most
Kings in our Days, holding their Kingdoms not as patrimonial, but as a
use, have no Power by any Treaty to alienate the Sovereignty in Whole, or in Part :
Yea, and before they come to the Government, at what Time the People are their
Superiors; such Acts may be a fundamental Law, for the future be rendered abso-
lutely void and null; so that even as to Damages and Interest, they shall be no ways
binding. For it is probable, that Nations thought fit to ordain that in this Cafe, the
other Party should have no Action against the King for Damages and Interest, since,
if that took Place, the Goods of the Subjects might be seized, as unalienable for the
King's Debt; and so the Precaution that might have been taken to hinder the Ali-
nation of the Sovereignty, would become entirely useless.

2. But that the entire Sovereignty may be firmly alienated, the Confect of the
Whole Body of the People is required; which may be done by their Representatives,
whom they call the Orders or States. And that any Part of the Kingdom may be
firmly alienated a twofold Consent is required, both of the Whole Body, and espe-
cially of that Part which is to be alienated, which cannot be divided from the Body
to which it was united against its Will. But yet in Cafe of extreme Necessity, and
otherwise unavoidable, that very Part may firmly convey the Government over
themselves to another without the Consent of the People, because it is probable that
Power was referred, when civil Societies were instituted.

3. But in patrimonial Kingdoms, nothing hinders, but that a King may alienate
his Crown as he thinks fit. But it may happen to be so, that that King may not have
Power to alienate any Part of his Dominion, as if he received it as his Propriety
upon Condition not to divide it. But as concerning those Things which are called
the Goods of the Kingdom, they may become the King's Patrimony two Ways,
either separably, or inseparably with the Kingdom; if this latter Way, they may be
transferred, but not without the Kingdom; if the other, without it.

4. But those Kings, whose Kingdoms are not patrimonial, can scarcely be thought
to have a Power to alienate the Goods of the Kingdom, unless it plainly appear by
some fundamental Law or Custom, that has never been opposed, that such a Power
was given them.

IV. (1) Which he makes Anilens, Pretor of the
Adjutant, says: Ubi femel decretum erit, omnibus id,
eiusque autem deis, quod pos.sessum ad
fidefque, libuit. Lib. XIII. (Cap. XX.
Num. 6.)

2 Antip. Rem. Lib. XI. (Cap. LV.)

3 Sullans enim, intreg re, diftinentis fas eft : 
Pertulit, solum pluribus placuit, cunctis tenendum. 
Lib. VI. Epit. XIII.

V. (1) But tho' the Act of Alienation has not
been previously declared entirely null, it is however
no less so. The Nullity follows necessarily, from
the King's Power being limited in that Respect by
the very Nature of his Kingdom; and much more,
if in conferring the Sovereignty, it was expressly
declared, that he should not alienate any Part of it.
1: it is a different Question to know whether the
Alienation remaining without Effect, the King, as
for his own particular Part be not held to make the
other Contracting Party some Amends, admitting
he can do so in a Manner not prejudicial to the
Interests of his Subjects, or the State. See the fol-
lowing Note.

2. It suffices to say, that the other Party may, and
generally do know, that it is not in the King's
Power to treat; In which Cafe they can only blame
themselves. The Reason alleged by our Author,
may afterwards be put to account, but without its
being necessary to find it upon a mere Supposition
of a tacit Consent of Nations. For the rest, if we
suppose that the Party, with whom the King has
made, could not know, that the Alienation was
not in his Power; I see no Reason, why in such
Cafe they may not have a Right to come upon
the King's patrimonial Estate for Damages and Inter-
rest; in the same Manner as those, who have treated
with a publick Minifter, acting without Authority,
may exact this Amends from him, according to the
Principles laid down by our Author himself else-
further: In a doubt, or when the King has alienated
some Part of his Kingdom, for very evident Reasons
of Necessity or Utility, it may be presumed, that
the People have given their Consent, according to
what has been said above, B. II. Chap.
VI. § 6. 7. and Chap. XIV. § 12.
3 See what has been said above, B. II. Chap.
VI. § 6. 7. with the Notes.
4 In which Cafe therefore he may indeed alienate
the Whole Kingdom, but not a Part of it.

VI. We
VI. We have elsewhere said, how far the People and the Successors may be bound by the Promise of a King; namely, as far as the obligatory Power is comprehended in the Sovereignty; which should neither be drawn out to an Infinity, nor confined within too narrow Bounds; but we ought to consider as valid in that Respect whatever the Sovereign engages himself to do for apparent Reasons. It is a different Thing, if a King be the absolute Lord of his Subjects, and his Rule be rather despotic than civil, as having brought them into Bondage by Conquest, or have obtained the Property of their Goods, without being Master of their Persons, as Pharaoh when he had purchased all the Land of Egypt, or as those who receive Strangers into their private Lands. For in this Case, besides a regal Right, there accrues another Right, which renders an Engagement valid, which a bare regal Power of itself could not do.

VII. This also is often disputed, what Right Kings have to dispose of the Goods of private Men to procure a Peace, who have no other Power over the Goods of their Subjects, than as Kings. I have already said, that the State has an eminent Right of Property over the Goods of the Subjects, so that the State, or those that represent it, may make Ue of them, and even destroy and alienate them, not only upon an extreme Necessity, which allows to private Persons a Sort of a Right over Men's Goods; but for the publick Benefit, which ought to be preferred to any private Man's Interest, according to the Intention, reasonably professed, of those who first entered into civil Society.

2. To which we must add, that the State is obliged to repair the Damages, sustained by any Subject on that Account, out of the publick Stock; so that he himself who hath sustained the Loss, contribute, if it be necessary, according to his Quota, to the discharge of that publick Debt. Neither shall the State be released from this Obligation, tho' at present it be not able to satisfy it, but whenever the State shall be in a Capacity, this suspended Obligation shall resume its Force.

VIII. Neither can I here generally admit the Opinion of Ferdinandus Vaboquis, that a State is not obliged to repair such Damages caused by War, because the Right of War permits such Damages. This Right of War, (as we have elsewhere explained it) partly Respect other Nations, and partly those that are at War among themselves; but it does not extend to the Members of the same State, who since they are closely associated, it is equitable, sustained on Account of the Association, as common to all; yet this also may be constituted

VI. (1) See Reinking. B. I. Cl. III. Cap. V. Num. 50, and compare this with what has been said above, B. II. Chap. XIV. § 7. and 12. Grothus.

2 But see what we have said upon B. I. Chap. III. § 11. Num. 1.

3 I add the Words, upon this Condition, which necessarily must be understood according to the Thought of our Author, who expresses himself clearly in another Place, where he has treated of the same Case: Ut paterfamilias latifundia pffident, Neminem alia leges habet habitantem recipere velit, &c. B. I. Chap. III. § 8. Num. 2. This gives me Occasion to defend him against a very fouh and ill-grounded Criticism of the late Mr. Coccius, in a Work published some little Time after his Death, intituled, Ammonia Juris Gentium, &c. He says there, (Cap. XII. § 4.) Our Author supposes a Matter of a Family, who, possessting a vast extent of Land, entertains a great Number of Servants and Workmen for the culture of them. This is not, adds he, a State, but a great Family; this Man is not a King, but a rich private Person: And Grothus confounds in this Manner the Head of a Family with an absolute Prince, which is very absurd. But is it not more absurd, to make so judicious a Man as Grothus say a Thing so contrary to the plain Sense of his Words, which import not a simple Contract of Hire, as it is supposed without Reason, but a Convention by which the Head of a Family in Question grants Lands, upon Condition that the Inhabitants of them shall acknowledge him for the future as their absolute Sovereign? He afterwards maintains, that admitting such a Convention, the new King would have no Right to alienate his Kingdom, and founds his Rea- son upon this, that there neither is nor can be, as it is pretended, any patrimonial Kingdom. This is not the proper Place to examine the Reasons he brings for this Doctrine, nor to weigh their Weakness. Besides, I have already said, B. I. Chap. III. § 11. Note 4. what we ought to think upon this Head, to avoid vicious Extremes.

VIII. (2) There are some, who say, that War being deemed to be undertaken by the Consent of all the Citizens, every particular Person is also deemed to have exposed himself voluntarily to support all the Losses, which he may sustain in Consequence of the Acts of hostilities, especially in a War purely defensive; and therefore, that the State is not held to reimburse any one; unless it has received Advantage from what private Persons have lost, or unless the Damage was sustained by such Persons, in Consequence of the Hazards they run by Order of the Sovereign. For the Rest, it is so much the worse for those that have suffered, even tho' they have suffered more than others. But the Consequence is not just. This tacit Consent of the Citizens to the undertaking of a War, implies indeed a Will to suffer Loss, when they cannot do otherwise; but not
Constituted by the civil Law, that no Action may be brought against the State for Damages by War, in order to make every Man more ardent to defend his own.

IX. There are some that place a vast Difference between those Things which are the Subjects by the Law of Nations, and those which are theirs by the civil Law; that they may allow the Prince a larger Right over these, even of taking them away without Cause or Satisfaction; but not so over the other: But fallly. For the Right of Property, whatever be the Title of it, has always its proper Effects by the Law of Nature itself; so that it cannot be taken away, but for such Causes as are naturally inherent in the Property, or such as arise from some Fact of the Proprietor.

X. But whether the publick Interest required that the Goods of the Subjects should be granted away by a Treaty, which a King ought not to do but for such a Reason, is a Question to be decided between the King, and the Subjects, as that of repairing Damages regards the State, and particular Persons. For to Strangers that contract with him the bare Fact of the Prince is sufficient, not only from the Pre-jumption which the Dignity of his Person brings with it, but also from Law of Nations, which allows the Goods of Subjects to stand obliged by the Fact of the King.

XI. 1. But as to the true Understanding of the Articles of Peace, we must here observe, what has been said before. The more favourable any Article is, the more largely it should be taken; and the less favourable it is, the more strictly it should be understood. If we consider the bare Law of Nature, there is nothing more favourable than what tends to this, that every one should enjoy his own. Which the Greeks express thus, ἱππων ἵππων τὰ ἱππατο. Wherefore where the Meaning of the Articles is ambiguous, it should be taken in this Sense, that he that has the Justice of the War on his side, should obtain what he took up Arms for, and also recover his Costs and Damages, but not that he should get any Thing farther by way of Punishment, for that is odious.

2. But because in treating of a Peace it seldom happens, that either the one or the other of the Enemies owns he had been in the wrong; therefore in Articles of Peace, such an Interpretation should be admitted, as may according to the Justice of the War make the Balance even on both Sides; which is generally done two Ways. For either it is intended, that those Things whereof the Peace has been disturbed by War, should be put on their antient Foot, (which are the Words of Morippus in his Oration, wherein he treats of the several Sorts of Leagues) or as the Greeks say, 'τις ἁπαξ ἤ 'τις ἐχάπαξ, That Things should remain as they are.

XII. 1. Of those two Senses, in a doubtful Case, the latter is more readily presumed, because what it includes is more easy to be done, and it brings no Alteration. Hence Tryphoninus observes, that after the Peace such Captives only are to return by Poffiminy, as are expressly mentioned in the Treaty, as we have proved elsewhere by invincible Arguments, in following the Correction of Faber. So Punitives also are not to be restored, unless stipulated. For by the Law of War we

not if there be any way to make them Amends, either fully, or in Proportion to what they have suffered more than their Fellow-Citizens, who were equally obliged to it. The one does not hinder the other.

2. There may be another considerable Reason for this, which is the Difficulty of estimating, and comparing together the Losses of every one. Besides, if private Persons are rich, and the Publick poor, as it sometimes happens, this sufficiently excuses the State from making any Amends.

IX. (1) Compare this with what has been said above, B. II. Chap. X. § 1. Num. 5. and Chap. XIV. § 8.

2. Our Author understands thereby the eminent Domain of the State, of which the lawful Use is founded upon the publick Utility, and consequently forms an Exception included in Property, as in every other Right of private Persons.

XI. (1) This is a natural Consequence of the Thing, or of the Intention of the Contracting Parties reasonably prefixed. For, as each believes himself in the Right, each no doubt is for making his Condition as good as he can, and at least as advantageous as that of the other Party. So that the Division of favourable and odious, of which we have elsewhere shewn the Usefulness and Want of Solidity, is not more necessary in this Place.

2. See for Insufficiency Chinny IV. § 3, which I have already cited above, upon B. II. Chap. IV. § 3. Num. 7.

2. See the Law of the Difficult quoted above at the End of Chap. I. of this Book. It is also sometimes agreed by Treaty of Peace, that such as should go over from one Party to the other, shall not be received. See the Articles of Peace concluded between the Emperor Justinian and Chosroes King of Persia, in the History of Menander the Pro-
receive Defectors, that is, by the Law of War we are allowed to entertain, and lift among our own Troops such as quit their own Party. All Things by such an Agreement continue his, who is poiffessed of them.

2. But that Word poiffessed is taken not civilly, but naturally; for in War a poiffession in Fact is sufficient, neither is any other required. Lands, I have already 4 said, are then poiffessed, when they are inclosed by some Fortifications; for such as 4 are only encamped upon for a Time, are not here repected. 4 Donathones 3 in his § 4. Oration for Crephon, says, that Philip made hate to poiffes all the Places he could possibly, knowing well that at the concluding of the Peace, he should keep all that he had in his Poiffession. But incorporated Things 4 cannot be poiffessed, but either b by the Things to which they adhere, (as the Services of Mannors) or by the Persons who have them. It is not however necessary to be Master of the Person, in order to poiffess such Other Things, when the Question is concerning a Right, which can only be exercised in the Country, which was formerly the Enemies.

XIII. In that other Kind of Agreement, whereby the Poiffession of Things disturbed by War, is to be restored, we must observe, that the last Poiffession immediately before the War is here meant; yet so as those private Persons that were then unjustly ejected, 5 may have recourse to Justice, either to obtain a provifional Decree, whereby they may be put again in Poiffession, or to claim their Eftate.

XIV. But if a free People shall voluntarily submit themselves to either Party engaged in War, this Article of Reflitution cannot reach them; because it only relates to those Things which were done by Force, Fear, or otherwise by a Treatery not allowable but in regard to an Enemy. Thus the Peace were concluded among the Greeks, the Thebans yet retained Platcles, pretending That they were poiffed of it, not by Force nor Treatery, but by the voluntary Surrender of the Inhabitants. And by the same Right was Nisca 3 retained by the Athenians. q Quintilius used the fame Diffinition against the Etolians, replying, That was the Law of Cities taken by Force, but the Cities of Thessaly freely submitted themselves into the Roman Dominion.

XV. If there be no Claufe whereby it is otherwise agreed upon, it is to be suppos’d in every Peace, that no Action shall be commenced for Damages done in War; which also is to be understood of those done between private Persons, the being also the Effects of War. For in a Doubt, those who treat of Peace,

3 De Corona, p. 316. B.
5 This is the Author’s Meaning, whose concord Expression has been very ill understood by the learned Gronovius. Suppose, for Instance, that a Person has the Utica and Profits, or the Fief of a Land, if the Enemy seizes this Land, tho’ he does not take the Lord of the Fief or Tenant Prisoner, as neither the one nor the other can exercise his Right but in a conquered Country, their Liberty is of no manner of Service to them; the Right then pulls over to the Enemy, without the Person to whom it adhered, and becomes real from personal as it was before. So that, after a Treaty of Peace, this Sort of Goods continue, as well as others, to the Party who retains the Lands, to which they adhere.

XIII. (1) The Poiffession, here intended, is rather the Poiffession of a Country in general, than that of private Persons. So that in regard to private Persons, Things ought to stand upon the fame Foot, as if the Poiffession had never been interrupted by War. And this would take Place, tho’ it were even supposed, that the private Person in question has been unjustly (poiffessed, in what manner soever, by a Subject of the other State, with which Peace has been concluded. For as this Injustice is supposed to have happened before the War, be he who has suffered it, may demand Reparation in the fame Manner as he might have done at first.

XIV. (1) But, says Zunzeler, admitting even that such a People has not submitted to the Dominion of either Party, unless by Force or Fear, I see no Reason, why they can pretend to be reinstated in their first Condition, by Virtue of the Interpretation of the general Claufe; especially if it is of so little Importance to the other Party, whether that People be reinstated in the Poiffession of their Liberty or not. I answer for our Author, that he supposes here, as appears from the Examples which follow, a People who were the Ally of the contrary Party to that they have surrendered to, or who were concerned in some other Manner in the War; Otherwise the Question would be entirely imperiment. Now upon this Foot, such a People may well be included in the general Claufe, according to which all Things are to be reinstated in their first Condition; if the State to whose Power they have submitted, have no other Title but an Act of Hollify, but not if they have submitted voluntarily: For the Claufe in question regards only Acts of Hollify; and the Party, who has submitted voluntarily, has by that alone renounced all Benefit of a future Treaty of Peace.

2 Thucyd. Lib. V. (Cap. XVII. Edit. Oxon.) The Historian had already said the fame Thing of the same City in another Place, Lib. III. (Cap. LI.)

3 Thucyd. Lib. supra. V. 17.

4 Quod f. manut. captivorum tamen pridem ex lex repulit. Theticala vivitiva f. voluntat. in dictum nomine sunt. L. IV. Lib. XXXII. Cap. XIII. Num. 15. (1) That is to say, Damages caused to private Persons of the other State at War, by lawful Acts of Hollify; and not those, which private Persons

are
are presumed with Reafon to do it on ich a Foot; that there be nothing which fav-
poses the one or the other guilty of Injuftice.

XVI. Yet tho' Debs, which were due to private Perfon; at the beginning of
the War, 1 are not to be accounted forgiven, for these are not acquired by the Title
of War, but only forbidden to be demanded in Time of War; therefore the Impe-
diment being removed, i.e. the War ended, they retain their full Force. But tho'
it ought not to be easily presumed, that what was a Man's Right before the
War is taken from him, for this Caufe chiefly (as Cicero 2 well oberves) Civil Societies
were firft constituted, that every one might keep his own, yet this must be under-
stood of that Right, which is derived from the Inequality of Things.

XVII. It is not fo concerning the Right to Punifhment; for this Right, as far as
it concerns Kings, or People, is for this Reafon presumed to be remitted; left the
Peace should not be compleat, if it left any old Grudges behind, which might in
Time renew the War. Wherefore unknown Injuries are also comprehended in the
general Terms, as the Action 3 of the Carthaginians in drowning foome Roman
Merchants, was remitted by the Romans, before it was discovered to them, as Ap-
plan relates. Dionyfus 4 Helicarnaffenis says, Those are the left Reconciliations,
which leave behind nothing of Refention, or Ill-will. And also Icrates, 5 After a
Peace is concluded, it is safe to remember former Injuries.

XVIII. There is not the fame Reafon that private Men should be thought to remit
the Right of demanding Punifhment, becaufe this may without War be judicia-
ly required; but since this Right is not ours in the fame manner, as that, which arises
from Inequality, and besides, Punifhments having always something odious: The
flightet Conjeftures that may be drawn from the Terms of the Treaty, are suf-
ficient to found a jufit Preufumption, that this alfo is paft by.

XIX. But whereas we have faid, that the Right, which we had before the War,
should not easily be thought to be remitted, this indeed holds very true in the Right
Perfons may have occafioned of their own Head, or under the Pretext of War against the Subjects of
the Enemy, or tho' of the fame State. The late Mr. Cocceius in a Diillation, De Punimini in
Peace, Sect. I. has advanced contrary to the Opinion of our Author, and several others whom he quotes;
that by fimpfly making Peace, the Parties do not hold themfelves reciprocally discharged from the
Damages occafioned on both Sides, and that an ex-
prefl Clause of general Amnesty is neceffary to that
Effect. He founds his Opinion on what follows.
I. A Treaty of Peace, fays he, is nothing more in
itself than a Tranfation upon what occafioned the
War, and confequently upon a publick Interet, in
generall, to which, if there be any Thing new that
concludes nothing in repect to the Interett of partic-
ular Perfons who have fuffered Damage from the
Enemy during the War. II. This Damage, adds
he, ought naturally to fall only upon thofe, who had
no juft Caufe for making War. Now in a Treaty of
Peace, nothing is determined as to the Juftice of the
War, each continuing in his own Opinion as to
that Point. III. From whence it arifes, that the
Right of Punimini fubfifts even after such a Peace,
according to Law XII. of the Digest, Prince. De
Capit. & Punim. IV. It is to avoid this Incon-
venience, that in Treaties of Peace, the Claufes,
by which a general Amnesty is flipulated on both
Sides, are fo express and extentive. But this gen-
eral Amnesty has a neceffary Connection with the in-
tent of a Peace, becaufe the contrary might make
Room for a new War. And two Circumstances of
not deciding upon the Juftice of the Caufe, proves,
that the Damages, occafioned in Confe-
quence of Acts of Hoftility, ought to be deemed
by both Parties as jufily fufpended. The Law quot-
ed is only a civil Law of the Roman People, upon
a particular Caufe. See above, Chap. X., of this
Book, § 4. Note 3. and 11. Nor does the left
Reafon prove any Thing, since Things are often
expressed which could not fail of being understood,
in which Case they are only recited for the Sake of
greater Precaution.

XVI. (1) For Inftance, if before the War, a
Thing had been fold and delivered to fome Mer-
chant of the Enemy's Country, and that Merchant
had not paid for the Goods. The Examples al-
ledged by Grosqvius in this Place are entirely
misapplied, because they fuppofe the Creditor and
Debtor are both of the fame State.

2. Hanc enim ob caufam maxine, ut fuam tenere,
Republicae Civitatisque confiitutum fuit. De Offic.
Lib. II. Cap. XXI.

XVII. (1) The Example is not well applied, fays
Grosqvius here. For the Merchants were not
thrown into the Sea before the Peace was concluded,
but fome time after the End of the firft Picnic
War. So that, as foon as the Affair came to the
Knowledge of the Romans, they were for avenging
it as an Infringement of the Treaty, and declared
War againft the Carthaginians, who, to avoid it,
gave them up Sardinia. But our learned Critic him-
self without Reafon fuppofes, that the Quelion
here relates to Things committed during the War,
but unknown at the Time the Treaty of Peace was
concluded. There is no Difficulty in regard to Things
of this Kind. For who can know all the Acts of
Hoftility, that have been committed during the
Course of a War? So that by the Parties holding
themselves reciprocally discharged from all the Mil-
chief they have done each other during the War,
they always understand, as well what they do nor
know, as what they do. The false Application of
the Example therefore confficts, only in the Crime
of the Carthaginians not being committed before the
War, but after the Peace made and concluded.


of private men. But as to the Right of Kings and Nations, a Remission may be more easily professed, if the Terms of the Treaty, or probable Conjectures drawn from them, lead us to that Interpretation; but especially if the Right in question were not clear, but in dispute. For it is humane to believe that those who make Peace intend sincerely to strive the Seeds of War. The fame Diocletian Halicarnassensis well observes, 'We are not so much to endeavour to patch up a broken Friendship for the present, as to take Care to prevent our having involved again in the same War. For we are met here not to put off the Miferies of War, but entirely to take them away,' which last Words are almost taken Verbatim from Iherates, in his Oration concerning Peace.

XX. whatsoever is taken away after the Peace is absolutely concluded, is to be restored, for from that Time the Right of War immediately ceased.

XXI. But of thofe Articles which relate to the Restitution of Things taken in War, thofe in the first Place may be more largely interpreted, that are mutual, than thofe that concern only one Party. Next, thofe relating to Perfons are more favourable than thofe that respect Things; and even among thofe that relate to Things, they that concern Lands are more favourable, than thofe that respect Moveables; and above all, thofe, that are in Possession of the State, more than thofe of private Perfons. And again, among thofe in the Possession of private Men, they are more favourable, that are posfessed under a gainful, than thofe under a chargeable Title, as Things bought with Money, and thofe held in Dowry by Marriage.

XXII. To whom any Thing is granted by Articles of Peace, to whom are also all the Profits allowed from that Grant, but not before; as Augustus Caesar well argued against Sextus Pompeius, who having Peloponnesus granted to him, would have also had all the Tributes that were in Arrears for some Years past, before the Time of that Grant.

XXIII. 'The Names of Countries are to be taken according to the present use, not so much of the common People, as of intelligent Perfons, for such Affairs are commonly managed by Men of understanding.

XXIV. Thofe to whom we make such Ceflion had a Right to it, it also seems first, that we ought to restore the Revenues, which have arisen from it, from the beginning of the War to the Conclusion of the Treaty of Peace. But when we only leave the Thing to thofe who have taken it, the Question is evidently superfluous; because the Possession, supported by the Right of War, secures the Revenue to the Possessor for. Nevertheless, in the former Case, the Ceflion of itself, if rightly considered, has no retrospective Effect with regard to the Revenues. For till the Treaty of Peace, by which the Ceflion was made, the Right to the Thing yielded up was in Difpute, so that the Party who gives it up, acknowledges no Right in the other, but for the Time to come, and by Virtue of the Ceflion alone which he makes to him, by a Kind of Transfertion. For the reft, that our Author intended to speak solely of this Case, appears from the Example which he alludes to. For Sextus Pompeius was not in Possession of Peloponnesus, Appianus Alexandrinus, whom our Author cites in the Margin, speaking before of the Conditions of the Treaty made between Octavius Caesar and Mark Antony on the one Side, and Sextus Pompeius on the other, distinguishes clearly Sardinia, Sicily, the Island of Corina, and some others, which Pompey held at that Time from Peloponnesus, which he was to have besides, p. 713.

XXIII. (1) See Francis Guizziardin in the fifth Book of his History. Grotius

It will not be amiss to relate the Fact from this Historian in a few Words. Levis XII. King of France, and Ferdinand V. King of Spain, had divided between themselves the Kingdom of Naples, after having expelled Alphonso King of Aragon. In this Partition Terra-di lombard and Abruzzo were adjudged to the King of France; and Paula with Caelistria
XXIV. Of Reference to some former Articles, and of the Obligation here.

XXV. But whereas some affirm, that an Excuse is allowable for a short delay in the Performance, this holds not true, unless caused by an unforeseen Necessity. For it is no wonder, that some of our Canons seem favourable to such Excuses, when it is their Design to exhort Christians to such Things as are agreeable to mutual Charity. But in this Question of the interpreting Agreements, we do not enquire what is most commendable, nor what Piety or Religion demands, but what every one may be forced to do; in a Word what is merely of external Right, as we call it in Opposition to the Duty of Conscience.

XXVI. But where the Meaning is doubtful, the Interpretation ought to be rather made against him who imposes the Conditions, as generally the more powerful. The Power is in him that gives, says Hannibal, not in him that defires Conditions of Peace: As the Interpretation ought to be against the Seller. For he can only blame himself, for not fully explaining himself; but the other receiving Conditions in Words capable of divers Sens, has a Right to take them in the Sense most favourable to himself; agreeable to which is that of Ariosto, when Friendship is contracted on the account of Interest, the Profit of the Receiver ought to be the Measure (of what is due).

XXVII. It is also a daily Dispute, when a Peace may be said to be broken, which the Greeks call 

XXVIII. De Paethis, Leg. XXXIX. It is indeed the Seller's Business to tell the Price of his Merchandise:

PLAUT. in Perf. (Act IV. Scm. IV. Ver. 37.)

GROTIUS.

Et Nius, Lib. VIII. Cap. XV.

(1) For when there is no Contravention to the Articles of the Treaty, tho' a new Occasion of War be given, the Penalty agreed on is not thereby incurred, which was to have taken Place on the Violation of any of the Articles: Nor is the Party offended discharged from his Engagements. However, as Mr. Burnet observes in his Difference De Contraventionibus Fœderum, (Cap. III. § 4.) when a new Occasion of War is given in this Manner, the Treaty of Peace is thereby broken indirectly; and with regard to the Effect, if Sufficient for the Offence be refuted. For then, the Offended having a Right to take Arms in order to do himself Justice, and to treat the Offender as an Enemy, against whom every Thing is lawful; he may also undoubtedly dispute with observing the Conditions of the Peace, tho' the Treaty has not been formally broken with regard to its Text. The same Author also very well observes, that this Difficult can scarce be of Use in these Days, because Treaties of Peace are conceived in such a Manner, that they include an Engagement to live in Amity for the future in all Relations; so that the least Occasion of War, how new soever it be, may be deemed an Infringement of the most important Article of the Treaty.

XXVIII. First,
XXXVIII. First, it may be done, when that act is which is contrary to all Peace; as when we are invaded in a hostile Manner, when there is no new Cause of War, which if it may be alleged with any Plausibility, it were better to suppose it an Act of Injustice without Treachery with it. It seems almost unnecessary to mention that of Tuscetides, "Not they who resist Force by Force, but they who first offer the Violence, are the Breakers of the Peace." This being granted, we must next see, who are the Invaded, and who by invading break the Peace.

XXX. I find some of Opinion, that if the Invaders be but their Allies, the Peace is broken. I do not deny but such a Contract may be made, not properly, that one Ally should be liable to Punishment for the Fact of another; but that the Continuance of the Peace may then be depended on to a Condition, partly arbitrary, and partly casual. But it is scarce credible, that such a Peace should be made, unless it manifestly appear from the Treaty itself; for it is irregular, and inconsistent with the Design of those that make Peace. Therefore they that thus invade, without the Assistance of others, shall be adjudged the Breakers of the Peace, and it shall be lawful to make War on them, not on others; contrary to which, the Thebans formerly pleaded against the 7 Associates of the Lacedemonians.

XXX. But if Subjects commit any Violence without public Order, we must then see whether this Act of private Men can be said to be approved by the State; to which three Things are required. 1. The Knowledge of the Fact. 2. A Power to punish. And 3. A Neglect in the Person authorized to do it; as you may easily gather from what has been said before. 1. The Knowledge may be proved, if the Fact be notorious, or has been complained of. 2. A Power is presumed, unless there be a Rebellion. 3. A Neglect may appear, if the Time be elaps'd, which every State generally takes to punish Offenders. And such a Neglect is equivalent to a public Decree. Neither can what Agrippa says in "Josephus" be otherwise understood, "That the King of Parthia should look upon the Peace as broken, if any of his Subjects took up Arms against the Romans."

XXXI. Another Query is often made, whether it be all one, if Subjects take up Arms, not by themselves, but fight under others engaged in War. The "Citizens in Ligy clear themselves, by laying, their Subjects took up Arms without any public Order. The fame was the Defence of the 7 Rhodians. And indeed the best founded Opinion is, that such a Thing ought not to be deemed permitted, unless there are

XXVIII. (1) (Lib. I. Cap. CXXXIII.) A De- pury from the Armenians, in his Speech to Caesar, King of Persia, said amongst other Things, as Paroecipitus informs us, that they who break the Peace are not always the first in taking up Arms, but those who lay Snares for their Allies, even in the Time of the Alliance. Perf. Lib. II. (Cap. III.) The same Historian makes the Moors speak thus in another Place: "Those who break the Treaty of Peace are not such, as having received manifest Injuries, and made open complaint thereof separate from the Offender: But they are those, who making Profession of their Willingness to ob- ferve the Alliance, commit Violence however against their Allies, and thereby render GOD their Enemy. They are not People, who in breaking with an Ally, only carry off their own Effects; but such as by taking away those of others, reduce the lawful Proprietors to the Neces- sity of exposing themselves to the Dangers of War." Vandalic. Lib. II. Cap. XI. Amma- nius Marcellinus relates, that in the Time of Valetinian, the Romans gave way on Purpose before the Persians, that they might not be the first in committing Hostilities, and thereby give Caesar to believe, that they had broke the Alliance; so that they did not come to Blow. Tll the Luft Extremity: Operisque confidunt retrocedere, &c. Lib. XXIX. 1st. Gratii.

XXIX. (1) The Condition is purly arbitrary, (postulating) as the Party, with whom the Peace is directly and immediately made, can contribute some thing in some Manner or other to hinder his Allies from offending his ancient Enemy. But it is casual, as he cannot absolutely hinder them from doing it, if they will not pay any regard to what he says or does for that End, and they are at the same Time in a Condition not to fear him. However as, from his having confined to the Rupture, in cafe his Ally should commit any Act of Hostility, he seems to have taken upon himself to hinder them from doing so; he has no Reason to complain when that happens, even the 3 he should have omitted nothing that depended on him. See further, upon the Division of Conditions into arbitrary, casual, and mixt, what Pufendorf says in his Trea- tise, Of the Law of Nature and Nations, B. III. Chap. VIII. § 4.

2 That is to say, the Plateans. For when the Lacedemonians had broke the Peace, by feizing treacherously the Citadel Cadmus, the Thebans believed they had a Right to seize the City of Plataea, under Pretex, that having been the Ally of the Lacedemonians, the Act of the latter included also a Rupture with it. See Pausaniaes, Lib. IX. seu Bront. Cap. I.

XXX. (1) It is in that Prince's Speech to the Jews, to exhort them to submit to the Romans: For in representing to them, that they had no Re- source; he told them, that even tho' hostile of their Nation, who inhabited Adiabene, on the other Side of the Euphrates, should be willing to come to their Aid, the King of the Parthians, in whole Domini- nations they were, would not permit it. De Bel. Jud. Lib. II. Cap. XXVIII. (XVI. in Latin.) p. 803. B. apparent
apparent Reasons for believing that there was an Intention to permit it; as we see now that is sometimes practised, in imitation of the old Etolians, who accounted it lawful,

1 To plunder the Plunderer. Which Custom Polybius says was so powerful, 2 That tho' they were not at War themselves, but only others, their Friends, or Allies, yet it was lawful for the Etolians, without any publick Order, to fight on both Sides, and to pray on either Party. And Lexy gives the same account of them. They suffer their Youth, 3 but without any publick Commission, to fight against their Allies, and often both Parties have Etolian Auxiliaries at the same Time. Thus the Hetrurians 4 of old, denied to affift the Sestanes, but yet did not hinder their Youth from going of their own free Will into the Service.

XXXII. 1. Again, the Peace is said to be broken, not only when the whole Body of a State, but if any of the Subjects be forcibly invaded, unless upon Occasion of some new Cause of War. For Peace is made to the Intent that all the Subjects might live in Safety: The Treaty being an Act of the State for all the Members in general, and for each in particular. And if there be even a new Cause of War, it shall be lawful, tho' the Peace subsists, for every one to defend himself and his Goods, against those that attack him. For it is natural (as Caffius says) to repel Force by Force. Therefore this Right cannot easily be thought to be renounced amongst Equals. But it shall not be lawful to revenge ones self, or by Force to recover what has been taken away, unless Judgment be first denied us. For this may admit of some Delay, but that of none.

2. But if Subjects make it their constant Practice to commit Outrages contrary to the Law of Nature, so that there be Reazon to believe they do it wholly against the Will of their Rulers, and no Court of Judicature can reach them, such as are Pirates; we may both recover our Losses from them, and avenge ourselves on them by Force of Arms, as if they were sentenced to us. But to assist others that are innocent on that Pretence, is directly against the Peace.

XXXIII. 1. A forcible Invasion of our Allies also breaks the Peace, but it must be those 5 that are comprehended in the Peace, as I have 6 already shown in the Case of the Sagenitians. This the Coriolanius alleged in Xenophon, in his 6th Book of the Greek History, We have all avowed to one another. But tho' those Allies do not covenant for themselves, but others do it for them, it is still the same Thing, provided it fully appears that they have ratified it; but as long as it is not certainly known that they have done it, they are reputed as Enemies.

2. But the Church is different of the other Allies, who have neither been engaged in the War, nor comprehended in the Treaty of Peace; as also of our Kinmen and Relations, who are not under our Dependence; neither can an Affluat upon them amount to the Breach of Peace. Yet it does not follow, (as we have 7 said before) that War may not be made on their account, but then it will be a new War and for a new Subject.

XXXIV. The Peace is likewise broken, (as I have said already) by doing contrary to what is expressed in the Peace; where by doing is likewise comprehended, not doing what we ought to do, and when we should do it.

XXXI. (t) This might be expressed in Latin by the Words of Plautus: De praed. pradom capio. In Tosc. (Ad II. Sen. VII. Ver. 15, 16.)

2 He makes Philip King of Macedon say this, Lib. XVII. Cap. V.

3 [See the Paulus cited above, B. II. Chap. XXXV. § 5. Note 2.] The Subrian Hans fought also sometimes on one Side, and sometimes on the other, as Agathias observes, B. IV. (Cap. III.)

4 Sanguini tamen non minusque & praebentibus periculis consanguinem iidem darit, ut si qui intratetatis suae voluntate ad ut illum eunt, non impediat. Lib. V. (Cap. XVII.)

5 See XXXII. (1) In this Manner Angius paflcd Sentence in favov of Horst against Syllaus. See Josephus, Antiq. fud. Lib. XVI. Cap. XVI. Grotius.

XXXIII. (1) See Timanus, Hid 32 Lib. LXV. upon the Year 1578. There is also something upon this Head, in Franc. Harrius, Hid. Bevanton. Vol. II. upon the Year 1556. Grotius.

3 But see what I have said, upon the Paulus cited in the Margin.


5 Our Author supposes reasonably, that those with whom we have this Kind of Ties, are not under our Dependence. For if the Injury is done, for Infrance, to the Queen, or a Prince, the King's Son, not reigning himself elsewhere, it is the same as if offered to the King's Person. See Bodin, De Repub. Lib. V. Cap. VI. p. 951. Edit. Francolport.1625. The Roman Law considers an Injury received by the Wife or the Children, as received by the Husband or Father, and gives an Action to the latter in his own Name. See the Receptum Sententiae of the Civilian Paulus, Lib. V. Tit. IV. § 3. and Cujus et Mr. Schulting upon him; as also the Jurisprudentia Papi- niana of Anthony Faure, Th. IX. Prinrip. II. ill. XIX. XXXV. Neither
War and Peace.

XXXV. Neither can I here admit of any Distinction between the Articles of Peace, as if some were of greater Concern than others: For whatever is inferred in the Articles, ought to be regarded as important enough to be observed. But Goodness, especially Christian Goodness, will more easily forgive small Faults, particularly if they be repented of; as Seneca speaks,

'Quem patiaret pecúllae, pene eft innocens.'

Who repeats of his Crime, is almost innocent.

But to secure the Peace the better, it would be well done to add to the Articles of Peace, that the Violation of any of them shall not be sufficient to break the Peace, but they shall be first put to Arbitration, before recourse is had to Arms, which Thucydides records was stipulated in the Peloponnesian Treaty of Peace.

XXXVI. And I am clearly of Opinion, that it is on that Foot we are to explain the Intention of the two Parties, when a particular Penalty is expressly added to the Violation of certain Articles; not that I am ignorant, that such an Agreement may be made, that it shall be in the injured Perfons Choice, either to exact the Punishment, or make void the Accommodation. But the Nature of the Affair in question requires rather the other Interpretation, which I mentioned. This is also very plain, and what I have said before, and proved by the Authority of History, that even in regard to Articles simply stipulated, he who fulfils not his Promife, when the other, who ought first to have executed his Engagements has failed therein, does not break the Peace; since his Obligation was conditional.

XXXVII. But if an absolute Necellicity occasion the Non-Performance of the Agreement, as if the Thing promised be loft, or taken away, or the doing of it be by some Means or other rendered impossible, the Peace shall not indeed be looked upon as broken; for as I have said already, Peace does not use to depend upon a casual Condition; but the other Party shall have his Choice whether he had rather wait for the Performance of the Promife, if there be any Hopes of a possibility of its being done, though late, or receive the full Value of it, or be discharged from any mutual Engagements answerable to this Article, or thought equivalent to it.

XXXVIII. When there is even Treachery on one Side, it is certainly the Choice of the innocent Party to let the Peace subsist; as Scipio did formerly after many perfidious Actions of the Carthaginians. Because no Man, by doing contrary to his Obligation, can thereby discharge himself from it. For though it be expressed, that by such a Fact the Peace shall be reputed as broken, yet this Clause is to be understood only in Favour of the Innocent, if he thinks fit to make use of it.

XXXIX. Laitly, We have said, that the Peace may be broken by doing what is contrary to the Special Nature of the Peace concluded.

XL. Thus those Things that are done contrary to Friendship, do break that Peace which was contracted under the Condition of Friendship; for what the Duty of Friendship alone may require from others, ought also here to be performed by the Right of Covenant. And to this (tho' not to every Peace, for there are some not on the same Account of Friendship, as Pomponius observes,) we may refer many of those Things, which Civilians advance concerning Injuries and Affronts done without force of Arms; and especially that of Tully, If any Thing be committed after a Reconciliation made, it shall not be accounted a Neglect, but an Offence, and not imputed to Imprudence, but Perfidiajjns; but even here also we are not to judge of it inviitably.


XXXVI. What if some Penalty be added.

XXXVII. What if Rendered by Others Necessary.

XXXVIII. The Peace shall stand firm, if the injured Person be satisfied to it.


XXXIX. How a Peace may be broken, by doing what is contrary to the Nature of every particular Peace.

XL. What comes under the Nature of Friendship.
2. Therefore an Injury done to a Relation, or a Subject, of him with whom a Treaty of Peace has been concluded, shall not be deemed as done to himself, unless there was a manifest Design to affront and insult him thereby. Which natural Equity the Roman Laws observe, in regard to Slaves that have been cruelly handled; and Adultery and Ravishment shall be imputed rather to Lucre than Hatred: And the invading another Man's Property, shall be reputed rather a new Act of Covetousness than of Treachery.

3. But cruel Threatnings, without some new Cause given, are inconfentient with Friendship; and hereto I will refer the Building of strong Places on the Frontiers, not so much for Defence as Offence, and an unual ringing of Forces, if there be just and apparent Reasons to think that they are prepared against him with whom we have made Peace.

XLI. Whether to entertain Subjects and Exiles be contrary to Friendship. 

* K 2. Ch. 
* § 24. 
* K 2. Ch. 
* § 25.

UBI supra, § 24. See Be 22. l. 12.

XLI. 1. To receive particular Persons as are willing to remove from one Prince's Territories into another's, is no Breach of Friendship; for this Liberty is not only natural, but has something favourable in it, (as we have said elsewhere.) In the same Place I shall rank the Entertainment given to Exiles: For as I have before proved out of Euripides, the State has no Right over those whom they have banished. Perusus argues well in Lisy, "To what Purpose is it to ordain one to be banished, if there were no Place allowed for his Refuge?" And Aristides calls, To receive the Banished, A Right common to all Mankind.

2. But we have already proved, that it is not lawful to receive whole Towns, or any great Multitudes, who made a considerable Part of the State from whence they came: Nor those who are engaged by Oath, or otherwife, to continue in the Service, or under the Slavery of him whom they have quitted. But we have mentioned above, that the like hath been introduced among some People, by the Law of Nations, concerning those who have been made Slaves by the Chance of War; and also concerning the delivering up of such who are not banished, but fly from Justice, I have treated in another Place.

XLII. To decide a War by Laws is not always lawful, but only then, when we have a full Propriety in the Thing disputed for: For the State is more strictly obliged

* XLI. (1) Ziegler, and others after him, criticise our Author, without Reason, in this Place, from having taken his Thought wrong. They make him say, that the Method of Laws is only to be used, when the Parties have an absolute Propriety in the Thing disputed for. But had they duly considered the Sequel of the Dicourse, they would have found, that Grotius never intended to say so. For he merely admits of a Recovery to Laws, when we are sensible of being too weak to reit, and he makes no Distinction there between the Things, of which the Sovereign has always full Power to dispose, as his peculiar Right, and those which appertain to the Subject, for the Defence of which he has undertaken the War. What milled the Interpreters, was the Expression of the Original, which is a little ambiguous: Sortis alioque: belli eiusius liceat ne fuperfatis, sed tam demum quibus de re agunt, in quam plenam bovemans dominium. It seems at first Sight, that these Words, sed tam de- mum, &c. specify the Case excepted, in which the Method of Laws may be used: but here the fuperfatis is to be understood; for the Senes is, that it is only in Regard to Things of this Kind, that we always may, if we will, refer the Issue of a War to the Decision of Laws, even then that we should do it in such Manner, because every one may dispoze of his own as he thinks fit. Whereas, when the Inter- est of the Subject is concerned, of which we are not absolute Makers, every other probable Method must be tried, before we proceed to this, which is in its Nature entirely uncertain. This is our Author's Thought. It is however not amiss to observe upon this Occasion, how much it concerns an Author, especially

3 Si quis sic facit injuriam, &c. Digest. Lib. XLVII. Tit. X. De injuria & fam os Libellis, &c. Leg. XV. § 35. See the fame Title of the Institutes, § 3.

XLI. (1) The famous Legatit Solon ordained, that no Strangers should be received into the Number of the Citizens of Athens, but such as were banished for ever by their Country, or who came to settle at Athens with their whole Families, in order to follow some Employment. PLUTARCH, in Vit. Solon. (p. 91. E.) King Perusus, as Apianus Alexandinus relates, said, to justify his giving Refuge to Exiles, that it was the common Right of all Men. Excerpt. Legat. Leg. Num. 25. (p. 167. Exc. Utr. ) This common Right is often confirmed, or rendered more strong by Treaties. See the Peace made with Antichius, in Polybius, Excerpt. Legat. XXXV. and that made between the Romans and Persians according to Mencander the Protector. (Legat. Justinian. & Thib. Cap. II.) as also what S M L E R says on the Articles of the Confederacy of the Swis Cantons. The Ar- dians, whilst the Kings of Syria made War upon each other, obtained this Condition by a Treaty; that they should be permitted to give Refuge to all Syrians who came to take it, in their Country; but that they should not expel, or deliver them up against their Will. STRABO, Geogr. Lib. XVI. (p. 754. Edit. Paris. Cusan.) Grotius.

2 Et hercle quid aditus cursum exflitiam pater, sibi suhit cursum exflitiat locus est P. Lib. XLII. Cap. XLI. Num. 7.


4 See what is said upon that Place.

5 XLI. (2) A SCOTTIS. Legat. Lib. IV. Num. 8. In the same Place, (p. 202.) this Term is used: "Non existimantur Se Litterati unius Vnitatis, qui Se inter Se non sunt Litterati."
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liged to defend the Lives, Chaftity, and Fuch like of the Subjects; and the King also is more strictly obliged to confult the Safety of the State, than to omit tho' Means which are most natural to his own and others Security. But yet, if he that is unjustly assaulted, shall, upon due Examination, find himself too weak to make any confiderable Reftistance, he may reaflonably refer his Cafe to Chance, that by expofing himself to an uncertain, he may elcape a certain Danger, which of the two Evils is the leaft.

XLIII. 1. Here follows a Question much controverted, viz., whether it may be lawful to decide a War by a Combat of one of each Side, 1 as that of Æneas and Turnus, 2 Menelaus and Paris; or between two of either Party, as that between the Ætolians and Eleans; or between three of a Side, as between the Roman Horatii and the Alban Curatii; or between three hundred on each Side, as that between the 3 Lacedemonians and Argives. 2

2. If we only refept the external Right of Nations, no Doubt but fuch Combats are lawful, for that 4 Right gives a Man Leave to deftray his Enemy how he can; and if the Opinion of the old Grecians, Romans, and other Nations, were right, that every Man had an absolute Power over his own Life, then tho' Combats are likewise re-

concilable to internal Justice. But we 5 have feveral Times faid, that this Opinion is repugnant to right Reafon and God's Commands. We have 6 elsewhere proved 7 by Reafon, and the Authority of Holy Scriptures, that he offends againft Charity who kills a Man, for fuch Things which he can well spare. To which we fhall add, that he who fets fo small a Value upon his Life, which GOD hath given him as a great Blessing, fings againft GOD and his own Soul. If the Thing difputed for be worthy of a War, as the Preservation of the Lives of many innocent Perffons, we ought to endeavour it to the utmost of our Power; but to make use of a fuch Combat, purely as the Trial of a good Cause, or as an Infrument of Divine Judgment, 8 is vain and superflitious.

3. There is but one Thing that can render fuch a Combat innocent and lawful, and that but on one Side, 9 when otherwise it is highly probable that he who pro-

secutes an unjust Cause should be the Conqueror, and thereby cause the Deftruftion of many innocent Perffons; he cannot then be any Ways blamed, who undertakes a Combat on this Account, wherein he has most probable Hopes of Success. And this is alfo true, that many Things which are not rightly done, may be by others, tho' not really approved, yet permitted, in Order to prevent greater Mifchiefs, that

especially when he writes in a concife Sile, to exprefs his Sentent with all poifible Plainnefs and Per-

fpicuity: Otherwife he gives Room for fuch as do not examine Things with sufficient Attention, that is to fay, the greater Part of his Readers, to take his Words in a quite different Meaning from his own, and to affcribe Things to the Writer, which never once entered his Thoughts.

XLIII. (1) See B. XII. of Virgil's Æneid, where that Combat is related at Length by the Poet, who, perhaps, invented it: For I know no o-

ther Author for the Fact. There is nothing faid of it in the little Treaife, De Origine Gentis Ro-

manae, ascribed to Aurelius Victor: He only faids that Æneas killed Turnus.

2 This is related in the third Book of the Æneid.

3 This Fact is in Thucydiv, an ancient Author, cited by Stobaeus, Serm. VII. See the Mifcella-

nea Logica of Murenxus, Lib. IV. Cap. XIII.

4 See above, Chap. IV. of this third Book.

5 All the Reafons (faE Mr. Buddrus, Ju-

rifer. Histor. Specim. § 23. 2) either prove nothing, or prove at the fame Time, that it is never lawful to venture one's Life in a Combat of any Kincl whatsoever. And this is what Grafinckel has before attested in his Defence of our Author against Fisher, p. 359. See what I fhall fay prcfently, in Note 7.

6 This was a superflitious Custom of the antient Germans, who called this Kind of Combats Judici-

cia Dei, or Ordana. See Francis Hotman, Off. III. as also the Difertation of Mr. Buddrus,

vs., cited in the foregoing Note, § 25. that of Mr. Hermitz, De Combattis, Leg. 2, Judicat in

Specialit. Rom. Germ. Imp. Rhetoric. § 21. Vol. II. Opus. 459, 460. and one of Mr. Sticher's,

intitled, De duibus ac legittima Indications Exifti-


7 This Exception shows that the Thing is not bad in itself, and that all the Harm conftits in ex-

posing our own, or the Life of others, without NecelHity to the Hazard of a fuch Combat, which would be unlawful, even tho' done without any A-

greemenl. The Defire of terminating War, which has alway's fuch fatal Consequences, even to the victorious Party, is fo laudable, that it may even excufe, if not entirely justify, tho' who engage, either themselves or others, imprudently in a Combat of this Nature. At leaft it seems to me, that in fuch Cafe, tho' who combat, not merely of their own Will, but by the Order of the State, are entirely innocent; for they are no more obliged to examine, whether the State acts prudenty or not, than when they are fent upon an Affair, or to fight a pitched Battle.

could
XLIV. Whether the Fall of the King does here oblige the People.

XLV. Who is to be judged the Conqueror.

XLVI. They who thus refer their Cause to the Trial of a Combat, may indeed lose their own Right, if they have any, to the Kingdom disputed for; but they cannot make over a Right to another, who has none of his own, to those Kingdoms which are not patrimonial. Therefore to make the Agreement valid, there is a Necessity to have the Content of the People, and of Persons already born, that have any Right to the Succession. And even as to Fiefs that are not free, the Content of the Lord, or Superior, is absolutely necessary.

XLV. 1. Often in such Combats it is disputed which is the Conqueror. They cannot be reputed conquered, unless the whole Party on one Side be slain or put to flight. So in Livy, he that retreats within his own Borders, or into his own Towns, is to be esteemed vanquished.

2. Those three famous Historians, Herodotus, Thucydides, and Polybius, furnish us, each of them, with an Example of Disputes concerning Victory. The CAfe related by the first, respects only such Combats; but he that rightly considers the Matter will find, that in all those Combats neither Party had a real Victory. For

8 But there is a great Difference between these Examples and the CAse in Question. When Ufurers and Courtefants are tolerated, that Toleration of itself implies no Approbation; it is a simple Impunity, which the Laws and Magistrates may, and ought often to grant, in Regard to several vicious Things. But let Combats are, by their Nature, such as could have no Effect, without being positively authorized by the State: So that if our Author*s Reasons were good, the State never could, I do not say declare such Combats of their own motion. Will, but even permit Champions to fight them, who should offer themselves for that Purpofe; because that Permission implies always an Approbation, and is adequate to an express Order.

9 See the foregoing Note.

10 As Homer long before challenged Eurybion, See EURIPIDES in the Heuridic, ver. 804, & seqq.

11 Antiq. Rom. Lib. III. Cap. XII. It appears by what follows, that the Question is not at all determined by our Author*s Principles and Reasons. For the Athen General refuses the Combat of one to one, and chooses rather that three should fight with three; because, says he, the Number Three includes, a Beginning, a Middle, and an End. Which is fine Morality.

12 Thus the Athenopoliains answered Mabamon, concerning himself and Menelaus, as LEUCANIVUS relates, Lib. XI. In like Manner Camberis, King of the Lombards, challenged King Achei. PAUL WARNAFRED. Lib. V. So Porphirius challenged the General of the Scyrmantes, to try which of them should have the Fortreis of Cheris, that their Diffpute might not expose a great Number of People to the Dangers of War. CONSTANTINE, Porphyrigenet. Cap. De Cafis Cheris. See an Example of a single Combat for a Kingdom, in PONTANUS* History of Denmark,

(Lib. V. p. 151. Edit. AMEL. 1671. where the Champions were Edmund Innsford and Canute) and what Historians say of the Challenges which put between the Emperor Charles V. and Francis I. King of France. Grotius.

XLIV. (1) Some Commentators say, that this Content is not necessary, because the King of a Kingdom, not patrimonial, having a Right to make War and Peace, has also, by necessary Consequence, that of terminating War in such Manner as he shall judge most conducive to the Good of the Publick. But the Consequence is not just: For as the fundamental Laws, or rather the Nature of a Kingdom not patrimonial, deprive the King of the Power to alienate validly the Crown, by his sole Content; by that alone, I say, the Right of making Peace includes an Exception of the CAse, in which the Alienation of the Kingdom would be concerned.

2 In sestis non iheris. Our Author thus here the Diffinition of Fiefs free and not free, in an improper Sense, as he has done elsewhere. See what I have said B. I. Chap. III. $ 23. Num. 2.

XLIV. (1) There is a Reserve of Ennusius which says, that to be really Victor, even when victorious, it is necessary the Vanquished should confess it.

Quo victa, non est victor, nisi victis' factur.

See SCALIGER upon FESTUS, at the Words Her- banum de. Grotius.

The Pallage of Ennusius is in the Collection of HIERONYMUS COLUMNUS, p. 133. Edit. AMEL. where the Note of that Commentator may be seen.

2 Pelvisique quam in suo jussu se recipiunt [AE- quil] etc. Lib. III. Cap. I. Num. 12. In opus a me saya se recipere, ut suum popularissimum paffi, &c. Ibid. Cap. II. Num. 10. the
the Argives were not put to flight by Otthryades, but marched off in the Night, supposing themselves Conquerors, and with a Design to carry the News to their Countrymen. Neither did the Corcyreans defeat the Corinthians; but the latter, after having fought with Advantage, seeing a strong Fleet of the Athenians near, without hazarding an Engagement with them, retreated in good Order. Latly, Philip the Macedonian had indeed taken a Ship of Attalus, for taken by those of her own Party, but did not rout the whole Fleet: Therefore, (as Polybius observes) he rather behaved himself like a Conqueror, than really thought himself so.

3. But those Things, as gathering the Spoils, giving Leave to bury the Dead, and offering Battle a second Time; which, both in the above-mentioned Authors and in Livy, you may find set down as Tokens of Victory, prove nothing of themselves, but as they may be attended with other Indications of the Enemy's Flight. And certainly, in a Doubt, the strongest Presumption is, that he who retreats runs away; but where there are no positive Proofs of Victory, the Cafe is just as it was before the Battle, and so they must either pursue the War, or come to a new Agreement.

XLVI. 1. Proculus tells us, that there are two Sorts of Arbitrations, one whereof he makes so absolute, that its Sentence must be obeyed, whether just or unjust; which, he says, takes Place when the Arbitration is founded on a Compromise. The other is, when the Judgment of the Arbitrator has Force only so far as is conformable to what an honest and equitable Person ought to pronounce. Of which we have an Example in the Decision of Celsus, if a Slave made free shall favour (says he) to do what Services his Patron shall require of him, the Demands of his Master shall be no farther obligatory than conflicts with Reason and Equity. But this Interpretation of an Oath, tho' it may have been allowed by the Roman Laws, yet it is not agreeable to the plain Sense of the Words simply taken; but this holds very true, that the Word Arbitrator may be taken in both Sorts, either as a Mediator only, such as were the Athenians, between the Romans and Demetrius; or for an absolute Judge, whose Decree must be obeyed. And it is in this Sense that we here take it; as also we have done before, when we treated of the Means to prevent a War.

2. Those against such Arbitrators, to whose Judgment both Parties have promised to stand, it may be provided by the Civil Law, as in some Places it is, to appeal from it, and exhibit Bills of Complaint; yet this cannot be between Kings and Nations. For here can be no superior Power, which may either hinder or disannul the Obligation of a Promise, so that their Sentence must stand, whether just or unjust; to which we may rightly apply that of Pliny, every Man makes him the supreme Judge of his own Cause, whom he has chosen Umpire. For it is one Thing to speak of the Duty of an Arbitrator, and another of the Obligation of those who have engaged by Promise to stand to their Arbitration.

3 Plutarch says, this Permission, demanded by the Thukian after a Battle, afforded the Victory to Agis. In Vit. Ageil. (p. 606. B.) The same Historian observes elsewhere, that those who had obtained Permission to bury their Dead, were deemed, according to the received Customs, to have renounced the Victory, and could not eke a Trophy. In Vit. Nicias, (p. 527. A.) Grotius.

XLVI. (1) Arbitrarium enim genera sunt duas, utc. Diggel. Lib. XVII. Tit. II. Pro fasc. Leg. LXXVI.

2 These Arbitrators, according to the Ideas of Roman Law, are generally chosen by the Parties, to judge and determine something relating to the Engagements of a Contract; whereas the former are taken to terminate a Quarrel.


4 See Plutarch, in the Life of Demetrius, p. 899. A.

5 See Mariana, Hist. Hift. Lib. XXIX. 15. Bembo, Lib. IV. [p. 63. where he treats of an Arbitration between the Florence and Venetians, in which the latter had made choice of Hercules, Duke of Ferrara, for their Arbitrator.] There are many Examples of Treaties of Peace concluded by the Means of Arbitrators in Cromer's Hist. Palm. Lib. X. XVI. XVIII. XXIX. XXIV. XXVII. XXVIII. There are also some in Pontanus's History of Denmark, Lib. II. See also those we have cited above, B. II. Chap. XXXIII. § 8. Grotius.

6 Adi forum quoque causa non judicium fict. quaecumque eligat, &c. Hist. Nat. Praef. Our Author undoubtedly supposes that there is neither Fraud nor Collusion on the Side of an Arbitrator. See Pufendorf, Law of Nature and Nations, B. V. Chap. XIII. § 4. with which Place it is necessary to compare this whole Subject.

8 S XLVII. We
XLVII. Arbitrators in doubtful Cases bound to the Equity.

XLVII. We must consider, in the Duty of an Arbitrator, whether he be chosen under the Notion of a Judge, properly so called, or whether a more extensive Power be given him, which, according to Seneca, is in some Manner essential to every Arbitration. A good Cause, says he, had better be referred to a Judge than an Arbitrator, because the Judge has a constant Rule and Orders to proceed by, which must not transgress; but the other having full Liberty to judge according to his Conscience, may retract or add something, and pronounce Sentence, not according to the rigorous Laws of Justice, but as Humanity and Piety shall direct. And Ariosto reckons it, the Duty of a benevolent Man, rather to go to an Arbitrator than a Judge; giving this Reason for it, For an Arbitrator repels that which is equitable, the Judge that which is legal; and for that Purpose the Ufe of Arbitrators was invented that Equity may prevail. For Equity, in this Place, does not properly signify, as elsewhere, that Part of Justice which restrains the Generality of the Terms of a Law, according to the Intent of the Law-maker, (for even this is the Judge's Charge) but every Thing which is better done than not done, tho' not according to the strict Rules of Justice, properly so called. But such Arbitrators, as they are frequent among private Persons, that are Subjects to the same State; and are particularly recommended to Christians, by the Apostle St. Paul, Cor. vi. to, in doubtful Causes, so large a Power is not suppos'd to be granted them. For when there is any Obscurity, we are to follow that Side which gives the least Extent to the Things in Question. But especially this is to be observed between sovereign Princes, who having no common Judge are premised to tie up the Arbitrator to those strict Rules which Judges are generally confined to.

XLVIII. But this is to be observed, that Arbitrators chosen by a People, or sovereign Power, are to give Sentence of the principal Matter, but not of the Possession, for Judgments of Possessions belong to the Civil Law: By the Law of Nations, the Right of Possession follows Property; therefore till the Cause is tried, no Innovation is to be made, both to avoid Prejudice, as also because the Recovery of those Things is difficult. Livy, in his History of the Arbitration between the Carthaginians and Massinissa, says, The Deputies did not change the Right of Possession.

XLIX. There is another Way of submitting to the Judgment of one in Office to terminate the War, which is to give the Enemy a full Power to dispose of us; whereby we surrender at discretion, and become subject to him to whom we surrender. The Greeks call it Ύπαρξειν τα καλα ανα. Thus the Athenians were asked, in Livy, whether they would submit themselves to the Discretion of the Romans. This was the Advice of L. Cornelius Lentulus, as related by Appian, about the End of the second Punic War, concerning the Affairs of the Carthaginians. Let the Carthaginians, says he, surrender at Discretion, as the Conquered use to do, and as others have done formerly; then we shall see what we have to do; they will then take kindly of us whatever we grant them, since they cannot consider it as the Effect of a Treaty concluded with them. Now this makes a great Difference: For whilst we enter into Treaties with them, they will always have some Pretence to break them, alleging, that they had been wronged in some Part of them. For since many Things are capable of a double Interpretation, there will always remain Room for a

XLVIII. (1) Iste melius videtur conditio causa bona, si ad Judicem, quam si ad Arbitrum mittitur, &c. De Benefic. Lib. III. Cap. VII. But the Ambiguity of the Latins Word Arbitre misled our Author in this Place. Arbitrators, properly so called, are not meant here, but real Judges, who in Affairs bona fide, as the Roman Law expresses it, were to determine according to the Maxims of Equity; and not according to the Rigour of the Law, as I have observed elsewhere. See Mr. Noddot's Treatise, De faciel. & Imp. Lib. I. Cap. XIII. 2 Rhetic. Lib. I. Cap. XIII. in fn. 3 Semp. in obseruis, quod minimum (r. (senti- mor.) Digest. Lib. L. Tit. XVII. De divers. Reg. Jur. Leg. IX.

XLVIII. (1) This the Duke of Savoy laid, in the Dispute which he had concerning the Marquisate of Saluzzo. See De Serres, [or rather the Conterminator of his Work] in the Reign of Henry IV. Grotius.

2 But see what I have laid in the Chapter of Pupin dorc. cited § 6.

3 Eodem anno inter Paganum Carthaginigenem, &c. Lib. XL. Cap. XVII. Num. 1. 6.

XLIX. (1) Which the Latins called Permisitaria de se arbitrarium, as appears by the Demand which the Roman Senate made to the Athenians, Interrogat. ab uno Senatore, permisissent eum arbitrarium de se Papulo Romanis, &c. Livy, Lib. XXXVII. (Cap. XLIX. Num. 4.) Grotius.

2 De Punic. Bell. (p. 34. Edit. H. Steph.) 4 Dispute:
Dispute: Whereas, if they surrender, and we disarm them, and become Masters of their Persons, they will then see that they have nothing properly their own; they will humble themselves, and whatever they shall receive from us, they will look upon as of meer Grace and Favour.

2. But here we must also distinguish, what the Vanquished ought to suffer, and what the Conqueror may do, either in Strictness, or without transgressing some Dut\[\textit{y}, or without exacting what is unworthy of him. The Conquered having yielded himself, must suffer any Thing at the Will of his Conqueror, as being now in Subjection; and if we respect the 3 external Right of War, they have nothing but what may be taken from them, their very Lives and personal Liberty, much more their Goods, whether publick, or belonging to private Persons. Livy tells us in another Place, 4 that The Athenians having surrendered at Difjonet, were afraid left they should be ill-used in their Persons. We have cited 5 in another Place, When all Things are surrendered to the Conqueror, it depends on him to take away or to leave what shall please. To this agrees that of Livy, 6 It was the ancient Custom of the Romans, when they would not make any Treaty, either of Peace or Friendship with a People, to punish them by Arms, till they had surrendered themselves with all their Rights, dative and human, given Highway, delivered up their Arms, and received Garrison into their Towns. And even sometimes those that yielded themselves might be killed, as we have shown in 6 another Place.

L. 1. But the Conqueror, that he may do nothing unjustly, ought first to take Care that no Man be killed, unless for some capital Crime; for also, that no Man's Goods be taken away, unless by Way of just Punishment. 7 And even by keeping within these Bounds, as far as his own Security will permit it, it is Honourable (to a Conqueror) to shew Clemency and Libenalty, and sometimes even necessary, by the Rules of Virtue, according as Circumstances shall require.

2. Admirable are the Conclusions of those Wars which are finished with a general Pardon, as I have 8 said in another Place. Thus pleaded Nicholas the Syracusan, in Diodorus, 9 They surrendered themselves up, with their Arms, trusting to the Mercy of the Conquerors: it would then be an eternal Shame, that they should be deceived in their Opinion of our Clemency. And again, What Grecian ever condemned them to barbarous Punishment, who yielded to the Mercy of the Conqueror? And thus Obrooicas Caesar, in Appian, speaks to L. Antonius, coming to surrender himself, 10 If you had but come purely to treat with me, you should have found me a Conqueror highly incensed at your Actions; but now you come to surrender yourself, your Friends, and your Arms to our Difjonet, you have disarmed my Anger, and taken from me the Power which you would have been forced to give me, if we had made an Agreement together; for upon considering what you ought to suffer, and I to grant, I shall prefer my Honour to Revenge.

3. We often meet in Roman Histories 11 with these Expreffions, Tradere fi in fidem, To yield themselves to the Faith. Tradere in fidem & clementiam, To yield to

3 In Reality it is not merely as being Conqueror's Subject, or the Conqueror may be treated in this Manner. Our Author is far from believing, that the latter, who in extreme Necessity, for Instance, render themselves Subjects to any one, who was not their Enemy, and give him the most absolute Power over them (which in Latin is exprefled by deinde µ). See above, B. II. Chap. V., § 31. that the latter, I 4 say, content, that he should dispose at his pleasure of their Estates and personal Liberty, and fill les of their Lives. I obferve this, because some Writers have falsely imagined that our Author has confounded these different Manners of submitting to a Perfon with each other.

4 Et permissis libera arbitrio, ne in corona fuis furoribus, metuant. Lib. XXXVII. (Cap. VII. Num. 1.)

5 Faciunt eum Romanis, &c. Idem, (Lib. XXVIII. Cap. XXXIV. Num. 7.) GROTIUS.

Our Author cites this Paflage from the seventh Book of the Roman Historian, which was occasioned by his having taken it from the Senechas of PEter du Faur, Lib. I. Cap. VII. p. 5. where we find the fiale Citation, with another from another Book of Livy.

L. (1) See a remarkable Example of this in MA\[\textit{rianas} History of Ferdinand, King of Le\[\textit{on}, Lib. XI. Cap. XV. and compare this Place with what we have said in the eleventh Chapter of this laft Book, § 14, 15. GROTIUS.


4 For In\[\textit{stance} in Livy: Legationes finimatis, ab Ecle\[\textit{anes}, & Dardono, & Rheico, TRADENTES IN PIDE\[\textit{M} evolutis, fuis hemoniæ, andreut. Lib. XXXVII. (Cap. IX. Num. 7.) Faulo, & faneque, ille in PIDE\[\textit{M} ET CLEMENTIAM Papali Romani PER\[\textit{MITTERT,
Of the Rights of Book III.

to the Faith and Clemency. So in the thirty-seventh Book of Livy, He gave a gracious Audience to the neighbouring Embassadors, that came to surrender their States to the Faith of the Romans. And in the forty-fourth Book, Paulus earnestly desiring that he might be allowed to surrender himself, and all be bad, unto the Faith and Clemency of the People of Rome. But it must be understood, that by these Words is meant an absolute Surrender: 5 And that the Word Fides in these Places signifies nothing but the Proby of the Conqueror, to which the Conquered yields himself.

4. There 6 is a remarkable Story in Polybius and Livy, of Phanes, an Aetolian Embassador, who, in his Speech to the Conful Manius, laid these Submissive Words, that The Aetolians did freely surrender themselves, and all they had, to the Faith of the People of Rome. Which when he had affirmed again to the Conful, who asked whether that was really the Design of the Aetolians; the Conful demanded that the chief Authors of the War should be immediately delivered up to him. Phanes presently replied, 7 We surrender ourselves up to your Faith, not unto Slavery: And added, that it was not the Catum of the Greeks to exact such a Thing as he commanded the Aetolians to do. The Conful answered, he valued not what the Catum of the Grecians was; that, according to the Catum of the Romans, he had an absolute Power over those who had surrendered themselves by publick Deliberation; and presently ordered the Embassadors to be laid in Irons, 8 Do ye, having surrendered yourselves to our Faith, pretend to teach us what in Duty and Honour we should do? as Polybius has it. From which Words it is plain, what he to whole Faith any People have surrendered themselves, may do with Impunity, and without violating the Law of Nations. However, the Roman Conful did not make Use of this Power, but difmissed the Embassadors, and permitted the Aetolians to have a new Confultation in their Assembly. 9 Thus the People of Rome are said to have answered the Fides: That they had been informed the Fides had yielded themselves, not to the Power, but the Faith, of the Romans. And of the Campanians, we read, 10 that they had submitted absolutely, and not by any Agreement.

5. But concerning his Duty to whom the Surrender is made, that of Seneca 11 is very applicable, Clemency has an unlimited Power to judge: It is not tied down by the Forms of Law, but pronounces according to Equity: It may both absolve and condemn, as it thinks fit. Neither does it signify much how the Perfon forrinding expresses himself, whether he yield to the Wildom, Moderation, or Mercy of the Conqueror, for they are all but Compliments, the Reality of the Matter is, the Conqueror becomes absolute Master to do what he pleases.

LI. But yet there are also conditional Surrenders, which are made either in Favour of private Persons, as when 1 the faving their Lives, their personal Liberty, or...


To which may be added, this Paffage of another Roman Historian, from whence it appears, that Persons surrendered in this Manner without Conditions: Mifutur ad Imperatorum legati, qui jugur-which imperata facturaus, as sine Ulla Pactusone ficre vnmque fumum in illius fidem tradere. Sallust. De Bell. Jug. Cap. LXVI. Ed. Waff. 5 It is the fame Thing, according to Polybius, as to surrender to the Conqueror's Diferition. Ex-erpt. Legat. XIII. The Greeks express this thus, 'Eis ilium eos nosque conquerentes, as in Thucy-rides, Lib. III. (Cap. LXVII). Diodorus Siculus says, Καθως ουκ εδοξομεν εις την Ερατον. Lib. XIV. Grotius.

some of their Goods be expressly stipulated; or in Favour of the whole Body of People, whence may result a mixt Government, of which we have treated in another Place.

LII. To publick Treaties are sometimes joined Hostages and Fledges, which are a Sort of Accessory. Hostages (we have said) are either such as freely give themselves, or are given by him that hath the sovereign Power. For he that is possessed of the supreme civil Power, has a Right both over the Actions and the Goods of the Subjects; but the Prince, or State, shall be obliged to make Satisfaction to him or his Friends, for any Losses which he may thereby suffer. And if it be indifferent to the State, which, of several Persons, goes as Hostage, it is best to decide that by Lots; but the Lord of a Fief has not this Right over his Vassal, unless he be also his Subject; for the Homage and Obedience that he owes him, does not reach so far.

LIII. We have already said, that a Hostage may be put to Death by the external Right of Nations; but not by the internal, unless he himself be guilty of a capital Crime. Neither can they become Slaves; but they may even by the Right of Nations enjoy, and leave their Goods to their Heirs. Tho' it is provided by the Roman Law, that their Goods should be confiscated to the Publick.

LIV. The Query is, whether a Hostage may lawfully Ecape? And certainly he may not; if at hir'd, or since, he hath engaged his Word (in Order to have a little more Liberty) that he would not; otherwise, it does not seem to be the Intent of the State that sent him, to oblige their Subject from making his Ecape, but to allow 2 The Roman Prætor, spoken of in the foregoing Note, referred to the Pontifex their City, Laws, and Liberty to live according to their own Laws. Urbani, agrifges, & juss legis iussu redituit. Lipay, idib. Num. 14. It is true, the Historian does not say this was by Way of Composition; but nothing hinders its being stipulated upon surrendering. Mr. Thomasius, in his Dissertation D. Spontanis Rerum Romanim Nam. § 12. maintains, that there is no Example of a Composition, by which the Conqueror left those who surrendered any Part of their Civil Liberty. He adds some other Remarks against our Author, which I shall not examine; tho' he does not seem to have sufficiently comprehended his Principles. See above § 49. Note 3.

LIV. (1) There are also Hostages, neither given by the Sovereign nor themselves, but by the Enemy. In this Manner Troyse made the Children of Armenia Hostages. 2 Ks. xiv. 14. Also under the Great took thirty thousand, as Quintus Curius relates, Lib. VIII. Cap. V. Num. 1. and Hannibal, four thousand, as we find in Lib. XXII. Cap. XXII. at the End. There are many other Instances of it in ancient History: And nothing is more common in these Days than to take Hostages by Force, for the Security of Contributions. There is a great Difference, with Respect to the Effects of Right, between Hostages of this Kind, and those which are given by the State. For the former, unless they have engaged by Promise to remain in the Hands of the Enemy, may not only escape, as our Author admits the other to do also, without sufficient Reason, as we shall see below; but the State may receive them, as well as any other Prisoners that make their Escape. This is what the late Mr. Battier, Professor of Law, and Syndick at Belfort, has very well observed, in a small Dissertatio De Officiis, & Sui. jure, § 12. See below, § 53. Note 4.

3 Or unless it has been expressly stipulated in the Act of Indemnity. See Corby, inFac. Lib. II. Cap. VII. and ALBRECHUS GENTILIS, De Juris Bell. Lib. II. Cap. XIX. p. 397.

LIII. (1) Hostages are demanded and given for the Security of the Execution of some Engagement: Now in this Case it suffices, that the Hostages are retained, in such Manner as shall be judged proper, till the Performance of the Things agreed on; it is not at all necessary, that the Hostages become Slaves. But it is not the same in Regard to those which are taken after a City has been reduced to surrender; for they ought to be considered as Prisoners, who, according to the received Custom of old, became Slaves. The Hostages also, who have been given voluntarily, if those who gave them break the Conventions, and renew the War, till it be executed; because, when those who have thenceforth become Enemies again. This Mr. Battier observes also, in the Dissertatio cited before, § 19.

2 DIVUS COMMODORE rescritp., Obediam bona, justi Capiteis, animadvers in fiium officia digna. Digest. Lib. XLI. Tit. XIV. De Juris Fisci, Leg. XXXI. But the Hostages might make Wills, if the Roman People or Emperor permitted them; or if they had acquired the just tuổi, that is to say, the Freedom of the City of Rome. See the following Law of the Title here cited, and Cujus. upon Law XI. of the Title Quo interfutamenta faciunt, p. 1063. col. 2. Vol. I. Opp. Edit. F. C. W. as also the Treatise of the late Baron Spanheim intituled Orbi Reversum ii. p. 239. 240.

LIV. (1) But says Mr. Bubardus, (in his Dissertatio intitul'd, Jurisprud. Hift. Spectem., § 56.) either the State did intend that the Hostage should continue in the Hands of him whom he was given, or that the State had not Power to oblige the Hostage to remain. The first is manifestly false; for otherwise the Hostage could be no Security, and the Convention would be illusory. Nor is the other more true; for if the State, by Virtue of its eminent Dominions, can expell even the Lives of the Citizens, why may it not engage their Liberty? Mr. Battier, in the Dissertatio which I have cited
allow the Enemy to secure him as he pleased: And thus may the Fact of Celia be defended. But tho' she had not offended in doing it, yet the State could not receive and detain their Hostage; whereupon Porfennus declared, 3 'If they did not send back his Hostage, he would take it as a Breach of the Treaty.' Then 4 The Romans immediately restored her, according to Covenant, as a Pledge of the Peace.

LV. The Obligation of Hostages has something odious in it, both because it is contrary to Liberty, and because it arises from the Fact of another: So that we are here to explain the Sense of the Terms in a Manner that restrains, as much as possible, such an Engagement. And therefore, they who are delivered Hostages on one Account, cannot be detained on another: Which must be taken thus, provided any other Promise in Question was made, without an Engagement at the same Time to give Hostages; but if we have already broke our Faith in any other Cafe, or a Just Debt be contracted, then the Hostage may be retained, yet not as a Hostage, but by the Law of Nations, 5 whereby Subjects may be retained Prisoners for their Sovereign's Debts, as if aulœxipus, by way of Arreft, or Reprief. Which however may easily be prevented, by inferring an express Clause, that the Hostages shall be restored, when that shall be performed for which they were given.

LV. He that is delivered as a Hostage only, to release either a Prisoner or another Hostage, if this die the other is released; for by his Death all Right of Pledge dies with him, as Ulpian has said, in the Cafe of a ransomed Prisoner: Wherefore as in Ulpian's 1 Cafe, the Ransom caufes to be due by the Death of the Perfon, in whose Room it had been substituted, so in this Cafe, the Perfon substituted cannot be here detained. Therefore the Demand of Demetrius to the Roman Senate to be diminished, was not unreasonable, As being a Hostage for Antiochus, be being dead, be caufed to be f6, fays Appian; and Justin out of Tragus, 3 Demetrius being a Hostage at Rome, as soon as ever he heard of the Death of his Brother Antiochus, went directly to the Senate, and told them he came thither as a Hostage for his Brother, being alive, but now he was dead he could not tell whose Hostage he was.

LV. But if the King who made the Covenant die, shall his Hostage still be detained? That depends upon what we have 4 already faid, whether the Treaty were perfonal or real. For Accessories cannot justify us in receeding from the general Rule in the Interpretation of Principal Acts, whose Nature they themselves also ought to follow.

LVIII. By the Way we must add this, that Hostages sometimes are not a bare Accracy of the Obligation, but really the principal Party; as when by Agreement, cited more than once, (§ 18.) declares also, and with Reason, against our Author's Opinion; who does not agree himself with what he advances, that the State ought to give up fugitive Hostages, as Mr. Vander Meulen observes on this Place.

2 See what Plutarch fays upon it, in the Life of Publicola, Virgil speaking of the Acrion of Cletus, fays, that, having broken her Chains, she saved herself by Swimming.

Et fluvium vindis innotet Cletis rapitis.


3 Quamadhnum, fì non dedatur absque, pro rapto fì fuerit habeturum, &c. Livy. lib. II. Cap. XIII. Num. 8.

4 Et Romanis pignus pacis ex fiderem refituturum, &c. Ibid. Num. 2.

LV. (1) That is to fay, even tho' there be some other Reason for which they might be retained without that Clause. This is evidently our Author's Thought. So that Ziegler, and others after him, are in the Wrong to fuppose the contrary; since they object to him, that an express Convention would not have more Force than a tacit one, by which the Party that receives Hostages, always engages to reftraint them, as soon as that is performed, for the Security of which they were given.

LV. (1) See the Law cited above, Chap. IX. of this Book, § 10. Note 7.


3 Patruus ejus Demetrius, qui obfe Romae erat, cognita morte Antiochi fratri, Senatum adit; Obideaque fc. vivo fratre, venufe; quo mortuo, cujus obfes fs, fe ignorare. Lib. XXXIV. Cap. III. Num. 6. Our Author observed here, that it was better to read, for the Connection of the Dialogue, Obideam inquit fc.; but Bernegger rejects this Correction, in his Note on this Place, without faying who is the Inventor of it. Scheffer however approves it. It is better, in my Opinion, to read Obideam fc., leaving out the ges, which is not in some Manuscripts, as the latter of those Commentators acknowledges, that the Pledge may be read without Inconvenience, by an Ellipsis, frequent in the antient Abridger we speak of.

LVII. That is to fay, they ought themselves to execute, in default of him for whom they are given as Hostages, what he had engaged to do so that the Obligation of the former does not cease by the Death of the latter: And, at Bottom it is the fame Thing as if they had entered into the Engagement themselves, and in their own Name. For,
ment, a Person having engaged himself for the Fact of another, and being bound for Damages and Interett, in Case what he promises is not executed, gives Hostages in his stead: And this seems to have been the Meaning of the Treaty concluded near the Force Caudinae, as we have remarked elsewhere. But the Opinion of those who maintain, that Hostages may stand engaged for the Fact of one another, even without a mutual Consent, is not only fever but unjust.

LIX. Pledges have some Things common with Hostages, and some peculiar to themselves. What they have in common is, they may be detained for another Debt at present due, unless Faith be given to the contrary. The Peculiar is, that what Contract ever is made concerning these, is not fo strictly taken as that concerning Hostages. For this Act is not in itself so odious, because it is natural that Things should be kept, not Men.

LX. We have said elsewhere, that no Time can prejudice the Right of Redemption, if that be performed for which the Things were first deposited. For that Act which has an antient and manifest Caufe, cannot easily be believed to proceed from a new one; therefore tho' the Debtor has left the Pledge for a very long Time in the Hands of the Creditor, it is presumed he has done it, by supposing that the antient Contract still subsisted, and not because he renounced his Right; Unless some evident Conjectures necessarily require another Interpretation. As when a Man was ready to have redeemed it, but met with some Impediment, and afterwards kept Silence so long as to give Reaon to suppose that he had voluntarily abandoned it.

For, as to the Rest, our Author does by no Means pretend, that their Obligation may not be in itself subsidary; as Ziegler supposes, and others after him, who, without Reason, often criticize this great Man, for Want of understanding his Thoughts.

2 Albericus Gentilis, whom our Author cites in the Margin, does not say this. He supposes, on the contrary, (p. 396. Edit. Hans. 1612.) that there has been a Contest of the Hostages themselves. Ziegler has before observed this Mistake.

LIX. (1) With this Difference however, that in such Case the Pledge is retained as a Pledge, but the Hostage not as a Hostage, but as a Subiect responsible in that Quality for the Act of his Sovereign; as our Author has explained it above, § 55. Num. 2.

2 One is more easily induced to leave Things than Persons in the Hands of another. This suffices as a Foundation for the Restriction. LIX. (1) See what I have said, B. II. Chap. IV. upon § 15. or last.

C H A P. XXI.

Of Faith during War, of Truces, of Safe-Conduct, and the Redemption of Prisoners.

I. There are some Things that use to be granted mutually by sovereign Princes, in Time of War, which Virgil and Tacitus call Belli Commercia. The Commerce of Wars. Homer, συνοικία. Such as Truce, Safe-Conducts, Ransom of Prisoners. A Truce is an Agreement, by which, during the War, for a Time we forbear all Acts of Hostility. I say, during the War: For as Cicero says, in his eighth Philippic, there is no Middle between War and Peace. And War is a certain State, which (like Habits) may subsist, even tho' its Actions be for a While suspended. Aristotle says, A Man may be virtuous, tho' asleep, and tho' be lead an inactive Life. And again, The Distance of Place doth not dif-

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By most Friendship, it only interrupts the present Exercise of it. And 7 Andronicus Rhodius, There may be a Habit, tho' at present it may not operate. So 8 Euphrates, An Habit, in Respect to an Ability simply taken, it is called an Aet; but in Respect to Action itself, is called Power; as Geometry is in a Geometrician when he is asleep. And in Horace, Lib. i. Sat. 3.

Ut, quaevis tacta Hermogenes, cantor tamen, atque Optimus eft modulator, & Alienus vafer, omni Abieto infrumento Artis, clausique tabernae
Sutor erat —

Why, as Hermogenes, * tho' he holds his Tongue,
Is fift'd in Mufick, and can fet a Song;
And fumbling Allen, tho' he left his Awl,
And threw away his Laff, and butt his Stall,
And broke his Threads, yet was a Cobler ftil.

Creech.

2. So then, as Gellius says, 9 A Truce cannot be called a Peace, for the War continues, tho' Fighting ceases. And in the Panegyrick of Latinus Pacatus: 10 Truce suspends the Effects of War. Which I here mention, that we may understand 11 that whatever is agreed upon to be of Force during a War, has also the fame Force during a Truce; unless fully appear, that it was not so much the general State of War, as the Exercise 12 of it, was had Regard to. On the contrary, if any Thing be agreed on concerning Peace, it is of no Force in Time of War. Tho' Vergil calls a Truce 13 Pacem Sequestrarum, A provisional Peace; and Servius, 14 A temporary Peace; and so does the Scholiat on Thucydides, 15 A temporary Peace bringing forth War. Varro, 16 Pacem Caprorum, The Peace of Camps for a few Days. All which are not Definitions, but certain Descriptions, and tho' figurative: Such also was that of Varro, 17 when he calls it Bellorum ferias, War's Holy-Day: He might as well have called it Bellum Somnum, War's Sleep; So Statius 18 called the Days wherein there was no Pleading, Peace, and Aristeot 19 called Sleep The Chain of the Sieves; and so you may call Truce, The Fetters of War.

3. But in M. Varro's Expedition (which also 20 Donatus follows) 21 Gellius finds just Fault with this, that he added, A few Days, shewing that it is sometimes granted for a few Hours, I may also add, for twenty, thirty, forty, nay a hundred Years, of which we have Examples in Livy 22; which may also confute that De-

8 Ad VI. Ethic. Nicom. (Cap. I.)
9 Seneca maintaining, that an elegant Man is such, tho' he holds his Tongue, and an Arfict an Arfict, tho' he has not the Instruments necessary for the Exercise of his Trade: Artificis eft etiam, cui ad exercendum artem instrumenta in jihpant——
10 Quum induca bella fupenderant, & Cap. IX. Num. 5. Edit. Cellar.
11 For Inftance, 10 pay fo much for the Ration of Prisoners, during the War, &c. that Commerce fould be free during the War, between Merchants, &c.
12 If, for Inftance, certain Contributions during the War be agreed on, as tho' Contributions are only granted to prevent Acts of Hostility; they ought to ceafe during the Peace, because at that Time Acts of Hostility are no longer lawful.
13 — Et pace foegrefl
Per Silvius Teurti, mixtique impune Latini Errore fugit —
Ancild, Lib. XI. ver. 133. & lacq.
14 Pacem ergo Sequestramus inducias dicit: id eft, pacem temporem, & medium inter bellum praeterium & futurum.
15 In Lib. I. Cap. XL. p. 25. Note 3. Edit. Osten. It is a maritime Term applied here. See the Differtation of a learned German Civilian named John Strauchius, De Inducia, (§ 2.) which is the fifth and laft of a Collection printed at Brunswick, in 1662.
16 Inducia, inquit, funt pac excrefens, paceorum durum. Apud Gellius, qui supra, 1. 25.
18 Et pacem pigger annus habet, mezufque reversa
Dimifione forem —
Silver. Lib. IV. Silo. IV. ver. 40.
22 See Lib. I. Cap. XV. and Lib. VII. Cap. XX. and compare Pufendorf with this Place, Law of Nature and Nations, B. VIII. Chap. VII. § 3; +
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Definition of Pausanias the Lawyer, 23 A Truce is, when it is agreed for a short Time, and for the present Time, that neither Party shall after Acts of Hostility.

4. But yet it is possible, if it shall appear, that Cession from Acts of Hostility in general, was the only Reason simply and wholly moving both Parties to make such an Agreement, that then whatever is said concerning a Time of Peace, may be likewise said of a Truce; not by Verus of the Word, but from a certain Conjecture of the Intention of the Mind; of which we have treated elsewhere.

II. The Word 24 Induce (a Truce) is not (as Gellius would have it) from inductio, because the Moment it is ended we may act as before: Nor (according to Oppius) from Enduitus, which signifies Entry; but we may then enter freely into Lands of one another; but from inductio, because there should be Rest from such a Time, as the Greeks call εκκαιρία. For it appears, both from Gellius and Oppius, that the Word (Induce) was by the Antients written with a 

\[ \text{and not a} \]

25; and what we now use in the Plural, was certainly used of old in the Singular Number. The antient Manner of Writing was Enduitia; for then they pronounced Otium, Reft, Otium, from the Verb Otii, which we now pronounce Uti, to use; as from Poina 26 (we now write Paena, Punishment) is made Punio, to punish; and from Poinus (now Paems, a Cartbaginiun) is made Punicus. So of the Word Ofia, Ofiorum, the Entries or Mouths of Rivers, is now made Ofia, Ofice 27; so from Induitia, Indibitorum, is made Inditio, Inditio, and thence Inditia, whole Plural (as I said) is now only in use. Gellius says it was also used formerly in the Singular Number. Donatus is not much in the wrong, when he would derive Indicuse, from in dies otium, A Rest for some Days. A Truce then is a Rest in War, not a Peace; therefore some Historians nicely distinguish it, when they say a Peace 28 was refused, but a Truce granted.

III. Wherefore, the Truce being expired, there is no Occasion for a new Declaration of a War; for the temporary Impediment 29 being removed, the State of War, which was onlyuspend, and not extinct, returns of itself; as the Use of the Right of Property, and the Exercice of paternal Power, in regard to a Madman, when he is come to himself. But we read in Livy, that by the Judgment of the Heralds, War was formerly denounced upon the expiring of a Truce. But the old Romans were defirous to shew, by those unnecessary Cautions, how much they loved Peace, and how careful they were not to engage in War, unless for just Reasons. Livy intimates as much, when he says, 30 After a Battle fought with the Veneti, at Nomentum and Fidenze, a Truce was granted, but no Peace made, and the Truce expired, and they had rebelled within that Time, yet the Heralds were sent to demand Satisfaction, according to antient Custom: But they would not hear them.

IV. 1. The Time appointed for a Truce, is either continual, as when it is made for a hundred Days, or by prefixing a Time when it shall end, as unto the Calendars

\[ \text{of the indiction, num. vii.} \]

23 Inducunt, quan. in brevem & in profasius temporum extremi, ne invicem se larcessent: Si tempore non or phoenix. Dig. LXIX tit. XV. De Captiv. & Pythim. &c. Leg. XIX. § 1.

24. For Instance, if it be agreed, that, during the Peace, the Subjects on both Sides may trade in certain Merchandizes of no Use in War.

II. (1) Mr. Barneby has thrown all but the last Period of this Paragraph into a Note, and says, it may serve, as much as any other, to justify the false Liberty, which he has taken in many Places, in regard to Things little necessary, that often interrupt the Chain of the Dilecture, so as to occasion the losing Sight of the principal Subject. What 31 Mefs are all these grammatical Niceties, continues he, to a Reader who enquires here after the Law of Nature and Nations? How well founded and useful forever they may be in other Receptes, an Author ought to rehit the Temptation he may be under, of placing so preposterously the Discoveries he believes he has made of this Kind; and nothing proves better the Necessity of permitting Writers to use Notes upon their own Works; because they may thereby satisfy themselves, and even sometimes serve the Publick, without Offence to their Readers, or prejudicial to the Understanding of the Subject they treat of. For the Rest, as Tales are very different, especially in Point of Etimologyn, some are for deriving Induce, not from inducto, but from the old Word indu or inducto, for in. See the Institutions Oratio of Vossius, Lib. IV. Cap. XIII. § 11. and his Etymologon.

25 Thus, for Instance, Livy says of Papirius, in regard of the Fallici, Et Fallicis Pacem potentibus annus Inducia dedit. Lib. X. Cap. XLVII. Num. 12. See the Patafle cited in Note 2 to the following Paragraph.


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(Or first Day) of March. In the former Case the Time must be reckoned according to its just Measure, that is, conformably to its natural Measure: For that Account which is made by Days civil, arises from the Laws and Customs of Nations. In the other Case it is generally asked, whether the Day, the Month, or the Year, on which the Truce is to expire, is meant to be excluded or included.

2. It is certain, that as in natural Things there are two Sorts of Bounds, the one within the Thing, as the Skin is the Bound of the Body; the other without the Thing, as a River is the Bound of the Land: So, according to either of these two Ways, may those Bounds that depend on the Will be conceived; but it seems more natural, that the Bound should be taken, which is part of the Thing. That is called the Bound of any Thing which is the extream Part of it, says Aristotle. Nei-

ther is this against common Use. Spurina forewarned Caesar of a Danger that should not exceed the 5 Ides (or the 15th) of March. Being asked upon the very Day about it, he said, it was indeed come, but not yet past. Wherefore much more should this Interpretation of Truces be thus understood, where the length-

ing of the Time has in it something favourable, eis. the sparing of human Blood.

3. But yet that Day, from whence a certain Space of Time is to commence, is not to be reckoned in that Space, be cause the Preposition does not signify Conjunction but Separation.

V. This I shall add by the Way, that Truces, and such like Agreements, do immediately oblige both Parties consenting, from the Time they are concluded; but the Subjects on both Sides then begin to be bound, when the Truce receives the Form of Law, that is, when it has been solemnly notified, which being done, it immediately begins to have a Power to bind the Subjects. But that Power, if the Publication be made only in one Place, shall not at that Instant extend itself throughout the whole Dominion; but upon a convenient Time allowed, to give Notice in every Place. And if any Thing in the mean Time be done by the Subjects contrary to the Truce, they shall not be punishable for it. The contracting Parties,

IV. (1) That is to say, from the Moment the Truce is concluded, to the same Moment of the last Day, and not with Regard to the Beginning or End of the Civil Day, which begins and ends at different Times, according to the Places and Customs of different Nations. Thus, by the Roman Law, an Infant is held to be a Year old, when it attains to the Beginning of the three hundred and fifty-fifth Day: Whereas, according to the natural Calculation, the Year is not completed till that Moment of the Day in which the Child came into the World. Anniculus, non flatu in natura, sed trecentas sexaginta quinto dies dici aut, incipiente plane, non exaeto die: Reum annum civiliter, non ad annum temporum, sed ad dies, numeramus. Digest. Lib. L. Tit. XVI. De tempore jureg. Leg. CXXIV.


3 Metafaph. Lib. V. Cap. XVII. 4 Si quis ut dicitur, ut intra diem mortis quis aliquid fiat; ita quoque dies, quo quis mortuus est, numeramus. Digest. Lib. L. Tit. XVI. De verb. jureg. Leg. CXXIII.

5 Infristius Curianus, iusta religione, Spurianamque iridem, & ut falsam argument, quem fini sedet, & Ibi Martiae adhuc. Quamquam, quae qui demus, dicitur, sed non praeteriit. Suetonius, in Cap. (Cap. LXXXI. in fin.) Dion Cassius expresserunt: Sic Stoicarum Theodorus thus, & alius, & alius, & alius. (Lib. XLIV.) And Ar-


6 But for Puffendorf, in the Chapter already cited more than once, § 8. What our Author says here is so much the worse founded, as it does not agree with what he had said just before himself, that in Regard to a Truce, the Proclamation of Time has something favourable in it. Syllogismi, in the Diflerration I have cited before, Cap. V. § 2, had long ago declared himself against our Author, upon this Head.

V. (1) They cannot know it certainly before that: And the Case is the same as when the War began. It frequently happens that there is Reason to believe, from the Preparations making, and the Rumours or Advices to be relied on, that a War is resolved: However, till the Declaration of it be published in Form, no one ought to attack the Enemy, as may be done afterwards. So that nothing is more frivolous, than the Objections which some Commentators make in this Place against our Author's Opinion.

2 It is true they are not in fault, as it is suppo-

sed, that the Truce could not be notified sooner to such as are at a remote Distance. But as each Party stands engaged for himself and Subjects, who, from the Moment the Truce is concluded, should all be held to discontinue Acts of Hostility, if it were possible for them to be apprized of the Treat-

ey, which ought immediately to be notified to them; each ought also to be deemed as engaged to disapprove, and hold for null, all Acts of Hostility committed in remote Places; and, in Consequence, to make all possible Amends to such as have suffer-

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Parties, however, are not the least bound to repair *those Damages.

VI. 1. What may be lawfully done, and what not, in the Time of Truce, may be understood from the Definition of it. All *Acts of Hostility are unlawful, either against Persons or Things; that is, whatsoever is then done by Force of Arms against the Enemy. For all such Acts, during the Time of the Truce, is against the Law of Nations, as *L. Amilias, in *Livy, *tells his Soldiers.

2. Nay, whatsoever Things of the Enemy shall by Accident fall into our Hands, tho' they had been formerly ours, are to be restored; because, in regard to external Right, by which we are here to regulate ourselves, the Property of them has passed to the Enemy. And therefore, as *Paulus, *tells the Lawyer observes, the Right of Possession, during a Truce, does not subsist; because Possession supposes an antecedent Right of taking by Force; which ceases during a Truce.

3. To come and go, to have free egress and regress, but without any Train or Attendance that may give Umbrage, is also permitted, as *Servius obverses on those Words of Virgil,

*Mixtique impune Latinis.*

Latins, no longer *Foed., mixed in the Woods."

Where he also tells us, that the City of Rome being besieged by Tarquin, and a Truce agreed upon between Porfenna and the Romans, whilst the Circus Games were celebrated in the City, the Enemy's Captains were allowed to come into the City, and contend in the Races, and that proving Victors they were crowned.

VII. To retreat back with an Army, which we find in *Livy, that Philip did, is not a Breach of Truce; nor to repair a Wall, nor to levy Soldiers, *unless it be particularly excepted in the Agreement.

VIII. 1. It is undoubtedly a Violation of the Truce, to seize on any Place possessed by the Enemy, by corrupting the Garrison. For such an Acquisition cannot be lawful, unless authorized by the Right of War. The same may be laid of the Reception of Subjects who would revolt to the Enemy. We have an Example in *Livy's forty-second Book, when The People of Corunna and Haltrartus, from a natural Inclination to Monarchy, sent Embassadors into Macedon, to defile a Garrison that might defend them against the infupportable Pride of the Thebans; the King told them *he could not send them any, having lately made a Truce with the Romans. In the fourth Book of *Thucyides, we read that Bruthas received the City Menar, revolting from the Athenians to the Lacedemonians in Time of Truce; but at the same Time an Exeuc is added, which is, that he had in his Turn somewhat to charge the Athenians with.

2. It is indeed lawful to take Possession of Places deserted, that is, really deserted, viz. with a Design not to possess them again; but not, if they be left un-garrisoned, whether the Garrisons were withdrawn before or after the Truce. For the Property remaining renders the other's Possession unjust; which shews how groundless the Cavil of Beltharius was, who, under that Pretence, seized, during the Truce, some *Places from whence the Greeks had withdrawn their Garrisons.

ed by them. It suffices, that they are not responsible for the Impossibility they have been under to prevent them, and that it cannot reasonably be considered as an Infringement of the Truce.

3 This the Athenians pretended, in Relation to *Scirra, which had surrendered two Days after the Conclusion of a Truce. See *Thucydidcs, Lib. IV. (Cap. CXIXII.) So what the Spaniards did in Italy, according to *Mariana, CXVIII. 7, is not to be justified. *Grortus.

VI. (1) The Truce is here supposed to be general. But sometimes a Truce is made for certain Places only, for Instance, by Sea, and not by Land: Or in regard to certain Acts of Hostility, as the ravaging of the Country, &c. See *Petten- dorff, in the Chapter cited above, § 3. Our Author observed, in a small Note upon § 10, that Examples of Truces may be found in *Procopius and *Menander, the Protector, in which certain Places were excepted.  

2. *Num. fraudem hostiam incautis, qui, pace peti- ta, inducitis datis, per isum indiciarum tempus, contra jus gentium, ad efttra oppugnanda veniunt. Lib. XL, Cap. XXVII. Num. 9.

3. See the Law cited above, § 1. Note 23.

4. *Demique obsilis urbs, &c. In *Aemid. XI. 144. But here the Safety of Egress and Regress is rather meant, than the Care not to do any Thing in going out and coming in, that may give Umbrage to the other Party. For the Rhetor, the Reader may see the Paroemiis *Furiis Germanici of the late Mr. *Herfius, II. 14. 15, wherein he explains in what Manner fale Conduct is abused.

VIII. (1) *Coriol. & Haliartus, &c. *Lib. XLII.  

Cap. XLVI. Num. 5, 10.

IX. 1. The
IX. (1) But see what I have said against Puffendorf, who is of the fame Opinion, § 10. of the Chapter already cited several Times. Our Author, and Strauchius, who follows him, (Cap. ult. § 44. Diff. De Induc.,) have here departed without Reason from Albertus Gentilis, De Fure Belli, Lib. II. Cap. XII.

2. Tamen cum qui ante Idus Martius profectis ex portu, & relatais templofate in Infulam deductis eft, & inde exiftit non videri contra legem fcrile. Digest, Lib. XXXIX. Tit. IV. De Publicis, & Vellei-galis, & Committiis, Leg. XV. Si preparo ne-fcitatum adversa temporis scripturi eum fcriberem, non deberem eos commiffi vindicari, Divi Fratris re-feremur. Ibid. Leg. XVI. § 8.

X. (1) They cannot, for Influence, retire during that Time, into a more fecure Port, nor intruch themselves. Puffendorf, in the Chapter to which I have referred several Times, is of a different Opinion, § 9. He maintains, after Strauchius, (Diff. De Induc. Cap. V. § 44.) that thee Sort of Things, which tend folely to put one's elf into a State of Defence, have nothing unlawful in them, because no one is deemed to renounce his Right to defend himself. And, adds he, it is the Fault of him who grants fuch Truce, if it gives the Ene- my Opportunity to render himself stronger. But thefe Reafons, upon clofe Examination, prove no- thing. And the late Mr. Batter, whom I have quoted before, has declared, with Reafon, for Grotius, in a new Academical Difertation, intitled, De Induc. Belli, printed in 1697. The Party, fays he, that hath granted a short Truce for the In- teriment of the Dead, hath granted it for that Pur- pofe only, and there is all the Reafon in the World to believe, that he would not have permitted any Thing further, had it been demanded of him. And

IX. The Query is, Whether he who is detained by some unforefeen and inevitable Accident, is found among the Enemies at the expiring of the Truce, has a Right to return? If we barely repect the external Right of Nations, his Cafe I do not doubt, is the fame 1 as his who coming in Time of Peace, upon the sudden breaking out of a War (not having Time to withdraw) is unhappy found among his Enemies, who, we have 2 already declared, is to continue a Prifoner till the End of the War. Neither is it againft internal Justice, as the Goods and Actions of the Enemies fland oblige for the Debt of their State, and may be taken by Way of Payment. Neither has he any more Caufe to complain than many other innocent Perfons, on whom the Calamities of War accidentally fall.

2. It signifies nothing to alledge here what is said of the Excufe of an unforefeen Tempif, 3 which has driven a Veffel into fomie Place where it is Subject to Con- fification. Nor that in Cicero's second Book of Invention, concerning a Man of War, by a Storm driven into Harbour, the Queenor would have fowd by the Law. For thofe Examples relate to a Punifhment which the infuperable Accident secures from; but here we do not properly discourse of Punifhment; but of the Use of a Right that for a certain Time lay fuspended, yet it would be far more humane, far more honourable, to release fuch a one.

X. There are alfo fome Things unlawful during a Truce, from the fpecial Nature of the Agreement. As ifップope a Truce were granted only for the Burying of the Dead, 1 nothing ought to be changed; so if a Truce be made, that the Besieged should not, 2 within fuch a Time be affaulted, then it would be unlawful to receive freater Supplies of Men or Provisions. But fince fuch a Truce is granted to oblige one Party, the other ought not to be prejudiced by it. And sometimes it is agreed in the Truce, that they shall not have Liberty to pais and repair; 3 fometimes Protection is granted to Perfons, not to Things; wherefore, if in Defence of our Goods we wound any Perfon, it is not Breach of the Truce. For fince it is lawful to defend our Goods, personal Safety is to be referred 4 to that which is
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XI. If the Faith of Truce be broken on one Side, the other may undoubtedly proceed to Acts of Hostility, without any Declaration; for every Article of the Agreement implies a Condition, as I have said a little above. We may find indeed some Examples in History, where some have bore it out to the End of the Truce, but we read also that War was made upon the Hetrarians, and others, for Breach of Truce. From which Diversity of Examples we may infer it to be lawful for the Injured Person to have Recourse to Arms; but whether he will or not is left to his own Choice.

XII. This is certain, that if the Punishment agreed on, be demanded, and be inflicted on the Transgressors, then the other Party has no Right to make War; therefore Punishment is inflicted, that other Things may continue safe. So, on the contrary, if the War be renewed, the Offender is acquitted from Punishment, since the other had his Choice. The Actions of private Persons do not break a Truce, unless the State has some Share in them, either by an Order or an Approbation, which is also implied if the Offender be neither punished nor delivered up, nor Reconciliation made.

XIV. A Right to pass and repass beyond Truth, is a Kind of Privilege; therefore what we have already said concerning Privileges, must be observed in the interpreting of it. But this is a Privilege not hurtful to any third Person, nor very burdensome to him that granted it, not to be taken in the strictest Sense of the Words, but with some Allowance, within the Propriety of the Terms. And more especially, if it were not granted upon Request, but freely offered. But still the more, if besides it have a private Advantage, a publick one is intended. Therefore we are to reject a strict Interpretation, tho' the Words may bear it, unless it would otherwise create an Absurdity, or that very probable Conjectures of the Intent of the Peron may induce us to it. But, on the contrary, an Extent even beyond the proper Signification of the Words shall take Place, to prevent such an Absurdity, or from very reasonable Conjectures.

XV. Hence we gather, that a false Paus granted to Soldiers, extends not only to inferior Officers, but also chief Commanders; because the Propriety of the Word will allow that Signification, though there is also another more strict. So under the Name of Clergy are comprehended Bishops. So the Mariners.

XII. (1) In this Case, the Party against whom Hostilities are committed, notwithstanding the Truce, may afix, besides the Penalty stipulated by it, new Punishments for what he has otherwise suffered by the Infraction of the Treaty. Mr. Baxter makes this Remark in the Differtation cited before, § 10. or lait.
2 See Popendore, Law of Nature and Nations, § 11. of the Chapter which answers to this.

XIV. (1) If, for Instance, to treat of Peace be the Matter in Question, and the Passport has been given for that End.

XV. (1) Thus, in the Roman Law, concerning privileged Wills, the Word Miles, in Opposition to that of Paganus, generally signifies all those who are actually upon a military Expedition, whether they command or obey, are Officers or common Soldiers. 2 According to which those who obey are called Milius, or Trupps, in Opposition to Officers, Generals or Subalterns. This is a known Thing, and Alberticus Gentilis proves it by Authorities, in his De juris Bellii, Lib. II. Cap. XV. p. 321. where he decides in a different Manner from our Author, both upon this and the following Example.

3 The Word Knegados, from whence the Latin Clerici, and our Words Clerk, and Clergy, are derived, included at first, that is to say, from the Beginning of the third Century, when this Cusom was introduced, all public Ministers of Religion, of whatsoever Order they were; in Opposition to Loisies, (Laisies,) or simple Believers. See Mr. Brougham's Differtation, De differentia inter Ordines Ecclesiasticos et Plebes, for inter Clericos & Laicos, which is the sixth of his Differtationes Juris Ecclesiasticorum antiqui ad Plinius Secundum, & Tertullianum, and the ninth Differtation of the same Collection, § 2. as also the fifth Chapter of his Origines praeceptorum materiarum juris Ecclesiasticorum, published with his Schilterus illustratus. To which may be added, the fifth Chapter of the first Book of Mr. Bingham's Antiquities of the Christian Church, from which the learned and judicious Author of the Bibliotheca Antiqua has given us several curious Extracts. But in Proceeds of Time the Term Clerk or Clergy was confined to Ecclesiastics of an inferior Class; so that Bishops were not comprehended under that Name. Examples of this are very common, and to this belongs a Passeage of the Decretals, cited by our Author in the Margin, but which is improperly placed in the Margin of the preceding Paragraph, in all the Editions of the Original, without excepting mine, (Mr. Barbe.) whose the Printers have forgot to put it in its Right Place, as I have marked it in their Copy. Clerici sunt, si contra ilam formam quorumdam eleganter, & eleganter tunc potuisse privato, & ab Ecclesiasticis beneficis triennio novitium fe usurpare, besides Epscopus unum, & contra buce fuso, et confungitur huius, in conferendis praedictis Office & Beneficiis potissimum uti, &c.
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XVI. To go, to come, to depart, how to be here under foot.

XVI. 1. Leave given to go 1 implies also one to return; not that the Word go includes it of itself, but because otherwise this Affirmity would follow, that a favour would be entirely useless. If one promises to let us go away in Safety, we are to understand a Permission to depart, without having any Thing to fear, till we shall be got into a Place of Security. 2 It was therefore Trenchery in Alexander, to cause them to be murdered in their Return home, to whom he had given Leave to depart.

2. But he that has Leave given him to go away, has not also to come back again; for neither has he that is allowed to come, a Liberty to send; nor on the contrary, for they are distinct Things, neither will Reaftion 3 warrant us to go beyond the Words; but yet, tho' an Error cannot give any Right, it may excuse from Punishment, if any were stipulated. He also that has Leave to come, shall come but once, and not again, unless the Time allowed 4 in the Pass gives Room to conjecture otherwise.

XVII. The Son must not follow the Father, nor the Wife her Husband; tho' when the Question is about the Right of Dwelling in a Country, the one follows the other: For we used to 1 dwell, not to travel, with our Families. But a Servant or two, tho' not particularly expressed, shall be presumed to be allowed, to him who cannot decently travel without them. For he that grants any Thing, is supposed to grant the necessary Consequences, which Necessity is here to be morally understood.

XVIII. Goods likewise shall be comprehended, not all, but what are necessary for Travellers.

XIX. Under the Name of Attendants we must not understand those whose Character is more odious than that of the Perdon himself, whose Safety is provided for: Such as are Pirates, Robbers, Fugitives, and Defectors. The expressing the Name of their Country 1 in the Passport, plainly shews that the Permission does not extend to others, who are not of that Country.

XX. Licence to pass freely being derived from the Authority with which he who gives it is invested, in a dubious Case, does not cease by the Death 1 of the Granter.

&c. Lib. I. Tit. IV. De Electione & Electi patratum, Cap. VII. § 3. In the Codex Thcodorius, the Bilhops are called Primi Clerici, Lib. XVI. Tit. VIII. De Judicis, Gelidi, &c. Leg. XIII. See the learned James Godfrey, p. 228. Vol. VI. and p. 31, 32. of the same Volume.


XVI. (t) There may be however some Cafes in which the one does not imply the other. Let us suppose, for Instance, that a safe Conduct is granted to some Person of the Enemy's Party to go, not into some other Place of their own People's, but into a third or neutral Country; to Rome, for Example, or into France, when he cannot go thither without passing through the Dominions of him who grants the Passport: In that Case, if he would return by the same Route, a new Passport is necessary; the Advantage of the first being expired. Thus the late Mr. Heurtius, after others, very well oberves, in his Difertation De Libertat Commentar. p. 13. § 577, 578. Vol. I. Opusc. & Comment. 2

2 This was a Boy, says Plutarch, that tarnifhed the Liture of that Conqueror's military Actions, who, on other Occasions, made War with Tuffing, and in a Manner worthy of a King. (In Vit. Alex., p. 698. C. Vol. I. Edit. Web.) Leunclavigius relates a like Trenchery of Bajazet to the People of the City of Widen in Servia. Hift. Turc. Lib. VI. Grotius.

3 Mr. Heurtius maintains, however, in the Difertation which I have cited a little above, (§ 15, p. 330.) that when a Passport is given in Order to treat of Peace, as that may be done, either in Person or by another, the Party may either go himself or fend another in his Place.

4 If, for Instance, it be expressed, that he may come during six Months, and if he can go and come several Times during that Term.


XIX. (1) When, for Instance, it is expressed with his French or German Attendants. Our Authority intimates, that if it be only paid, with his Attendants, or Followers, it does not signify of what Nation they are. By which he tacitly rejects the Opinion of Albertinus Gentilis, who, in his Treatise De Jure Belli, Lib. II. Cap. XIV. p. 537. inclines to believe, that when the Nation is not expressed, it is supposed the Attendants or Train ought to be of his Nation to whom the Passport is given.

XX. (1) It may, however, be revoked, in my Opinion, if the Successor deems it proper for good Reasons; but in such Case it is necessary, that the Person to whom the safe Conduct has been granted, should have Notice given him to retire, and the necessary Time allowed him for removing into a Place of Safety.
XXI. The Redemption of Prisoners is a Thing very favourable, especially amongst Christians, to whom the divine Law particularly recommends this Kind of Mercy. The Redemption of Prisoners is a great and signal Part of Justice, says Laetantius. To redeem Prisoners, especially from a barbarous Enemy, is called by St. Ambrose, the most noble and highest Liberty. The same Author defends his own and the Churches' Pact, in setting even the confecrated Vessels to redeem Prisoners. The greatest Ornaments of Sacraments, says he, are the redeeming of Captives: And many other Things to the same Purpose.

XXIV. 1. I dare not then approve, without Restriction, those Laws which forbid the ransom of Prisoners, as we may read 1 of among the Romans. No
Of the Rights of

State so negligent of Captives as ours, 2 said one in the Roman Senate. And Livy says, that in the most antient Times Rome had no Compassion for those who were fallen into the Hands of the Enemy. The Ode 3 of Horace is well known on this Subject, where he calls the redeeming of Prisoners a shameful Condition, and an Example of dangerous Consequence, a Loos added to the Cowardice of the redeemed Prisoner. But what Aristotle condemns in the Spartan Government, is generally blamed in the Roman; namely, that every Thing in it related too much to warlike Affairs, as if the Safety of their State confituted only in them. But if we would consider it according to Humanity, it would better sometimes to renounce all the Pretensions for which War is undertaken, than to leave fo many Men, either our Kindred or Countrymen, unto intolerable Slavery.

2. Such a Law then cannot be esteemed just, unless there appear a Necessity for that Severity, purely to prevent greater, or more numerous Calamities, which are otherwise morally unavoidable. For in such a Necessity, as the Prisoners themselves, by the Law of Charity, should patiently bear their hard Fortune, they may be laid under an Obligation to it, and others prohibited to do any Thing to draw them from it, according to what we have 4 said in another Place, that a Citizen may be delivered up for the Good of the Publick.

XXV. Prisoners taken in War are not made Slaves, by our Laws or Customs. Yet I doubt not, but that Right of demanding a Ransom from one so taken, may be transferred by the Captor to another, for Nature allows even incorporeal Things to be alienated.

XXVI. And the fame Perfon may be indebted for his Ransom to several Men; as if discharged by one, before he paid his Ransom, he be taken by another; for there are distinct Debts, from distinct Causes.

XXVII. An Agreement made for a Ransom cannot be made void, because the Prisoner is found to be much richer than he was thought to be; because by the 5 external Right of Nations, which is now the Matter in Question, no Man may be compelled to give a greater Price than what he first agreed for, if there was no Cheat in that Contract; as may be easily understood from what I have said 6 already concerning Agreements.

XXVIII. From what has been said already, that Prisoners are not now made Slaves, it follows, that we do not acquire all their Goods in general, as was done formerly, in Consequence of the Right of Property, which one had over their Persons, as we have said 7 in another Place. The Captor then has Right to nothing but what he actually takes; wherefore, if the Prisoner can hide any Thing from him, it is none of the Captor's, because he is not possesse of it. As Poulus the Lawyer decides, against Brutus and Manilius, 8 he that feizes upon a Field, cannot be paid to possesse the Treasure that is buried there, because he knows not of it; for no Man can possesse what he knows not of; whence it follows, that what is so concealed may help to pay for his Ransom, 9 he having still kept the Property of it.

XXIX. 1. There

2 Nemo negritis ignotis, nulli unquam iudicati
villarum fulle captivus, quanm negritis, &c. Livy,
Llx. XXII. (Cap. LIX. Num. 2.) See another
Passage of the same Author, (quoted above, Chap.
IX. of this Book, § 4. Num. 2.)

3 Diffreritius conditionum
Pauletis, &c. exemplo tradueit
Persicion omnes in arma.


** Flagitia additis

Dannum.

(Chap. III. Od. V. ver. 13, & seq. 26, 27. Gro-

tius.)

4 The Emperor Maurice feriously repented an
Inhumanity of the fame Kind, which he had com-
mited. See Zonaras, in his Life. Gro-

tius.

XXVII. (1) It suffices to say, that the Circum-

stance of the Prisoner's having more or less Riches,

has no Relation to the Engagement. So that if his

Ransom was to be settled by his Worth, that Con-
dition should have been put in the Contract.

XXVIII. (1) Caesarum quod Brutus & Mani-
lius, &c. Digest, XLI. Tit. II. De adquir. vel amitt.
poff. Leg. III. § 3. See Cuius upon this Point,

748.

2 When Prisoners of War became Slaves, 20
according to the received Custom, the Master ac-
quired a Right of Property both over their Persons
and Effects; it was not necessary, that he should
actually take Possession of all they might have, or
even have Knowledge of it, provided he could feize
it, when discovered: The Intention of appropriat-
ing to himself all the Goods known or unknown
of his Prisoner, was evident, and a natural Confe-
guence
Chap. XXI.

W A R and P E A C E.

725

XXIX. 1. There is also another Query, whether a Ransom agreed upon, and not paid before the Prisoner’s Death, is to be recovered from the Heir; the Answer is easy in my Opinion: If he died in Prifon there is nothing due, for the Agreeement was made upon Condition that he should be set at Liberty; but he that is dead cannot be so. On the contrary, if he die, being set at Liberty, it shall be due; because he had already gained that for which the Ransom was promised.

2. I freely own, that the Contract may be so made, that the Ransom shall be simply due from the very Moment of the Contract, and the Captive shall still be detained, not as a Prisoner of War, but as one engaged for himself. So, on the contrary, the Covenant may be so made, that the Money of the Ransom shall be only then due, if the Prisoner be alive, and at Liberty, upon a Day prefixed. But such Sort of Clauses not being very natural, are not professed, without evident Proofs.

XXX. Here is one Query more, whether he is obliged to return to Prifon, who was releas’d on Condition of releasing another, if that other die before the Releaseement. I have proved elsewhere, that in regard to gratuitous Promises, the Promiser has performed his Word, if he has omitted nothing to engage a third Perfon to do such or such a Thing; but a Promife being made upon a valuable Consideration, the Promifer stands obliged to the full Value, that he promised. So in this very Case, he that is releas’d, is not obliged to return into Captivity; for that was not stipul’d in the Agreement: And Liberty is a Caufe too favourable for presuming a tacit Convention. But neither ought the Prifoner to enjoy Liberty for nothing; but that pay the Value of what he could not perform. For this is more agreeable to the Simplicity of natural Right, than what the Expositor of the Roman Laws have deliver’d unto us concerning an Action Praescriptae verbi (in prefixed Terms) or a personal Action, * Ob causam datam, causas non fecund (for a Thing given and a Thing not following.)

Chap.

AT the Heir might be chargable with the Prifoner’s Ransom.

XXX. Whether he that is releas’d to free another ought to return, the other being dead.  

2. 1. 15.  & 16. B.  

XXX. 1. This Paul Balini did not do, who was releas’d upon Condition of setting Cardinal Carvojali at Liberty, who died whilst a Prifoner. And Mariana, Hist. Hift. Lib. XXX. blames Balini for having fail’d in that manner. But Papruta, Lib. II. relates the Fact with some little Difference. Grotrius.

See further, upon the fame Café, which happened to a Venetian General taken by the Spaniards, Paulus Jovius, Hist. Lib. XII. Vol. I. p. 203. Edid. Bafiol. 1556, where he is called Belorini.

2. As thus. A Perfon has given a Thing, in order to have another for it. He who was to give it, fails, whether he be able to give it, or not being able, he is or is not in Fault: In this Case, the $ Y

other

quérence of the Thing; as when a Perfon acquires an Estate in Land, where there may be many Things which have a natural Dependence upon it. But the Café is different amongst us, with whom the Custom of Slavery is abolished. Whatever desire we may have to take and appropriate all that belongs to a Man we have made Prifoner of War, we have no other Right over his Prifon, than to detain it till a Ransom be paid, or Peace concluded. So the Governer may search, rife, and appropriate all we can find, that belonged to him; but if we have neglect’d to make the necessary Search, or the Prifoner, who is under no Obligation to declare all he has, has found Means to conceal something from us; there is then no Acquisition of that Thing: neither is it acquired as a natural Dependence of some other Thing, as the Prifoner does not belong to him, who took him. So that the Example of the Treaurer, unknown to the Matter of the Land, is very proper here. And further: Let us suppose that before any Agreement concerning Ransom, the Perfon, in whose Possifion the Prifoner is, discovers some Effects belonging to the Prifoner in the Hands of a third Perfon, but which this third Perfon has found either amongst the Bones made in plundering, or in the Hands of another Prifoner, whom he has taken himself: Will any Body fay, that these Effects may be claimed by the former, upon Pretence that they belong’d to his Prifoner? So that Ziegler’s Criticism is no better founded here, than almost every where else. I must fay the fame of the late Mr. Hertiu’s Thought, who in his Differtation De Lyra, (Se : 11. § 30. p. 287. Vol. I. Opusc. & Comm.) tho’ he fail’d in which that Commentator in regard to the pretended Acquisition of Effects unknown, appears contrary to our Author’s Decision, and makes it extend even to Prifoners of War, who actually become Slaves. His Reason is, that he who has contended with his Prifoner, does thereby declare, that he is contented with the Ransom he re-
Of the Rights of
Book III.

other contracting Party may either bring his Action praefcriptis verbis, for Damages and Interest, or re- demand what he has given, even tho' the Thing, he ought to receive, has perished by some forousius and inevitable Accident; as well because he had given what was his with the View of something he has not had, as because in this Kind of Contracts, which had no proper and peculiar Name, he who had begun the Execution in this Manner, was at Liberty to retract, before the other had performed his Engagements. See Digest, Lib. XIX. Tr. V. De Praefcriptis verbis, &c. Lib. V. § 1. and Lib. XII. Tit. IV. De conditione causae data causae non sequar, Leg. ult. Laws cited by our Author in the Margin. The Reader may consult Mr. Noodt, Probabil. Jur. Lib. IV, Cap. IV. and V. where he learnedly and judiciously explains, according to his Custom, these Laws which are both difficult, and one of them corrupt in one Place. See also what I have observed, upon B. II. Chap. XII. § 7. Num. 3. According to these Principles of the Roman Lawyers, the Perfon who has released a Prisoner of War in the Cafe in question, would have a Right to oblige that Prisoner to return into Captivity after the Death of the other.

C H A P. XXII.

Concerning the Faith of inferior Powers in War.

I. The general

King of Com- 

manders.

Among publick Agreements Ulpius reckons this as one, When the Generals of each Army agree some Things between themselves. I promised, that after having discoursed on Faith given by Sovereign Powers, to say something of that given by Inferior ones, either between themselves, or unto others; whether those Powers be immediately next to the Sovereign, such as Generals, so called by way of Excellency, to which we may apply that of Liey. 2 We allow no other as General, but he to whose Conduct the whole War is committed; or those of a lower Rank, whom Cæsar thus distinguishes, 3 The Duty of a Lieutenant General is one Thing, and that of a Commander in Chief another. The one is to execute Orders, the other to do whatever he judges proper for the Management of Affairs.

II. There are two Things to be examined with respect to their Engagements. As whether they thereby engage the supreme Power, or whether themselves. The former Query may be determined by what I have said elsewhere, viz. That we are obliged by those whom we depute to be Ministers of our Wills, whether that Will be specially expressed, or gathered from the Nature of their Commiion. For he that grants a Power, grants, as much as he can, all Things necessary to the Execution of that Power, which in moral Things is to be morally understood. Inferior Commanders therefore must bind their Sovereigns two several Ways, either by doing that which they think is probably included in their Office, or by doing that which belongs not to it, yet have a special order to do it, which is either publicly known, or to those with whom they treat.

III. There are also other ways, whereby a Sovereign Power may be obliged by the previous Facts of his Ministers, but yet not so, that that Fact is the proper Caule

that Ulpius intended to distinguish two Sorts of publick Conventions: The one made during Peace, or between those who live in Peace with each other; the other, made during a War, wherein the Generals usually treat in the Name and by the Authority of the State, for which they command. Upon this Point the natural Signification of the Terms, per pacem, is preferred in all the Purity of the Latin Tongue.

2 Nec duorum novissim, nisi ab eis aequo et pacifico, bene et honesto geratur. Lib. IV. (Cap. XX. Num. 6.)

3 Also enim jucundum Legatos partes, alicuius Imperatoris, qui eum suum esse et praefcriptum, alibi liberum et usum gratie confideri debeat. Comm. de Bell. Civil. Lib. III. Cap. LI.

II. (1) See Cambden, upon the Year 1594, where he relates the Sentence of Count Miranda in the Affair of Hawaiius, (p. 629. & seq. Edit. Angli. 1625.) Gronov. of
of that Obligation, but only the Occasion of it; and that two Ways, either by consenting to it, or by the Thing itself. Their Content will appear by their Ratification, which may be not only express, but tacit; that is, when the Sovereign had Knowledge of what passed, and yet permitted Things to be done, which cannot probably be referred to any other Cause, than the Execution of the Engagements contracted without his Participation. In what manner, and how far, this Approbation may be presumed, we have 2 shewed in another Place. By the Thing itself he may be so far obliged, as not to enrich himself by another's Loss; that is, either that he perform the Agreement, by which he is willing to receive a Benefit, or quit that Benefit; of which Equity I have also treated elsewhere. And thus far, and no farther, that Saying holds true, Whatever brings Profit, is binding. On the contrary, we must condemn them of Injustice, who refuse to perform the Agreement, and yet still retain that, which they could never have had without the Agreement; as when the Roman Senate could neither approve the Fact of Cn. Domitius, nor would make it void, as Val. Maximus 3 observes: We meet with many such Examples in History.

IV. 1. And here we must repeat what we have formerly 4 said, viz. that the Sovereign is obliged by the Fact of his Agent, tho' he act contrary to his private Instructions, provided he keep within the Bounds of his publick Office. The Roman Praetor well observed this Equity in Actions relating to Factories. For not every Contract made by a Factor, 1 binds the Person that employs him, but such only as regard the Affairs for which he is appointed Factor; but 2 if it be publicly noticed, that no Man should henceforward contract with him, he shall not be any longer treated with as Agent. But tho' such a Declaration be made, 3 yet if it be not known to the Contractors, he that employed him shall be obliged. 4 It must likewise be considered, 4 on what Foot the Factor was appointed: For if he was ordered to treat under certain Conditions, or by the Intervention of a certain Person, he ought necessarily to follow the Method prescribed him; in Default of which, we have a Right to disown what he has done.

2. Whence it follows, that Kings or People, some more, some less, may be bound by the Contracts of their Generals, if their Laws and Constitutions be sufficiently known. But if they be not well known, we must follow the most probable Conjectures, which always suppose, that to be within their Power, without which they cannot well discharge the Functions of their Office.

3: If a publick Minister exceeds his Communion, and promife more, than he can perform, he himself shall be bound to full Restitution, unless some well known Law shall hinder it. Or if there be any Deceit in it, as if the Minifter should pretend to a greater Power than really he has, he shall then be bound also to make Satisfaction for the Damages consequent thereto; nay, he may be punished for his Deceit, in Proportion to the Greatness of the Crime. In the former Case his Goods are liable to make a Recompense, but if they are not sufficient, his Service or corporal Liberty. In the latter also, his Person or his Goods, or both, according to the Greatness of his Crime: But as to what I have said of Deceit, it will not be enough in Case of it, to declare beforehand, that he will not oblige himself, for both Satis-

III. (1) Cnus Domitius had taken by Treschery, and carried to Rome, Bituitius King of Auvergie. The Roman People did not approve that Action; however they did not set the King at Liberty, left upon his return Home, he should renew the War. Cujus Factum Sematus neque probos probatus, neque ejfendere volunt, nee remittat in patriam Bitu- tiu berrararn remortari. Lib. IX. Cap. VI. Num. 3. IV. (1) Non tanem omne quod cum infirite geri- tur obligat eum qui praepultit: Sed ita, fi quis ra- gratis, cui praepulsit fuitur, contractum est, id est, dandum ad id, ad quam cum praepultit. Dig. Lib. XIV. Tit. 3. De Injuria Act. Leg. V. § 11. 2. De quo palam praepulsit fuitur, ne cum eo contrahatur, is praepultis loco non habatur. Ibid. Leg. XI. § 2. Proficihre palam, ac acceptum, clarii litteris, unde de plana veliis fuit: ante ter- 4 bernam silificet, vel ante cum locam, in quo negotium exercetur: Non in loco remato, sed in evidenti, § 3. 3 Whether the Bill fixed up be writ in such a Manner, as it cannot be well read, or has been taken away, or spoiled by the Rain, or some other Accident: Praepulsit autem perpessit eft operis. Geterum 3 fi per id tempus, qui praepulsit non erat, vel ob id factum, praepulsit, contractum: Injuria locum habebit. Prorsus 3 dominus quidem meritis praepulsit, alius autem justus, aut sanctus, vel plus, vel quo famili, etiam, ne praepulsit aet, vel non parente: Dicendum, eum, qui praepulsit, te- meri. Ibid. § 4. 4 Conditiones praepulsit, etiam de: Quid enim efi certa leges, vel intervenit cui jurem per- jusus, vel jacigvo, quod contum censendi, vel ad certum rem? Aquilibrium erat, id eft, servari, in quo praepulsit eft. Ibid. § 5. 5 faction
fication for Damages received, and Punishment for an Offence committed are due, 5 not by a voluntary, but by a natural Connection.

V. But because in all such Agreements either the Sovereign, or his Ministers, stands obliged, therefore by Consequence the other Party stands engaged likewise, neither can it be said the Contract is imperfect. Thus we have done with the comparing the inferior Powers to their Superiors.

VI. Let us also see, what Power they have over their Inferiors; neither is it to be doubted, but that a General may oblige his Soldiers, and a Magistrate tho' of his Town, as far as the Power they generally have to command them extends; for as to other Things, there must be a Content on their Part. On the contrary, an Agreement made by a General or Magistrate in Things merely advantageous, shall always turn to the Profit of the Inferiors; for that is plainly included in the Power of the Superior, and in such Things as may be burthenome, provided those Burdens be usually exacted, but otherwise not without their Acceptance: Which Things agree to what we have 4 already established concerning the Effect which, according to the Law of Nature, a Stipulation has in favour of a third Person. But these Generals will be more clearly illustrated by handling of the Particulars.

VII. 1 It does not belong to a General to examine the Causes, or Consequences of a War, for it is his Business to manage the War, not to conclude it, no, tho' he has an unlimited Power in his Commッション, that being only understood of the Conduct of War. Ageletius thus answered the Persians. 5 It was only in the Power of the State to make Peace. Therefore the Roman Senate made void that Peace, which Albinius made with King Jugurtha, as Salust 3 tells us, because it was made without the Order of the Senate. And in Livy, How can that Peace be established, which is made without the Authority of the Senate, or Decree of the People of Rome? Therefore the Treaty made at the Force Caudine, and at Numantia, did not bind the People of Rome, as we have 4 shewed in another Place. And thus far is that of Polibius true, 5 If there be any Thing to which the People may be obliged, they may to all Things; that is, those Things that do not belong to the Conduct of War; and this is evident from what that General had said just before concerning Conventions, whereby one should engage that the City of Rome should surrender, or that the Romans should abandon it, or let Fire to it; or that they should change the Form of their Government.

VIII. 1 2 To grant a Truce is in the Power not only of a General, but of inferior Commanders, that is, unto those whom either they attack or besiege, as far as it concerns them.

1 It is not so much for this, as because the other Party suggested in treating, that the publick Minister acted with Integrity, without which he would have been far from treating. Otherwise, if he had been so imprudent to treat, tho' he knew the Minister affirmed more Power than he actually had: Whatever Knavery the latter was guilty of the other Party, because he knew it, and yet acquiesced in the Minister's Protestation, would have renounced his Right to exact any Punishment or Amendments; and ought to be deemed to have been willing to risk the Default of the necessary Ratification.

2 Plutarch, in Agyphi. p. 601. B.

3 Senatus, ius per fuerat, decernit, quo aequo Populi injusta nullam potissime fedelis hic Bell., Figurath. Cap. XLIII. Eeda. Hoff. The Words, which our Author repeats in Italic Letters, as that Hippocrates, are not his.

4 Ant cinque ratum ibi pausa, quam quinque Consulat, ex auctoritate Senatus, iniqua Populi Romani, peremptum. Lib. XXXVII. Cap. XIX. Num. 2.

5 Si quid olim in quid obstant Populii poftit, in omnia potius. Livy, Lib. IX. Cap. IX. Num. 7.

VIII. (1) Puffendorf with Reason excepts such Truces, as Occasion all the Remembrance of War to disappear entirely, and come very near a real Peace: Law of Nature and Nations. B. VIII. Chap. VII. § 13. In my Opinion, those should be also accepted, which, continuing the Appearance of War, are made for any considerable Time. This is the Thought of A C A L I. De Jure & Officis Bellum, Lib. I. Cap. VII. Num. 6. and of A B D E N R I C U S GENTILIS, De Jure Bellorum, Lib. II. Cap. X. § 288, 289, and Cap. XII. p. 305. See also Mr. VITRUVIUS, Injus. Jur. Nat. & Gent. Lib. III. Cap. XV. Quæs. IX. and certainly Truces of this Kind are of too great Consequence to be left entirely to the Discretion of a General of an Army. Besides, Circumstances are not always so urgent, as not to admit of Time for consulting the Sovereign, which a General ought to do, as much as possible, both for the good of the Publick, and his own Interest, even in regard to Things, which it may be in his own Power to tranquil. Amongst the Romans, Truces of any Length were never granted but by the Senate and People. There have been Nations (as the late Mr. Battier observes in his Dissertations de Indicia Bellorum, which I have cited upon the preceding Chapter) who would not give their Generals Power to make any Truce, tho' for a shorter Time. So Agis, King of Lacedaemon, on one Side, and Thrysillus with Antipatros, Generals of the Argives, on the other, having concluded a Truce for four Months, it was declared void by both States: And the Lacedaemonians were so much offended at Agis: for having taken an Action, that they decreed he should do nothing for the
them, and the Forces under their Command. For they cannot thereby oblige other Commanders who are equal to them, as the History of Fabius and Marcellus in Livy informs us.

IX. 1. It is not in the Power of Generals to release Perfons or dipole of Sovereignities, or Lands gained in a War; upon which Account Syria was taken from Tigyrus, tho' Lucullus had bestowed it upon him; neither could Majojius, relates Sophonisba, whom he had taken in War, for Scipio maintained, that the was under the Power, and at the Discretion of the People of Rome: But as to other Things, which are by Way of Prey, the General has his Power given him to dispose of them, yet not so much by Virtue of his Authority, as from the Custom of each Nation, of which we have laid 4 enough before.

2. But as to Things not as yet actually possessed, it is certainly in the General's Power to grant or leave them; because in War many Cities and Men often surrender themselves, upon Condition of preferring their Lives or Liberties, or sometimes their Goods, concerning which the present Circumstances do not commonly allow to much Time as to consult the Sovereign. By a Parity of Reason, this Right ought to be granted to inferior Commanders concerning Things within the Extent of their Commission. Maharbal in the Absence of Hannibal had promised to some Romans, that had escaped at the Battle of Thermopylae, to give them not only their Lives, as Polybides 5 too conciliately expresseth it, but also, upon delivering up their Arms, to let them depart every one 4 with a Suit of Cloaths. Hannibal detained them under Pretext 5 that Maharbal had not Power to grant such Liberty without his Approbation, to People that surrendered themselves. And Livy confers his Action thus. 6 Hannibal kept his Faith like a true Carthaginian.

3. Wherefore let us consider M. Tally rather as an Orator, than a Judge, in the Cause of Rabirius. He would argue that Saturninus was lawfully killed by him, tho' Marius the Consul had got him out of the Capitol upon Promise of Life. 7 How could the future without the Participation and Consent of ten Commissars, whom they named. This is in Thucydides, Lib. V. Cap. LIX. LXX. LXIII. Edc. Oxon. and not in Dionysius Halicarnassensis, Lib. II. which Mr. Batter, cites here, § 3. not being aware that Ayala, upon whose Authority he unhealthily repeats it, as he gives, as he does, the Name of Throfylus to one of the Generals of the Argives, whereas his Name was Throfylus that Ayala, I say, only cites that Greek Historian of the Roman Antiquities, to prove that the Kings of Macedon were not absolute.

And much less, upon this Foot, upon superior Officers and Commanders in Chief. So that, if after the Truce be granted, and during its Continuance, some other Commander finds Occasion for attacking, with the Hope of good Success, the Enemy, who relies upon the Faith of the Treaty for Suspension of Arms; he may do it without Scruple or Treachery, according to the Principle of our Author. But Mr. Batter seems to have Reason to declare himself against this Opinion in the Differences I have cited, § 4. And indeed, as it is with the tacit Consent of the Sovereign, that the Truce has been made, as that was included in the Extent of the Power of him who granted it; no other Minifter can break the Agreement, without indirectly injuring the Sovereign's Authority. Besides, this may make way for Fraud and Intrigues, that might tend to render the Use of Truces, to be necessary on many Occasions, useless and impracticable. For there would be Reason to apprehend perpetually the Being suspended during that Time by some other Body of the Enemy's Army: And even he himself, who has granted the Truce, might understand Cause other Troops of his Party to come, and attack the Enemy, and al change the Faith of the Agreement made with him. Let us add to this another Reason from ALBEGIUS GENTILIS. The General, says he, who commands an Army in Chief, may certainly oblige the Sovereign, by the Treaties which he makes, as to what regards the Conquest of the War intrusted to him: Wherefore then may not one of his Lieutenants oblige the General himself, by the Conventions which he makes within the Extent of his Office? De Jure Belli, Lib. II. Cap. X. p. 289.

IX. (1) It was not Tigyrus, that was deprived of Syria, but Antiochus, the Son of Antiochus Pius, and Grandson of Antiochus Cyzicnas; as appears from Justin, whom our Author cites in the Margin: Ignot Tygras & Luculo vicit, Rex Syria Anti- chos, Cyzicnum filius, ab eodem Lucullo subdatur. Sed qui Lucullus dererat, postea aemulatus Pompeius, Lib. XI. Cap. II. Num. 2. 5. Besides, as Gronovius observes, Pompey had no more Right to take Syria from Antiochus, than Lucullus to give it him. According to the Rules of Right and the Laws, the Act of both the one and the other ought to have been ratified by the Roman Senate and People. See that learned Perlen's Note. So that the Example is not proper.


5. POLYB. ibi supra (Cap. LXXXXVI.) Bajzer made Use of as frivolous an Excuse in a like Affair, against the People of Creton in Saron, as LEUNCLAVIIUS relates, Lib. VI.


7. De, fi idem Batturino data effe — non omni C. Rabirius, sed C. Marius deit: tabernique violentis, fi in fide non flet, Qua fide, Laebiene, qual petitque a Senatus — conjuge dari & Orat. pro C. Rabirius, Cap. X.

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Faith (says he) be given, without a Decree of the Senate? And so would infer, that the Faith given by Marius did only oblige himself; but C. Marius was empowered by the Senate to do whatever he should judge proper for maintaining the Empire and Majesty of the Roman People. This was the greatest Authority that could be given according to the Custom of the Romans: And who can say that it did not include the Right of granting Impunity to any one, if that were absolutely necessary for the Security of the State?

X. But in these Agreements made by Generals, because they act for another, the strictest Interpretation is to be taken, as far as the Nature of the Contract will allow, that by their Fact their Sovereign be not more obliged than he is willing, or themselves suffer Damage in doing their Duty.

XI. So he that is accepted of by a General upon an absolute Surrender, shall be judged to yield himself wholly to the Will of the Conqueror, whether of the King or People. An Instance of which we have in Gentius, King of Illyria, and Per- sons of Macedon, of which the former yielded to Anticius, the other to Paulus.

XII. Wherefore the adding of this Caution, It shall be established if the Sovereign ratify it, which we often find in Agreements, will provide, that if the Agreement be not allowed by the Sovereign, the General himself shall be bound to nothing, except so far as he has reaped an Advantage by the Convention.

XIII. And they who have engaged to deliver up a Town, may dismiss their Garrisons, as we read the Locrians did.


C H A P. XXIII.

Of Faith given by private Men in War.

I. That Faith given by private Men in War is not binding, conti-
1. That Faith given by private Men in War is not binding, con-

II. Faith given to Enemies and Robbers is binding, and hence far.
B. 3. ch. 19. § 2.
B. 2. ch. 2. § 7.
B. 3. ch. 19. § 5.

II. Faith given to Enemies and Robbers is binding, and hence far. A. 35.

I. (1) Aquæ stiam, si quid singuli, temporitus addas, hosti promiterint, eft in eo ipso fidis confer-

II. (1) But see what we have said upon B. II. Chap. XI. § 7.

nished
niished by Men; but if against Thieves, or Pirates, it remains unpunished in Detec-
tion of thefe, with whom we had to do.

III. In this private Faith we are not to except Minors, if they are capable of un-
derstanding what they promise. 1 For the Privileges allowed to Minors arise from
the civil Law; whereas we now speak of the Law of Nations.

IV. And we have already laid 2 of Promises made by Mistake, that we have a
Power to retract them, when that which through Error believed, was according to
the Intention of the Promifer, the Condition of the Promife.

V. 1. But how far the Power of private Men may extend in making any Con-
tract, is a more difficult Question. It is certain, that no private Perfon can alienate
what is publick; for if this be not allowed to Generals, as I have proved 3 a little
above, much les ought it to be allowed to private Perfons. But yet it is to be dif-
puted, whether the Covenants made with their Enemies of their own private Con-
cerns, whether Actions or Things, may stand; because we cannot grant thefe to
the Enemy, without some Damage to our own Party. Whence it may seem, that
all such Covenants are unlawful, whether they be made by Subjects, on the Account
of the eminent Right of their State over them, or by lifted Soldiers, in regard to
their military Oath.

2. But we muft obferve, that fuch Agreements, which prevent a greater or more
certain Mifchief, are to be eftemed 4 rather beneficial than hurtful, even to the
Publick; because a leffer Evil has comparatively the Appearance of Good: Of Evils
the lefs is to be chosen, as one fays in 5 Appian. Yet neither can that bare Faith,
whereby a Man does not absolutely renounce all Power over himself, and what he
has, nor can the publick Benefit, without the Authority of a Law, have that Power,
as to make an Engagement void and of no Effect, tho' we fhould grant that what
was promised was againft the Duty of the Promifer.

3. The Law indeed can take away this Power from Subjects, whether perpetual
or temporary, but yet it does not always do fo, for it ipars Citizens. Neither can it
always do it, for human Laws (as I have 6 laid already) have no Force to oblige,
but when they are proportioned to human Infirmity, and not when they impose any
Thing too burthenful, which is entirely repugnant to Reason and Nature. There-
fore tho' Laws and particular Orders, which manifestly enfuch Things, are not to
be accounted Laws. And general Laws are to be taken in a favourable Sense, fo
as to exclude Cafes of extreme Necessity.

4. But if that Act, which was prohibited by any Law, or particular Order, and
declared void, might juftly be fo prohibited, then that Act 7 of the private Perfon
shall be made void, and he may alfo be punifhed, becaufe he promised what was
not in his Power, efpccially if being bound by Oath he did it.

VI. The Promife of a Captive to return unto Prison is juftly tolerated, 1 becaufe
it does not render his Condition worfe than it was. Therefore that Action of M.
Regulus was not only glorious (as fome account it) but what was his Duty. 2 Regulus,
says Cicero, Ought not by his Perjury to have violated the Conditions and Covenants of
War, notwithstanding what Horace fays,

3 Atqui fcebat, qua fi barbarus
Tortur paraer-

What Cords and Wheels, what Racks and Chains,
What lingering Torments for his Pains
The barbarous Hangman made, he knew.

Creech.

For when he promised to return, he knew what they might do. So of the ten

III. (1) See above, § 5. of the Chapter referred to in the proceeding Note.

V. (5) As for Infurance, when we promise to pay

2 It is a Carthaginian who fays this to induce his Countrymen to Submit to the Romans, as they
were not in a Condition to refift them. De Bell. Punic. p. 55. Edit. H. Steph.

6 B. 1. ch. 4.

7 B. 3. ch.

III. A Minis
here not ex-
cepted.

IV. Whether an Error does exclude it.
B. 3. ch. 11.

5. An Ob-
jeifion made from publick

Publick ed.

Regiftry, any

III. Cap. XXIX.

5 Lib. III. Od. V. Ver. 49. 50.

Captives,
Captive, as Gellius relates it from old Writers. Eight declared they had no Right of Poffession, because they were bound by Oath.

2. Some maintain this Agreement to be void, because it is contrary to the Duty which we owe to our Country: But not every Thing that is against our Duty, is immediately void, as I said before. Besides, it is not against our Duty, to procure our Liberty by promising to forbear a Thing, which it is in the Enemies Power to hinder. For whilst we are not released, we are as ufelefs to our Country, as if we were really dead.

3. Some also promise not to make their Escape; this also binds them, tho' they were in Fetters when they made it; tho' some are of another Opinion. For by this very Promise sometimes our Lives are faved, or we have more Liberty allowed. But if after this Promise, a Perfon be laid in Irons, he is therefore disfranchized of that Promise, if he made it up to that Condition, that he should not be bound.

4. It is a foolifh Query fome make, whether a Perfon taken Prisoner by one, may yield himself to another. For it is very plain, that no Man can by Contract take away that Right, which another has acquired. For by the very Right of War, or partly by the Right of War, and partly by the Grant of him that makes the War, a Prisoner taken in War belongs to the Captor, as we have faid before.

X. There is a remarkable Question concerning the Effects of fuch Agreements, namely, whether private Men upon their neglecting to perform what they have promised, may be compelled to it by their Sovereign. And that they may, is the beft grounded Opinion, but only in a folemn War, and that by the Right of Nations, which binds thofe that make War, to do what is right and juft to each other, even concerning the Facts of private Men; as if an Embaffador fent from the Enemy should be infulted by a private Perfon. Thus A. Gellius quotes out of Cornutus Nepos, That many in the Senate agreed, that thofe of the ten Prisoners, who were obliged by Oath to return, refufed, fhould be by a ftong Guard be delivered up to Hanibald.

XI. We must obferve those Rules which we have feveral Times mentioned, concerning the Interpretation of Words in fuch Agreements, that is, we ought not to recede from the proper Signification of the Words, unlefs to avoid an Abludity, or when there is any other Conjecture, sufficiently certain, of the Intention of the Promifer; fo that where the Words are dubious, we are to incline rather to that Sense that is againft him who gives the Conditions.

XII. He that agrees for his Life, has not therefore a Right to his Liberty; under the Name of Apparel, Arms are not comprehended, for they are distinct Things.

3 For Influence, Albericus Gentilis, De Jure Belli, Lib. II. Cap. XI. Comares Puffendorf with this Place, L'ar de Nature and Nations, B. VIII. Chap. II. § 2.

4 Tam olim ex iii poffe/liminio juftam mun ef fii reipenduntur, quantum de/joiri vindi/enti ferent. Noct. Attic. Lib. VII. (Cap. XVIII.) Dejioir vindi, that is to fay, capitis muniores, as Horace expreftes himself, (ubi supra) speaking of Regulus. Grorius.

This De minuto capitis was a Consequence of the Oath, by which the Prisoners were engaged to consider themselves always as in the Enemy's Power, and his Slaves: So that they had loft all the Rights of Roman Citizens.

VII. (t) Or rather the Holmen, and fome others who had taken Refuge at Ithome, Lib. I. Capt. XIII.

2 The Historian does not speak of a Promife expressly given by the Prisoners not to bear Arms: He only fays, that Hamilton releafing them, threatened to punifh them severely and without Mercy, if they bore Arms against the Carthaginians, Lib. I. Cap. LXXXVIII.

4 Aids
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Aids are then to come when they are in sight, tho' they do nothing; for the bare Presence has its Effect.

XIII. But he cannot be said to return to the Enemy, who returning privately, departs again immediately; for our Promise to return is to be so understood, that we shall be again in the Power of our Enemy; to take Advantage of an Explanation quite contrary, is according to Cicero 1 a notorious Cheat, a foolish Cunning, which adds Perjury to Chicanery. 2 Gelius calls it a fraudulent Trick, branded by the Censors with Infamy, and says the Practisers of it were rendered odious and execrable.

XIV. In Agreements made not to surrender, if just Succour should come, we must by them understand, such as are sufficient to free us from the Danger we were in.

XV. This also is to be observed, if any Thing be agreed on concerning the Manner of Execution, that alone does not render the Agreement conditional: As if it be stipulated that we should pay in a certain Place, and that Place happen afterwards to change its Name.

XVI. We must judge of Hostages as above said; for the most Part they are but a bare Accursay of the principal Engagement; but yet it may be so covenanted, that the Obligation may be alternatively understood, that is, that such a Thing shall be done, or the Hostages may be detained. But in a dubious Case, we must incline to that which is most natural, that is, that they shall be reputed as an Accursay only of the Agreement.

XIII. (1) Redit uti in foro, &c. De Offic. Lib. III. Cap. XXXII.

2 Here erum fraudulentum, &c. Noct. Atic. VII. 18.

XIV. (1) There is in Procopius four Examples of this Sort of Convention. Gettic. Lib. III. (Cap. VII. XII. XXX. XXXVII.) And one, in Agathias, concerning the City of Luca, Lib. I. (Cap. VII.) Another in Bzepato, concerning a Castle in the Island of Corfo. Hist. Gen. Lib. X. See others of the same Kind, B. XVIII. and in the War against the Mori. Cramer has also one, Lib. XI. Grotius.

CHAP. XXIV.

Of Faith tacitly given.

I. That some Things are agreed only by Silence, was not ill observed by James, which takes Place, in publick, private, and mixt Agreements. The Reason is this, because it is the Consent, bowsoever signified and accepted, that has the Power of transferring Right. But this Consent may be declared otherwise than by Words and Letters, as we have more than once showed already. And some Signs are included in the Nature of certain Acts.

II. As for Example. He that coming from an Enemy, or a strange Country, commits himself to the Faith of another King, or People; does without doubt tacitly oblige himself to do nothing against that State, whose Protection he desires.

I. (1) Videtur autem in hae specie id filius expectari eorum jutorum, ne quid praeclare, &c ampler pecunia fundus effet locatus. Dig. Lib. XIX. Tr. II. Loci condunti, Leg. I. princi. See Mr. Norreys Treatise, De Poetic. Cap. II.

2 Our Author understands by mixt Convention what he calls Spongie, that is to say Conventions made by publick Persons and upon publick Affairs; but without any express or tacit Order of the Sovereign: For in that Respect they have something of private Agreements in them, those who make them, having at the same Time they are made, no more Power than mere private Persons.

II. (1) Albericus Gentilis, (De Jure Bill. Lib. II. Cap. IX. init.) ascribes this to Valerius Maximus, from whom he cites some Words, to which our Author seems to allude in this Place after him. But that Historian says nothing at all of Zephyrus; he speaks of Strategems in general: Ilia vero pars calliditatis egregia, &c. non enim reprehendit nomine pecul remota, quas spinas, quas adscendit, nonas ex aperi exspreis petit, Graeci pronuntian, tiones Strategemata sensum. Lib. VII. Cap. IV. prox. It is true, he puts in the Number of these innocent Strategems a like Action of Statius Tavainius. For the rest, see Puffendorf, on this Case, Laws of Nature and Nations, B. VIII. Chap. XI. § 8.

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wherefore we are not to join with them that justify the Act of Zopyrus; for his Loyalty to his King could not justify his Treachery to those unto whom he had fled. The fame may be said of Sextus, the Son of Tarquin, who retired to Gabii. Virgil upon Simon, says,

* Accipe nunc Danaum infidias, & crimen ab uno

Difce Omnes—

Now bear how well the Greeks their Wiles disguis'd;
Belold a Nation in a Man compri'st.'

Dryden.

III. He that defers or admits a Parley.

III. So he that demands, or admits of a Parley, silently promises, that during the Parley both Parties shall be secure. Livy calls it a Breach of the Law of Nations, to hurt an Enemy under the Pretence of an Interview. He terms it, "An Interview perfidiously violated. Val. Maximus paffes this Cenfure on Ca. Domitius, who had invited Bithitus King of Armorica to a Conference, and had entertained him as his Guest, and then treacherously bound him, His infatiable Ambition of Glory made him be perfidious. Wherefore I admire, why he that wrote the 8th Book of Cæsar’s Gallic Wars, whether Hirtius, or Oppius, relating the like Act of T. Labienus, adds these Words, He perfidious, that Cæsaris Infidelity might be prevented without any Imputation of Treachery to himself. Unlesa this be rather the Judgment of Labienus, than of the Writer.

IV. But we must not extend this tacit Conflent beyond what I have said; for if those with whom we have an Interview receive no Hurt, it is no Breach of Faith to make use of that Conference to divert the Enemy from his military Projects, and in the mean while to advance our own Affairs. It is one of the innocent Artifices of War. Wherefore they who blamed the deluding of King Periplus, with the Hopes of Peace, had not so much regard to Justice and Fidelity, as to a generous Mind, and martial Glory, as may be sufficiently gathered from what has been already said of warlike Stratagems. Of this Kind was that Policy, by which Aj trubal saved his Army out of the Ausonian Dilefs; and by which Scipio Africanus the elder discovered the Situation of Syphax’s Camp, both recorded by Livy. Whole Example L. Sylla followed in the Social War at Eterna, as Frontinus tells us.

V. There are also some dumb Signs, significant through Culfum; as of old Hair-

3 This is in Livy, Lib. I. Cap. LIII. and LIV.
5 III. (1) It is therefore with Reaflon, that Aemusblames Ragnarius, General of the Huns, for having treacherously attempted to kill Narses, as the latter returned from a Conference demanded by the former. Lib. II. (Cap. VII.) Grotius.
6 Divides, quod ipsi Conflit, parum causa adversus colligui fraudem, infidibus—Si fecus defraud, ni pro jure Gentium, causaviolandi coniunzioni iniun erat, fuit extimabitur, Lib. XXXVIII. Cap. XXV. Num. 7 & 8.
7 Major nunc pars perfida, [it must be read fo instead of perfidam] violati colligui, manus mane turunt. Ubi tups. (in fn. Cap.) Grotius.
8 This Correction of our Author is entirely unnecessary, as appears from many Examples of the same Kind cited here by Gronovius. See also Caesar, De Bell. Gall. Lib. I. Cap. XLVI. and the Note of Mr. Davies. The Sense is the fame at Bottom.
9 Ca. etern Domitium, &c. Lib. IX. Cap. VI. Num. 5.
10 Eam Comiti commiserit, &c. Cap. XXIII. Mr. Coecilius, during bis Life, celebrated Profeffor of Law at Frankfort upon the Oder, criticiat our Author (in a Difertation De Officio & Jure Mediatorum Pacti, § 24) as if he doubted, whether there was any Perfidy in this Action of Labienus. I confefs, for my Part, I cannot fee the least Foundation for that Cenfure, and do not believe, that any Body, who will read the Paflage with never fo little Attention, can find any. It was the Fate of our Author to be ill understood by those who take the most Liberum in replying in him.
12 He demanded a Conference for the next Day, but decamped without Noise at the beginning of the Night. See Livy, Lib. XXVI. Cap. XVII.
13 Scipio sent Soldiers disguised like Slaves with his Officers, who during the Time the latter confterned with Syphax, difpersed themselves throughout the Camp, and examined every Thing. See the fame Historian, Lib. XXX. Cap. IV.
15 V. (1) Amongst the Perfam (or rather amongst the Aphiirns) the Hands joined together behind the Back was a Sign of Submission, as Ammianus Marcellinus relates, Lib. XVIII. (Cap. VIII.) upon which See Lendenberg’s Notes, (p. 222. Edit. Vah. Gran.) Amongst the Romans they had also this Sign, to put the Shield under the Arm, and throw down the Standards, as appears in the fame Historian, Lib. XXVI. Cap. IX. p. 512. (upon which the Reader may consult the Note of)
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Hair-laces, and Branches of Olives; and among the Macedonians, * the Erection of Pikes; among the Romans, * their covering their Heads with their Shields, were Signs of a submissive Surrender, and consequently obliged to the laying down of Arms. But whether he that signifies his accepting of a Surrender, be obliged, and how far, may be easily learnt from what has been said already. * Among us the hanging out a white Flag is a tacit Sign of demanding a Parley, and shall be as obligatory, as if expressed by Words.

VI. We have already * declared how far an Agreement made by a General without the Order of the State, may be believed to be tacitly approved by the Prince or People; as when the Act is fully known, and thereupon some Thing done, or not done, of which no other Reason can be given, but their Consent to the Agreement. B. 3. ch. 15. § 17. and B. 3. ch. 27. § 3.

VII. A Punishment cannot be nullifièd from its being for a Time neglected; but some positive Act must necessarily intervene, which may either by itself argue a good Will, as a Treaty of Friendship; or at least so great an Opinion of the Virtue of the Perfon to be punished, that his former Actions may merit a Pardon, whether this Opinion be expressed by Words, or by such Actions as are usually taken to signify as much.


2 This LVy confirms: Quia corrigens Haetas Macedonias confessorum—ut accepti hanc marem off Macedonum pradendent fo, &c. Lib. XXXIII. Cap. X. Num. 3. 4. The learned Grooviui refers to this Passage.

3 Appianus Alexandrinus, to whom our Author refers here in a little Note, and Valois has cited upon Ammianus Marcellinus, relates this, speaking of the Troops of Afranius, De Bell. Civ. Lib. II. p. 45. Edit. H. Steph.

4 The People of the North kindle a Fire to signify that Demand, as appears from the History of Johannes Magnus, and other Authors. Pliny observeth, that in his Time, it was customary to present a Laurel, to signify a Defere that Hostilities might be discontinued: Libya [Laurus] pacifera, ut quarn prstarti, etiam inter armata dyjes, quiem fit indigum. Hift. Natur. Lib. XV. Cap. XXX. Grotius.

VIII. (1) Polybius handles this Quotation, whether we pardon the Perfon who actually com- mits the Crime, we are not nullified by that alone to pardon him also by whose Order it was committed. Except. Legal. Num. 122. For my Part, I think not. For every Man is answerable for his own Faults. Grotius.

The Citation from Polybius was faulty (to make a transient Observation) as well as an Infinity of others in all the Editions before mine: For it was marked Num. 22. where there is nothing like it. The Fact in the true Passage, as I have corrected, is this. A Roman Embassador had been killed by Lepius. The latter was delivered up to the Romans by King Demetrius, whito Subject he was. But he was sent back, with another of his Accomplises and the Historian, who relates it, believes, that the Reason why the Senate acted in this Manner, was, because they were for referring to themselves the Liberry of punishing on a proper Occasion such an Attempt upon their Embassador, for which Satisfac- tion might be supposed to be taken, had they punished the Authors of the Murder, p. 1324. Edit. Anglat. But it does not appear by the Narration, that Demetrius had any Share in the Crime, and much less that he had commanded it. And as for the Quotation in itself, the Decision of our Author does not always take Place in my Opinion. For if he, who has commanded, or otherwise occasion- ed a Crime to be committed, gives up the Author of it, expressing thereby his Defere to obtain Praran for himself; the Party, against whom the Crime has been committed, ought to be deemed to grant the Pardon, whether he punisies the Crimi- nal delivered up or no; unless in punishing him, or sending him back, he declares in a proper Man- ner, that he does so without Prejudice to the Right he refers to himself against him who was the first Caufe or Accomplise in the Crime. Otherwise, there is a tacit Consent to Pardon implied, which an- swers to the formal Demand of it, and which may be premisèd with as much Reason as in the other Examples alluded by our Author.

C H A P. XXV.

The Conclusion, with Admonitions to preserve Faith and seek Peace.

I, AND here I hope I may make an End; not that I have said all that might have been said, but that which hath been said may be enough to lay a Founda- tion, on which if any other will build a more flately Fabrick, I shall be so far from envying...
Of the Rights of

I. (1) Nec enim ultra ras vehementius rebellionem rempublicam contineat, quam fides. De Offic. Lib. II. (Cap. XXIV.)

The Emperor Julianus’s Embassadors said to Cæsar, King of Persia, according to Procopius: “If we did not speak to yourself, O King, we should never have believed, that Cæsar, the Son of Cæsars, could have entered into a horrid War, with the Emperors in Arms, without regard to the Oath he had lately taken, that is to say, what is deemed amongst Men the most certain and most sacred Pledge of Promise given; and in Breach besides of Treaties, which are the sole Resource of those, who, from their bad Success in War, are not yet in care for the future. Is not this changing human Life into that of wild Beasts? For if Confidence be no longer to be repose in Treaties, Wars must necessarily be eternal; and War without

envying him, that I shall heartily thank him. Yet before I divulge my Reader, as before, when I treated of the Design of undertaking War, I brought some Arguments to persuade all Men, to the utmost of their Power, to prevent it. So now I shall add some few Admonitions that may be of Use, both in War and after War. These Admonitions regard the Care of preserving Faith and seeking Peace. We ought to preserve our Faith for several Reasons, and amongst others, because without that we should have no Hopes of Peace. *For by Faith, (says Cicero) not only every State is preserv’d, but that grand Society of all Nations is maintained. If this be taken away, says * Aristotle rightly, All human Correspondence ceas’d.*

2. Therefore the fame Cicero * calls it detestable to break Faith, the Obligation of which is the Bond of human Life, and, as Seneca * says, Faith is the most sacred Good of the rational Soul. Which Sovereign Princes ought the more solemnly to keep, by how much they offend with more Impunity than others. Wherefore take away Faith, they will be like wild Beasts, whose Rage all Men dread. Justice indeed in other Parts, has often something that is obscure, but the Bond of Faith is self-evident, and to that End do Men engage their Faith in their Dealings, that all Doubts may be removed.

3. How much more then does it concern Princes religiously to observe their Faith, first for the sake of their Conscience, then for that of their Reputation, on which depends the Authority of their Government. Let them not then doubt, but that they who endeavour to infill into them the Art of Deceiving, practize the same they teach. Their Practices cannot possibly proper long, which render Men unfacable to Men, and hateful to GOD.*

II. Further, it is impossible that we should have a quiet Conscience, and a just Confidence in the Protection of Heaven, unless we aim at Peace in every Thing we do throughout the whole Course of a War. For it was very truly said of Salutary, That wise Men, for the sake of Peace, make War. To which agrees the Opinion of St. Augustine, * We seek not Peace, to make War; but we make War, in order to establish Peace. Arisotle himself often condemns those Nations that make War their chief End. Violence is in itself brutish, which is yet most eminent in War; whereas it ought to be the more carefully tempered with Clemency and Humanity, left by too much imitating Beasts, we abfolutely forget the Man.

III. A safe and honourable Peace then is not too dearly bought, at the Expendence of forgiving Offenders, Damages, and Charges, especially among Christians; to whom our LORD bequeath’d Peace, as his last Legacy, whose best Expositor St. Paul, Rom. xii. 18. Would have us live peaceably with all Men, as far as in us lies. A good Man unwillingly enters into a War, nor is willing to pull it to the utmost, as Salutary * tells us.

IV. This
IV. This Reason alone might indeed be sufficient; but very often our own Interest requires it. First, when we are weaker than our Enemy, because it is dangerous to contend long with one more mighty; and here, as at Sea, we must by some Light redeem a greater Mischief, without listening to revenge or hope, had Counsellors, as Livy 1 rightly calls them; which 2 Aristotle thus expresses, 3 It is much better to part with some of our Substance that are stronger, than being overcome to perish with all we have. 

V. Yea, and to the stronger Party Peace turns to account; because as the fame Livy most truly says, 4 Peace is glorious and advantageous, when we give it in our Prosperity; it is better and safer, than a hoped-for Victory. For we must consider, that the Succes of War is uncertain. Aristotle says, 5 We must remember how many and unforeseen Changes happen in War. Diodorus 4 in an Oration for Peace blames those, Who boast of their great Explicits done in War, as if it were not equal for Fortune to favour sometimes one Side, sometimes another. And 5 the bold Attempts of desperates our Author expresses the Paflage, which he attributes to Sallust. (apud Sallustium legimus, says he) but without marking the Place, or putting the Words in it. I can find no such Paflage in the two perfect Works of that Historian, nor in his Fragments: Neither does Mr. Waster's Index, which is very ample, and sufficiently exact, give any Light concerning it; tho' there are Expressions in this Paflage, which he undoubtedly would not have failed to observe. I am not therefore able to believe, that our Author, deceived by his Memory, or otherwise, has cited this Author for some other. What might have given Occasion for it, is a fine Paflage in the History of the War agains Jugurtha, where there is something that relates to this Place, which the Reader will not be offended at my repeating. It says, that War is easily entered into, but as hard to be got out of again; that the beginning and end are not in the same Person's Power: That any Coward may begin it, but to conclude it, depends upon the Victors Pleasure: Omne bellum fini facili, eternam aegerum denua: non in uijjum potestas initium quis & fenam igitur: incipere, cuius etiam ignava ilicere, depnui, quam vuclur: uuliel. Cap. LXXXV. Edit. Wolf.

IV. (1) It is in the seventh Book in a Harangue, wherein Titus Quinctius, constituted General against his Will by the felicitous Soldiers, exhorts them to Peace and Submission: Pacem, etiam quicquid pollutum, nullius, quid nos nullius spertet. Quinf annis etiam quibus modo nos justa arma non atque annalibus armis cognosciternissimes. Capi. XLV. in E.N.

2 The Paflages cited here, and in the following Paragraph, by our Author, without faying from what Work they are taken, are both in the Rhetorick addrefled to Alexander. Cap. III. p. 616. C. Vol. II. Edit. Parif.

V. (1) It is in the Speech of Hannibal to Scipio: In bonis tuis rebus, ne quis dubii, tibi amplea se pecula doni sit pass.—Mifer tuiquantque est certa pars, quae semper est victoria. Lib. XXX. Cap. XXX.

Num 18. 19.

2 Quum tuae vires, tum iunm facing, Marten- bellis communem, prope anima. Liby, ubi fuper. Num. 20.


4 In the Oration recited by Diodorus Siculus, from which only these three lines fay he took this, without specifying the Place, or even the Book, it is not the Speaker, that claims a presumptuous Confidence, founded upon good Succes: On the contrary, the Speaker, that is to fay an Athenian Demagogue, named Cleophon, exhorting the People, not to Peace but War, amongst other Reasons employs that, which he knew was very proper to animate the Multitude. The opposite Reflection is the Historian's own, who did not think fit to relate more of this Paflage, Bibl. Livy. Lib. XIII. Cap. LIII. p. 356. Edit. H. Stegb. 5 There is an ancient Greek Verse that says, the Den of a Lion even dying is dangerous:

'εναντιον γαρ και κατανίπανον χρηματα. Grotius.

Mr. Barbyrac in his Additions and Correftttij says: After this Note was printed I found the Greek Verse by Accident in Plutarcl, towards the End of the Life of Marius, p. 422. C. Edit. Wech. Where there are two Words differently placed from the Manner in which our Author here repeats them.

'εναντιον γαρ και κατανίπανον ολοις.

Besides the Word ἀπάραξις is translated abjurate, and not dying by the Latin Interpreter, and two French Translators; which at first seems to agree very well with the Sequel of the Discourse. So that Grotius's Application would not be just, or else we must fay, that citing by Memory, he had forgot the Sense of the equivocal Word ἀπάραξις in the Place from which he took it. However when I examine well the Circumstances of Marius's Condition, who is said to have heard some Voice perpetually reftudning this Verse in his Ears; our Author turns to have had good Reasons for explaining ἀπάραξις by even dying: Which we should find if we had the ancient Poet, from whom this Verse had probably fallen into a Proverb. In the Terror and extraordinary Agitation of Mind, in which Marius was, he did not consider Sulla as absent, to whom the ἀπάραξις ought to be applied, according to the Sense commonly given to that Word: On the contrary, he represented that young and vigorous Army, as present, and at the Gate of Rome, from the News he received of his approach. I therefore imagine, that he applied the Greek Verse to himself, and that he took it at the same Time as a Prefage of his approaching Death, and an Exhortation to perifh like an old Lion, as he was. The Word ἄνομος is often applied to those who die, especially in the Poets: And I find Example very like this in an ancient Oracle repeated by Lucian, in which a Wolves is spoken of:

Of the Rights of, &c. Book III.

operate Men are as much to be feared, as the most violent Bitings of dying Beasts. If both Parties think they are of equal Strength, then (in the Opinion of Cicero) it is the fittest Time to treat of Peace, whilst each Party has a good Opinion of his own Strength.

VII. But Peace being made, whatever the Conditions be, they ought to be punctually observed, on account of the Faith given, the Obligation of which I have proved to be sacred and indispensible. And we ought to be very careful to avoid not only Perfidiousness, but whatsoever may exasperate the Mind. For what Cicero said of private Friendship, may be fitly applied to publick. That all the Duties of Friendship are to be observed religiously at all Times, but especially when it has been renewed by a Reconciliation.

VIII. May the ALMIGHTY then (who alone can do it) impress these Maxims on the Hearts of Christian Powers; may he enlighten their Minds with the Knowledge of every Right, Divine and Human, and inspire them with the contant and dutiful Sense of their being the Ministers of Heaven, ordained to govern Men; Men, for whom, of all his Creatures, GOD has the greatest Regard and Affection.

cation of the Greek Verse consist in Roms's being the Country of Sylis. But that Circumstance did not make it more terrible to Marius, than before: It was the present Situation of Affairs, and especially the Augmentation of Sylis's Power, from the Victories he had lately acquired, which terrified Marius, and would have frightened him any where else. So that this Observation of the new Transtluator is not better than many others of his, for Inflation, that which he makes a little lower, (Vol. IV. p. 188. Edit. Amstel.) upon PLATO's thanking his good Genius, for having occasioned his being born a Man and not a Beast. If ever Commentator endeavoured to find, Nudum in scripsi, it was certainly in this Place.

6 GRONOVIIUS properly refers us here to this Passage of FLORUS: Sed ut quum maximae mortiferi essent moribus silent meriencium belliarum: frater, ut minus frater, fereatur Carthagine, quam integre. Lib. II. Cap. XV. Num. 13. And FREIBERGIIUS cites one from SENeca upon it, Excerpt. Contr. Lib. IX. Contr. VI.

VI. (1) Hoc unicam esse tempus de pace agenda, dum si quemque conferender, & pares absque viderentur. De Bell. Civ. Lib. III. Cap. X.


VIII. (1) Our Author, as the learned GRONOVIIUS remarks here, uses the express Terms of the Prayer of Thibarius to the Gods, according toTacitus: Hic [Deos precor] ut mibi, ad dominum illum vitam, quietam & intelligentem humanum divinique juris muniatum. Gr. Annal. Lib. IV. Cap. XXXVIII. Num. 4.


The famous SOCRATES often spake of the LOVE, which the Gods had for mankind, as appears from the Memoirs, which Xenophon has left us of his Discourses and Actions. See for Inflation, Lib. IV. Cap. III. Edit. Oxon. SIMPLICIUS, in his Commentary upon Epicetus, says, that Man is a Possession of GOD, neither vile nor contemptible; and uses that Reason to prove, that GOD cannot neglect to take Care of him, as of his Creature. In Cap. XXXVIII. p. 239. Edit. Lady. Batorov. That Philosopher Reasoned upon a Principle, which PLATON had long before laid down, which is, that Man is a Kind of Possession peculiar to GOD, whom consequently he loves. In Phaedrus, Vol. I. p. 62. B. Edit. Hen. Sooph. I cannot conclude my Notes better than with these fine Passages, which are the more remarkable, as they are taken from Heathen Authors, whose Authority in this Point is of more Weight, than that of a Father of the Church.

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